VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D275/2006

CATCHWORDS

Domestic Building List – contract for renovation of dwelling – whether contract repudiated – whether repudiation by builder or by owner – assessment of costs of completion and rectification of defects – whether "*extras*" claimed by the builder properly such or within scope of original works – whether "*extras*" recoverable having regard to ss 37 and 38 of *Domestic Building Contracts Act* 1995 – whether payments of "*extras*" already made can be reopened in the absence of some pleaded restitutionary claim – whether such payments can simply be re-characterised as progress payments – payments already made but irrecoverable on basis of pleadings rendering it unfair to the owners for builder to be allowed to recover unpaid "*extras*" which would otherwise be recoverable

APPLICANT	Lloyd L. Watkins Pty Ltd (ACN 064 610 457)
RESPONDENTS	Tom Vondrasek and Tracey Glanville
WHERE HELD	Melbourne
BEFORE	M.F. Macnamara, Deputy President
HEARING TYPE	Hearing
DATES OF HEARING	20-24 November 2006
DATE OF ORDER	5 December 2006
CITATION	Lloyd L Watkins Pty Ltd v Vondrasek (Domestic Building) [2006] VCAT 2479

ORDERS

1. That within 14 days of this day the parties must bring in short Minutes to give effect to these Reasons.
2. Adjourned to further hearing at 9:30am on 20 December 2006.

3. Costs reserved.

Michael Macnamara
Deputy President

APPEARANCES:

For Applicant:	Mr Pumpa of counsel, instructed by Wainwright Ryan Eid Lawyers
For Respondents:	Mr Eric Riegler of counsel, instructed by Noble Lawyers

REASONS

BACKGROUND

1 Mr Vondrasek and Ms Glanville are husband and wife. They bought their house at 8 Ripon Grove, Elsternwick, on 15 September 2001. The house was built it seems in the 1930s and had been renovated in the 1950s. Before Mr Vondrasek and Ms Glanville bought it, it had been occupied as two separate dwelling units. Mr Vondrasek and Ms Glanville investigated the possibilities of extending and renovating their house, engaging a drafting service, TD and C Pty Ltd, to draw the plans and obtaining a building permit from the private building surveyor, *"McKenzie Group"*.

2 They sought quotations from three builders for the works involved in carrying out the plans. One builder, Lloyd L. Watkins Pty Ltd, the applicant in this proceeding, was approached because its principal, Mr Lloyd Watkins, was a friend of Ms Glanville's stepfather. Mr Watkins gave the owners a quotation on behalf of his company dated 24 September 2004 quoting a total price of $132,308 inclusive of GST. The quotation stated :

> Any Project over total cost of $12,000 requires insurances (Home Owners Warranty Insurance) which is governed by the Building Control Board, this cost will be $1,385.00 (GST is included in this price).

Another builder gave an oral quote of $150,000.00 and the third builder approached to quote stated that he was too busy.

3 According to Mr Watkins, the day that he visited Ripon Street to have preliminary discussions with a view to pricing the job, he was shown through the house by Mr Vondrasek alone. According to the owners, they both accompanied Mr Watkins on the short tour of the property and each offered comments.

4 Ms Glanville describes an extensive consultation whilst Mr Watkins viewed the property. Mr Watkins' account suggests that the meeting was rather more perfunctory. According to Mr Vondrasek, he drew Mr Watkins' attention to a partially completed *"archway"* indicating that its completion would be part of the job and further that he drew Mr Watkins' attention to a white ant infestation under the floor in the kitchen stating that rectification of the subfloor area to repair the effects of the infestation was also part of the job. Mr Watkins denies that either of these matters was raised with him. His quotation makes no reference to either of these matters.

5 On 19 December 2004, the owners and Mr Watkins, on behalf of his company, signed a building contract in the form of the Housing Industry Association's *"Victorian Alterations, Additions & Renovations Plain*

English Contract (January 2003 version)". Mr Vondrasek signed as owner but Ms Glanville did not. No one has attached any significance to the fact that Ms Glanville did not subscribe to the contract and this proceeding has been conducted on the basis that she is both liable on the contract and entitled to enforce it jointly with her husband.

6 Schedule 2 of the contract provided for the prime cost items and provisional sum items and allowances. There were no provisional sum items or allowances included but two toilet suites, two vanity baths, a set of taps, a laundry stainless steel trough and a number of other items were included as *"prime cost items"*. No hot water service was included as a prime cost item.

7 Schedule 3 in accordance with s 40 of the *Domestic Building Contracts Act* 1995 (the Act) set out the schedule for progress payments. A deposit of 5 percent or $6,615.40 was payable upon the signing of the contract; a progress payment of 10 percent for the *"base"* stage $13,230.80 was payable; an instalment of 35 percent of the contract price $46,307.80 was payable at the lock-up stage; 25 percent of the contract price $33,077.00 was payable at the fixing stage with the balance 10 percent $13,230.80 upon completion. Progress payments were payable within seven days after the relevant stage was completed and the notice was received. 133 days were allowed for the completion of the works.

8 Clause 43 gave the owners an entitlement to liquidated damages *"for each week after the end of the building period"* until the earlier or completion of the works and the date that the contract is terminated. No particular rate of such damages was nominated in the relevant schedule to the contract and a note to clause 43 provided that, in the absence of a nominated sum, damages at the rate of $250.00 per week were to the allowed *"if the Owner vacates the premises during the Building Works or $130 per week if the Owner remains in occupation"*.

9 On the day the contract was signed the owners delivered a slightly more detailed plan of the proposed renovations. The plan was annexed to the contract (which was prepared by the builder) but there were no specifications.

10 Mr Watkins rendered invoice No 00226 on 15 January 2005 including $6,615.40 being the 5 percent deposit inclusive of goods and services tax and $1385.00 for the Home Owners Warranty Insurance. That invoice was paid. Whilst the owner paid the entire amount without demur, as will be seen, they now challenge the builder's entitlement to charge them separately for the Home Owners Warranty Insurance as distinct from absorbing it within the total contract price.

11 On 21 April 2005, the builder rendered invoice No 00231 for a progress payment of 15 percent *"to frame up stage"* of $19,846.20. Once again, this account was paid.

12 On 24 May 2005, Mr Watkins rendered invoice No 00232 on behalf of his company which was not for a progress payment but rather with respect to what was described as *"extras"*, including a total amount of $17,963.00 for a range of items including labour and materials. Amongst the items in this invoice, shown as extras were -

Cornice – WC, bathroom and hall – 3 step		
	Materials	$74.00
	Labour - 16 hours	$800
Relocate stormwater under house – Materials		$71
	Labour 16 hours	$800
Prepare and stop archway to lounge – materials		$50
	Labour 16 hours	$800.

13 The owners paid this bill in its entirety; however, they now challenge the propriety of each of the items described above as proper *"extras"* charges.

14 As work continued, the owners raised with Mr Watkins the inclusion of a number of additional features which were to be incorporated. Nevertheless, the owners say that they were concerned at the inclusion as *"extras"* of a number of items. Mr Vondrasek said that each invoice which included *"extras"* was the subject of a discussion between him and Mr Watkins. Invariably he said when a challenge was made for the inclusion of a particular item an *"extra"*, Mr Watkins' response was that the item was not in his quotation. Mr Vondrasek says that ultimately he approved payment of these extras reluctantly. He said he feared that were he not to pay these items, the builder would cease work and he and his wife would be faced with an even larger problem.

15 Mr Watkins says that on 13 July 2005 Mr Vondrasek asked him to provide a price for a front fence to the property *"to run from the corner of the bathroom, garage and boundary fence of the next door neighbour"*. Mr Vondrasek denies this conversation and says that the fence in question was included in the original plans, hence was part of the original scope of works and ought not be billed as an *"extra"*.

16 On 12 July, Mr Watkins says he discussed with Ms Glanville the installation of a *'highlight"* window between the kitchen and the dining room. According to Mr Watkins, she approved the construction of this window and its billing as an extra. Ms Glanville agrees that Mr Watkins discussed it with her but denies that she approved the *"highlight"* window to be billed as an *"extra"*.

17 On 24 July, the builder rendered invoice No 00234 - another *'extras"* invoice in the sum of $6035.28 for labour and materials including goods and services tax. The extras included –

> Painting to lounge and shelving in Study
>
> Construction of shelves and cupboards in Study
>
> Sound screen to garage walls
>
> Chrome strips to Bathroom and Toilet floor

This bill was paid and no challenge is made to the propriety of any of these *"extras"* charges.

18 On 28 August 2005, the builder rendered invoice No 00235 seeking a total amount of $13,641.10 including $4841.10 of *"extras"* and a progress payment of $8,000.00. The call for the progress payment did not nominate a particular *"stage"* of the building. In particular, it is clear that lock-up stage had not been reached at that time. Mr Watkins said he persuaded the owners to make a number of payments on account of the lock-up stage which they agreed to do. In his viva voce evidence, he said that without these "*sub progress"* payments, his company would not have been able to meet the cost of labour and materials. Moreover he added, some work ahead of *"lock-up"* stage was being undertaken, for instance with facilities such as the bathroom to ensure that the owners' residence remained habitable. Mr Vondrasek said that this invoice was a replacement for an earlier and larger one which sought a more extensive payment for *"extras"*. He negotiated a reduction. The extras on this invoice were as follows :

> Extra concrete required for foundations for garage, boundary wall, kitchen and laundry wall – 8.379 cu.mts
>
> Three extra 3 mt skips for removal of soil
>
> Labour for jack hammering of old foundations – 4 days

The extras including GST were billed at $4,841.10. These *"extras"* are now challenged by the owners.

19 The amount as shown in the presumably revised invoice was paid.

20 On 28 September 2005, the builder rendered invoice No 00236 *"for erection of brick front and side fence"* of $7900.00 inclusive of goods and services tax. Once again, this invoice was paid but is now challenged by the owners.

21 On 17 October 2005 invoice No 00237 $11,000.00 inclusive of GST was rendered as a progress payment and was paid shortly thereafter. On 21 November 2005, a further progress payment in the sum of $18,000.00 inclusive of goods and services tax was rendered and paid shortly thereafter.

22 Mr Watkins had injured his shoulder on site. He told the owners that he would be undergoing surgery at the end of the year. He was admitted to

hospital for his surgery on 15 December. His last day on site therefore was 14 December. The owners say that according to their understanding Mr Watkins would not be back on site until after the Christmas/New Year break, namely on 10 January 2006. According to Mr Watkins –

> On 14 December 2005 Tom told me that no more work was to be done inside the house after this day but the concrete in the garage could still be poured …
>
> Tom was aware that I was booked into hospital for surgery the next day on my shoulder. My absence from the project for the surgery need not have caused internal works to cease but Tom requested that internal work cease from 14 December 2005, which I presume was to allow the owners to get prepared for the holiday season without the disturbance of the building works.

23 Mr Vondrasek responded :

> I never told Lloyd to cease work on the inside of the house. Lloyd ceased work on the inside of the house from 14 December 2005 because he had to undergo his shoulder operation and as Lloyd always worked on his own, no further work was carried out on the inside of the house.

24 Mr Watkins was in hospital only for a single day. When he was discharged, he and his wife left for a holiday break on their house boat on Lake Eildon. On 29 December 2005, the builder rendered invoice No 00239. This included :

> Progress payment – Balance of Lock Up Stage $8507.80 inclusive of goods and services tax

It also included miscellaneous extras of $8373.36 inclusive of GST; electrical extras of $4059.00 inclusive of GST and a further extra *"Sewer Renewal (as charged by Plumber)"* $5390.00 inclusive of goods and services tax. The total sought was $26,330.16. No part of this invoice has been paid. The owners object to the "*Electrical Extras*" and the charge for sewer renewal and the claim amongst the miscellaneous extras for $4850.00 inclusive of goods and services tax for "*Floor to Hall – entry, Kitchen and Laundry [strip floor]"*.

25 The owners say that the rendering of this last invoice, which remains entirely unpaid, led them to contemplate taking some form of action. Mr Watkins could not be reached by 'phone during the Christmas/New Year break. They approached a body known as *"Building Advice and Conciliation Victoria"* (BACV) which is a joint service from Consumer Affairs Victoria and the Building Commission. They said that they sought to have a conciliator or a mediator deal with Mr Watkins rather than for them to deal with him directly. They completed a document styled *"Domestic Building Complaint"* and lodged it with BACV. According to the timelines in the building contract, the project should have been finished in June. Yet, as of 14 December, not even the whole of the outer wall had

been completed. They included some 9 items in their complaint with a question: *"Will a member of the Legal profession play an active role in this complaint?"* they ticked the box *"No"*. According to Ms Glanville, repeated attempts to obtain the services of a conciliator from BACV proved fruitless. She says ultimately she was told that whilst the owners' complaint had been referred to a conciliator and left on her desk. No action was taken because the conciliator was on leave throughout January.

26 On 9 January 2006, Mr Watkins rang the owners (according to a note prepared by Ms Glanville) at 9:00 pm. The parties are at odds as to precisely what transpired in this conversation. I heard evidence from Mr Watkins and Ms Glanville and also from Mr Vondrasek and Mrs Watkins who were standing by either end and heard some or all of one side of the conversation. Both parties agree that the conversation became quite embittered. Mr Watkins says that Ms Glanville accused him of being a liar and cheat, demanded that he not return to the site and threatened him with charges of trespass if he did. Ms Glanville denies this. Both agreed however that Ms Glanville said the owners refused to pay the last invoice as rendered on 29 December. Ms Glanville says that Mr Watkins threatened to return and *"rip out the kitchen carcass"* – a statement which Mr Watkins admits making. He denies however that he threatened to declare himself bankrupt as Ms Glanville alleges he did. In the course of the conversation, according to her own account, Ms Glanville alleged that the builder had received *"$63,000"* already in extras. In fact, according to one of the owners' own working documents, the amount was $36,739.38 in extras. Both Mr Watkins and Ms Glanville said that the other was shouting or screaming but that he or she was remaining in control and speaking rationally. The call ended on a hostile note. The owners arranged to change the locks of their house. Mr Watkins despatched a letter dated 9 January 2006 on his company's letterhead headed *"Without Prejudice"*. The letter was clearly not without prejudice and has been treated as an open communication. It stated :

> Re our telephone conversation this evening when you advised that no payment of Invoice No 2239 dated 29 December, 2005 would be paid, I hereby advise that all construction work will cease until payment of Invoice No 2239 has been paid.
>
> Yours sincerely
>
> Lloyd L. Watkins.

27 Meanwhile a letter from the owners to Mr Watkins *"crossed"* in the post with his letter. It stated :

> We hereby advise that we are claiming liquidated damages following uncompleted building work for 8 Ripon Grove, Elsternwick, effective from 12 June 2005, at the rate of $250 a week, as per our contract.

28 The owners say that they wrote this letter upon advice from a person at BACV. The liquidated damages section of the contract, as quoted above,

shows that where the owners remained in possession the damages were limited to $130.00 per week. The owners were overreaching themselves in making the claim for $250.00 per week on any view.

29 Failing satisfaction from BACV, the owners made contact with a Mr Simpson, a building consultant and mediator, to whom they were introduced by a friend of a friend. This, according to Mr Vondrasek and Ms Glanville was again in pursuit of the strategy of approaching Mr Watkins through a third party rather than directly themselves. Mr Simpson made contact with Mr Watkins who initially agreed to meet at some form of conciliation but ultimately declined to attend. The builder had meanwhile instructed Wainwright Ryan Eid Lawyers who wrote to the owners by letter dated 24 February 2006. The letter was headed *"Without Prejudice Save As To Costs"* but the heading was clearly misplaced and the letter was a piece of open correspondence. The letter provided a short history of the project to the end of 2005 and continued :

> At a face to face meeting on 14 December 2005, Mr Vondrasek said to Mr Lloyd Watkins that no more work was to be undertaken inside after that day, but that you were happy for the concreters to complete the garage. ….
>
> On 29 December 2005, our client submitted a Progress Claim for the balance of lock-up stage in the sum of $8,507.36 and other extras totalling $26,330.16. At that stage, there was also $21,663 worth of unbilled works.
>
> On 9 January 2006, Ms Glanville told Mr Lloyd Watkins not to attend the site the next day. She alleged that she did not have to pay for extras because she allegedly did not sign for them. Ms Glanville then stated that if our clients stepped on the property, she would have him charged with trespass. This discussion occurred in a telephone call.
>
> By letter to you dated 9 January 2006 which was sent on 11 January 2006 by registered mail, our clients suspended works due to your above actions.
>
> Our client considers that both your demand that no further works be performed on the inside of the property after 14 December 2005 and your denial of access to our client on 9 January 2006 constitutes repudiation of the Contract. Our client accepts your repudiation of the Contract and acknowledges that the Contract is now at an end. Accordingly, our client's rights and remedies subsist both under the Contract and common law to claim loss and damage from your [sic] arising from your repudiation.

30 The letter then proceeded to a detailed treatment of some costings and demanded payment of $51,809.70 by 4:00 pm 9 March, failing which the letter stated :

> We will seek instructions to issue legal proceedings against you without further notice.

The letter concluded :

> Regardless, your [sic] are otherwise obliged to grant immediate access for the removal of our client's tools, equipment and fencing. Please contact this office to make arrangements.

31 The owners then consulted Noble Lawyers, who responded to Wainwright Ryan Eid by letter dated 14 March 2006. This letter stated, *inter alia* :

> … we advise that our clients consider that your client's purported termination of the contract of itself constitutes a repudiation of the contract which our clients hereby accept and advise that the contract is terminated. Accordingly, your client is disentitled to any further payment under the building contract.

32 The letter proceeded to allege defective workmanship and breaches of a number of provisions of the *Domestic Building Contracts Act* relative to variations. The letter concluded :

> Accordingly, please be advised that our clients will be retaining others to rectify and complete your client's defective and incomplete works and will be seeking to recover their loss and damage from your client.

APPLICANT'S CLAIM

33 The builder filed the application commencing this proceeding on 28 April. It sought the sum of $53,347.85 interest and costs.

34 A mediation on 14 July 2006 failed to resolve the dispute.

35 By its amended Points of Claim, the builder alleged the contract the making of the variations and the rendering of various invoices. It alleged that the owners had repudiated the contract and that the builder through its solicitors' letter of 24 February had accepted that repudiation. The pleading denied liability for the alleged liquidated damages asserting that the time for completion of the project had been extended by agreement. The builder sought payment of invoice No 00239 rendered 29 December 2005 in the sum of $26,329.00, a further $21,663.00 of work undertaken but not invoiced, a loss/profit margin of $3,696.72 and costs of temporary security fencing in the sum of $176.91. The claim therefore was for $51,866.35. Alternatively, the sum of $54,815.16 said to be the balance of the contract price together with $17,822.36 *"due to the builder for unpaid variations"* leaving the owners liable to pay the builder $72,637.86 *"on completion of the work"* with the builder *"entitled to that sum less the cost to the builder of performing the remainder of the building works including rectification of any defects"*.

COUNTERCLAIM

36 By their counterclaim the owners sought :

A. Damages in the sum of $120,851.28

B. Further damages for inconvenience and loss of use and enjoyment of a home

C. Interest

D. Costs

E. Such further or other orders as the Tribunal deems appropriate.

REPUDIATION BY THE OWNERS?

37 The first piece of allegedly repudiatory conduct by the owners according to the letter from Wainwright Ryan Eid of 24 February 2006, came on 14 December 2006. It will be recalled that Mr Watkins says that he was directed not to undertake any further work inside and this was denied by Ms Glanville and Mr Vondrasek. I have no hesitation in accepting the evidence of Mr Watkins on this point. Amongst the owners' discovered documents was a collection of four sheets of paper apparently prepared as *"talking points"* for the owners' conversation with Mr Watkins on 14 December. The last of these *"talking points"* numbered 3H is as follows :

> No one in the house until the come back date you mentioned. It's lock down. We want a break from the dust, dirt and chaos. I expect someone to finish the garage concrete which doesn't need anyone in the house.

This aide memoir is to the same effect as Mr Watkins recounted the conversation. The question is: Does this in itself or in combination with other matters constitute a repudiation of the building contract by the owners?

38 In *Shevill v The Builders Licensing Board* (1982) 149 CLR 620, 633 Wilson J said :

> Repudiation of a contract is a serious matter and is not to be lightly found or inferred … In considering it, one must look to all the circumstances of the case to see whether the conduct 'amounts to a renunciation, to an absolute refusal to perform the contract' …

In the course of his judgment in the same case Gibbs CJ said that :

> A contract may be repudiated if one party renounces his liabilities under it – if he evinces an intention no longer to be bound by the contract … or shows that he intends to fulfil the contract only in a manner substantially inconsistent with his obligations and not in any other way. (1982) 149 CLR 620, 625-6.

39 In *Shevill's* case the High Court declined to infer repudiation from constant late payment of rent by a lessee. In contrast in *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989) 166 CLR 623, in he High Court Mason CJ, Brennan, Deane, Dawson and Gaudron JJ inferred repudiation by a lessor where the lessor had delayed for five months in providing the lessee with a lease in registrable form. The Court made this finding despite concluding that a 14 day notice to perform given by the lessee was ineffective to make time of the essence of the lessor's obligation to provide the registrable lease.

40 Assessed against those principles, did the owners request or demand, call it what you will, could there be no further outside work before the end of the

Christmas/New Year break amount to a repudiation? On behalf of the builder, Mr Pumpa laid emphasis upon the use of the word *"lockdown"* in the owners' aide memoir.

41 In my view, what happened on 14 December cannot be regarded as a repudiation by the owners. First, the request was that work continue on pouring the slab in the garage. Clearly then the owners contemplated that the builder would continue performing the contract and that it would be completed in due course. Even although there are express provisions in the building contract about possession and even in their absence there would be implied entitlements for a building contractor, I cannot accept that any restriction at all upon a builder's right of access to a site in itself and without more amounts to a repudiation. Especially is this so where upon the uncontradicted evidence of all involved, the principal of the building company intended (a) to undergo surgery; and (b) to take a Christmas/New Year break. The owners seem to have done no more than to insist with some vigour upon an arrangement which seemed to be mutually convenient for the builder because of the surgical and holiday plans of the builder's principal and for the owners because of their desire to be relieved of the chaos of building operations indoors in the festive season.

42 As a matter of objective analysis, these facts would not lead one to infer a repudiation. It is also noteworthy that Mr Watkins did not infer that a repudiation was being offered to him. On 29 December, he rendered an invoice. There was nothing in his evidence to suggest that this invoice was given other than in the ordinary course of business and in the expectation that work on site would continue. His call to the owners on 9 January 2006 appears to have been based upon the assumption that he would return to the site. It was only when a dispute was raised as to the invoice that matters took a different turn.

43 Nor am I able to attach any particular significance to the use in the owners' aide memoir of the word "*lockdown*". Mr Watkins' account of the conversation in his witness statement does not mention the word *"lockdown"*. It is therefore not entirely clear that the word was in fact used. Certainly, in my experience, in the building trade the word *"lockdown"* is used to describe the state of a building site over an industry holiday period, such as around Easter or Christmas. I am unaware that it has any necessary connection with the concept of a contract being terminated or repudiated.

44 The next question is whether what happened in the course of Ms Glanville's conversation with Mr Watkins on January 2006 or the events immediately following it, amounted to a repudiation by the owners.

45 It is necessary first to make findings as to what occurred in light of the conflicting accounts of the conversation which had been given. I am wary of accepting uncritically the document propounded by Ms Glanville. It portrays her as cool, reasonable and articulate and Mr Watkins as being

somewhat incoherent and resorting to abuse and obscenity. I am inclined to think, despite the evidence to the contrary of Ms Glanville and Mr Vondrasek, that the conversation became quite heated on both sides. Nevertheless, I do not believe that Ms Glanville ordered Mr Watkins off site as he alleges. I say this for a number of reasons. First, such a requirement would have a dramatic effect if the owners had taken up so extreme a position. I regard it as unlikely in the extreme that neither the owners' letter following the conversation nor Mr Watkins would have mentioned this dramatic event if it had occurred. As noted the right to liquidated damages under the contract would be brought to an end by the termination of the contract. Ordering the builder off the site must necessarily have had that consequence. Yet, the owners sent a letter making an open-ended demand for liquidated damages.

46 Nor would the refusal to pay the invoice even if wrongful on its own amount to a repudiation. *Hudson's Building and Engineering Contract (11th Edition*) [4-221] citing *Cornwall v Henson* [1900] 2 Ch 298. Similarly, the failure to pay rent on time in itself did not constitute a repudiation in *Shevill's* case. In the present instance, there is much to be said for the view that the owners had a legal entitlement to refuse to pay some or all of the amounts invoiced. First, the contract provided for payment by certain stages. The invoice was rendered upon the footing that the project had reached lock-up stage. Since parts of the outstanding wall surfaces of the building were as yet incomplete and remained in that state when I viewed them on the first day of the hearing, there was no entitlement on the part of the builder to demand a progress payment for the balance of the monies payable at lock up stage. The fact that the owners had been willing to make earlier progress payments which they were not contractually obliged to make cannot require them to make a payment covering the whole of the payments due to the lock up stage when that that stage has not been reached.

47 Mr Watkins said that he had undertaken internal works such as in the kitchen and bathroom to enable the owners to continue to reside in the property. So much may be accepted. But there was no provision in the contract which entitled the builder to payment to lock up stage until the completion of the works to that stage which had not occurred. There was also doubt and room for debate in light of the provisions of the *Domestic Building Contracts Act* 1995 to which I will return later as to the builder's entitlement to payment for some or all of the *'extras"* which were invoiced. In some cases, that entitlement might depend upon an adjudication by the Tribunal which by definition had not occurred at the time that the invoice was rendered or that Ms Glanville and Mr Watkins had their conversation on 9 January. In those circumstances, I do not believe that the owners' refusal as at that date to pay the invoice amounted to a repudiation.

48 Likewise, the actions taken by the owners in changing the locks do not amount to repudiation. Clause 29 of the building contract gave the builder

an entitlement to possession of the premises. Changing the locks effectively locking the premises against the builder was scarcely consistent with those provisions. Nevertheless, the circumstance in which the locks were changed must be considered. The builder's position was that with the 29 December invoice unpaid, he would not continue work. He wanted to gain access solely for the purpose of *"ripping out"* the carcass of the kitchen which was on the premises. In locking the building against him, the owners were not preventing him from performing his obligations under the contract but rather were seeking to prevent him taking a step which was of devious propriety and legality.

49 I should add for completeness that in my view the excessive demand for liquidated damages made by the owners in their letter of 9 January 2006 in no way constitutes a repudiation of the contract. Clearly, the foreshadowed claim is misconceived as to quantum. That in itself however does not evince an intention not to be bound by the building contract or evidence lack of readiness to perform.

REPUDIATION BY THE BUILDER?

50 Having found that the owners have not repudiated the contract, it must necessarily follow that the letter from the builder's solicitor of 24 February 2006 did amount to a repudiation of contract by the builder. The assertion *"that the contract is now at an end"* is a clear and unambiguous statement that no further performance would be tendered and that the builder refused further to perform the contract. The letter from the owners' solicitors of 14 March 2006 treated the letter of 24 February as a repudiation stating that the owners accepted it. The contract was terminated by the repudiatory letter of 24 February, accepted by the owners' solicitors letter of 14 March 2006.

DEFECTS

51 The owners' building consultant, Mr Simpson, provided a final report dated 17 November 2006 which was an *"update"* upon a report which he had given based upon an inspection of the premises which he carried out on 27 February. In that report he estimated the costs of rectification extended over some 40 items at $39,240.00. In his viva voce evidence, he said that these figures represented only the base costing and it would be necessary for a margin of 50 percent to be added to this figure to make provision for goods and services tax, contingencies and profit and supervision margins. In the course of an extensive cross-examination by Mr Pumpa, Mr Simpson conceded that there was an element of *"doubling up"* in the costing of the 40 items of rectification. For instance, in the first three items, the cost of removing the roof guttering in the vicinity of the kitchen was allowed for more than once - once as a simple replacement item and again for the purposes of levelling and repairs to fascia. He also conceded that each item appeared to have been separately costed so that where a particular tradesman had a number of items to complete and a number of items of material to obtain and source, it was inappropriate as his initial costings did,

to allow separately for arrival and set up and materials collection for each item. Incorporating these concessions, in his closing address Mr Riegler propounded a revised schedule for rectification and costings showing a base cost of $29,469.00 with a figure of $43,953.40 when the margins were added.

52 Mr Tony Croucher of Buildspect & Co Pty Ltd gave expert evidence at the request of the builder. He responded to the 40 items raised by Mr Simpson concluding that the base cost of rectifying these items to the extent that they required rectification (he did not necessarily concur with Mr Simpson on every point) was $37,258.00. He added to this contingency of 10 percent and a margin of 20 percent which together with the 10 percent goods and services tax yielded a total cost to complete of $54,096.00. In a supplementary letter to the builder's solicitors dated 27 September 2006, Mr Croucher stated :

> It should be noted that the figures for both rectification and completion include a profit margin of 20%, a contingency allowance of 10% and a GST component of 10%. These allowances are included to ensure an adequate allowance should another builder or tradesperson be engaged to complete works or rectify the alleged defects. If Mr Watkins were to carry out the works, his costs would be those allowed less profit margin allowed.

53 He said that the contingency allowance should remain *"and the GST allowance would only apply to those amounts invoiced to the client"*. In the course of cross-examination and following the view and consultation of experts on site on the first day of the hearing, Mr Croucher made certain concessions. He would have allowed item 21 on Mr Simpson's list *"poor plaster repairs prior to painting"* which he denied in his initial report. This item he said should be allowed at 4 hours at $55.00 per hour plus overhead contingencies and goods and services tax of $350.00 inclusive of GST. He said, however, that if other painting works were to be allowed then only $100.00 should be allocated to this item.

54 Again, based on further evidence, Mr Croucher was prepared to concede item 32 on Mr Simpson's list *"stumps installed incorrectly"* at 1.5 hours labour plus $10.00 material plus overhead contingency and GST equalled $112.00 inclusive of GST. He had allowed item 2 a requirement of re-levelling the gutter but commented that if item 8 requiring a gutter replacement was allowed, then this item should be deleted reducing his estimate by $145.00. If contrary to his view, an allowance was made at item 8 *"gutter rusting"* for the replacement of the guttering in the vicinity of the kitchen, he said that some $365.20 inclusive of GST should be allowed instead of $73.00 which he had provided for. If item 10 were allowed – replacement of rusted roof – Mr Croucher said that the allowance should be $1451.00 inclusive of GST. Mr Simpson and Mr Croucher were agreed that item 11 on Mr Simpson's list which he said required a replacement of the *"valley gutter"* could be rectified for $500.00.

55 The result then is that even upon the extra evidence which the builder through his counsel urges me to accept, there is a very high number of defects which it will be quite expensive to repair. Those specific findings tend to belie Mr Croucher's observation *"generally the work has been carried out to a satisfactory standard"*. No doubt these matters become more intractable as time goes on and many might have been dealt with without formal disputation in the course of the completion processes under the contract. The result however is that a relatively modest contract has taken more than twice the time allocated to it by the builder under the contract which he prepared and has not even reached lock up stage. These works abound with defects which are costly to rectify. All in all, the owners' disenchantment was quite understandable.

56 I turn first to the items which are nominated by Mr Simpson as defects and rejected by Mr Croucher.

57 Mr Simpson's fourth item related to *"apron flashing"*. His report states :

> Inspection revealed that the apron flashing on the roof over the kitchen area and inserted into the concrete masonry wall does not have a return fold in accordance with Clause 8.4(a) of HB39-1997 which requires that: Wall and step flashings should incorporate a 10mm weathering fold, and enter the masonry wall by at least 25mm (HB39 is referenced through AS 3500 as referenced through the Building Code of Australia).

58 He suggested that this alleged fault could be rectified either by replacing the apron flashing *"or alternatively, supply and fit a new flashing to the underside of the parapet flashing and over the existing apron flashing"*. In response, Mr Croucher said :

> Clause 8.4(b) of HB-39 states: ' … *Alternatively, sloped wall flashings should incorporate a 10mm weathering fold fixed into a 15mm deep saw cut. Refer to photograph 1 for details of sloped wall flashing. This installation is satisfactory and further work is not required'.*

59 The photograph appears to depict a flashing set into a slot or saw cut in the wall and bending 90^{o} to reach the roof. As I understood Mr Croucher, his contention was that the 90^{o} bend constituted the *"weathering fold"*. Mr Simpson said that the weathering fold required a further upward bend of the flashing within the slot or saw cut so as to avoid a situation in which the flashing directed water into the masonry. This had the potential of creating a leak through the wall. I prefer the evidence of Mr Simpson on this matter. Whilst one cannot be certain without removing the flashing, the photograph appears to depict the flashing inserted into the saw cut or slot without any fold.

60 Item 5 - galvanised pipe - was deleted by Mr Simpson.

61 Mr Simpson's item 8 related to gutter rusting. He said

> Inspection revealed that filings left by the builder had caused rusting and corrosion to the gutter.

> Part 4.9 of AS 1562.1 as referenced through Building Code of Australia, states that: All debris, such as cement mortar and in particular, metal clippings and filings should be removed from the roof and adjacent eaves and box gutters daily. Surface coatings should be protected from damage during installation.

62 Photographs taken by Mr Croucher on 23 June show a line of rusting within the guttering. He said that both on that day and at the view on the first day of the hearing, he was able to remove the rust areas which he said were simply iron filings. Hence it was merely a matter of cleaning which would take place in the course of completion and was not a defect. Mr Simpson said that the rusted portions were not simply the filings which had previously been there but had been washed away but rather represented the progress of corrosion and the guttering itself.

63 Doubtless this process, whatever it might be, has worsened since the experts made their initial visits. There might be an issue of mitigation of damage though nothing was pleaded in this regard. With some hesitation, I conclude that the photographic evidence provided by Mr Croucher shows that there is indeed corrosion in the gutter and it should be replaced.

64 The next disputed item was No 10. Mr Simpson said :

> Inspection revealed that metal filings left by the builder have caused rusting and corrosion to the roof sheets.
>
> Point 4.9 of AS 1562.1 as referenced through the Building Code of Australia, states that: All debris, such as cement mortar and in particular metal clippings and filings shall be removed from the roof and adjacent eaves and box gutters daily. Surface coatings should be protected from damage during installation.

Mr Croucher said that the filings were easily brushed off and this could be done during the completion process. Hence, there was no defect. The photographic evidence provided by Mr Croucher and adopted by Mr Simpson shows there are long rusty lines upon the upper ridges of the corrugated roofing. Whilst rusty filings might simply reside in the low points on this roof which has a relatively low pitch they would not after several months be standing in a line on its higher ridge points. This supports the view that the corrosion is in the roof itself and so the item should be allowed.

65 Item 11 – valley gutter – was agreed between the experts of $500.00.

66 The next disputed item was No 12 – laundry external door. Mr Simpson said –

> Inspection revealed that the external door to the laundry has been set into the door frame approximately 12mm.
>
> This is not in accordance with fig 1.2 of AS 2689 as referenced through the Building Code of Australia. According to the Australian Standard on door installations, the door should be set flush with the external edge of the door jamb.

> Additionally, the builder has fitted a 12mm timber cleat to the edge of the door jamb to bring the outside edge flush with the plaster wall. This is unacceptable building practice as the join between the jamb and the cleat [will] crack.

Mr Croucher said that the problems exhibited by this doorway were common *"as door jamb section is not available in a range of widths and therefore standard section must be accommodated"*. Mr Croucher said that the appropriate rectification was as follows :

> This is usually done by packing in the manner here but rather than installing the packer flush with the edge of the jamb section, it is more visually pleasing to install the packer with a 5mm quirk and then install the architrave, with a similar quirk on o the packer. This obviates the need to cut the packer back to accommodate hinges and also stops a crack line from occurring. It will be necessary to remove the packer and re-install with a 5mm quirk all round.

67 Mr Simpson in re-examination said that the cost of a "*tailor made*" door frame was relatively modest and that was the appropriate mode of rectification rather than resorting to the expedience described by Mr Croucher. Mr Croucher suggested that such *"tailor making"* of door frame was somewhat more expensive than Mr Simpson was prepared to concede.

68 With some hesitation, I accept the view of Mr Simpson on this point. The present installation is unpleasing to say the least. It is the sort of installation that one would expect to see from a *"handyman"* rather than from a registered builder. A renovation necessarily entails a builder working with a number of dimensions which may no longer be *"standards"* or perhaps never were *"standards"*. Proper workmanship requires, in my view, that a *"tailor made"* frame should be provided. I therefore accept Mr Simpson's evidence on this point.

69 Item 13 – laundry substrate. Mr Simpson is of the opinion that contrary to the relevant standard applied by the Building Code of Australia, the substrate around the laundry sink is standard plaster board and not water resistant. Mr Croucher said :

> Mr Watkins is of the opinion the plasterboard installed is water resistant and had faded when stored in the carport. It could not be confirmed if the plasterboard is water resistant … It is satisfactory to install FC sheet over the plasterboard and then install ceramic tiles onto the FC if it is confirmed the plasterboard is not water resistant.

No evidence was placed before me as to the status of the plasterboard one way or the other given that according to Mr Croucher, Mr Watkins had assured him that three stumps had been properly packed in accordance with the relevant standards and photographic evidence showed this was not the case. I am not prepared to accept the assurance given by Mr Watkins to Mr Croucher. I proceed on the basis that the sheeting is not water resistant. It should be rectified as provided for in Mr Simpson's report.

70 Item 14 – laundry door to garage. The same issues arose here as with respect to item 12. I reach the same conclusion accepting the opinion of Mr Simpson.

71 Item 15. According to Mr Simpson's report :

> Inspection revealed that the timber floor in the kitchen area has been installed 6mm lower than the existing timber floor in the meals areas. This is a tripping hazard and should be rectified as soon as possible.

Mr Simpson advocated that the kitchen floor be re-laid at a cost of $2800.00.

In contrast, Mr Croucher contended that the proper action was simply to "*install a metal trim over the junction of the floors after polishing to provide a neat finish*".

This work would be part of the cost of completion and would not be a defect.

During the site visit, Mr Simpson said that he regarded a trim bar as an appropriate transition from say a polished wood floor to a carpeted floor but not appropriate as between two different wooden floor surfaces. The effect he said would be "*like the inside of a caravan*". The living area has pre-existing parquetry floor.

72 With some hesitation I accept Mr Croucher's view on this point.

73 Item 16 – meals area. Mr Simpson observed :

> Inspection revealed that the GPO [ie general power outlet viz a power point] on the wall adjacent to the opening to the kitchen as out of level. This is poor building practice and will require rectification prior to painting.

Mr Croucher said that this was a matter which would be dealt with "*prior to fit off*", hence there was no defect. I accept Mr Croucher's opinion.

74 Overpainting. Mr Simpson observed "*that the hinges and the flush panel door have been overpainted and will require replacement*". He said that the hinges were highly polished chrome. Mr Croucher said that the overpainting could be cleaned with "*thinners*". Mr Simpson said during his viva voce evidence that the suggestion of cleaning with thinners made during the course of the view was not satisfactory. He said that he attempted this cleaning process without success. Any attempt "*to scrape*" the paint off would damage the surface of the hinges. The over-painting is quite marked. Either the hinges as a whole could have been painted to match the door or they could have been left unmarked. It is very poor workmanship to paint up to approximately 50 percent of them. I accept Mr Simpson's view on this item.

75 Item 20 – tripping hazard between television room and meals area. The same issues arise with respect to this item as with respect to item 15. I reach the same conclusion.

76 Item 21 – poor plaster repairs prior to painting. This point was conceded by Mr Croucher, though he and Mr Simpson differ on costing. His own costing was recorded above Mr Simpson's costing of $400.00 plus 50 percent for margins and GST.

77 Item 22. This is another case of overpainting hinges. The same issues arise and I accept Mr Simpson's opinion.

78 Item 24. Mr Simpson said :

> Inspection revealed that the plaster to the right hand side of the vanity unit in the WC is pitted and poorly finished.
>
> The plaster has not been applied in accordance with AS 2589.1 - Gypsum linings in residential in light commercial construction – Application and finishing Part 1: Gypsum plasterboard Part 7.8.1 which states the plaster shall be applied with tools which will permit the feathering of joint treatment edges. After drying, this final coat should be sanded to leave a smooth even surface covering the joint.

Mr Croucher rejected this alleged defect saying : "*minor imperfections were noted but do not warrant repair*".

Based on my observations during the view, I accept Mr Croucher's opinion.

79 Item 26 – toilet seat damaged. Mr Simpson recorded :

> Inspection revealed that the toilet seat has been damaged on the underside edge.

Observations at the view confirmed Mr Simpson's finding. Mr Croucher's comment was : *"a small indent at each side of lid towards the front were observed but are part of the moulding. The seat is not damaged and does not warrant replacement"*.

During the course of view, Mr Simpson hypothesized that the lid was a *"second"*. My own observation is that the moulding is defective. In the circumstances there is no reason why a lid with a proper and non-defective moulding should not be provided. I accept Mr Simpson's finding.

80 Item 27 – study floor uneven. Mr Simpson observed :

> Inspection revealed that the new floor installed by the builder in the study is out of level.

Mr Croucher says that the restumping of the subfloor was carried out at the request of the owners by another contractor before the builder commenced work. The new floor was fixed over the old. In Mr Croucher's view, the builder ought not be held responsible. As I noted above, there are no specifications in this contract and nothing in the plans attached to the contract which would render the builder responsible for stumping in this

existing part of the house. I accept Mr Croucher's opinion and do not allow this item.

81 Item 28 – tripping hazard between hallway and meals room. The same issues arise here as with reference to items 15 and 20. I accept the opinion of Mr Croucher for the reasons already given that there is no defect.

82 Item 30 – overpainting on door hinges. The same issues arise as with respect to items 18 and 22. For the reasons previously given, I accept the opinion of Mr Simpson on these matters.

83 Item 31 – garage roller door. Mr Simpson recorded :

> Inspection revealed that the roof and wall had been constructed in such a manner that a roller door is unable to be fitted.
>
> It will be required that the side masonry wall will need to be relocated and the roof bearing support moved away from the door opening.

Mr Croucher observed that the problem was one with the plans. Any structural change would require new building and planning permits. The plans as originally provided stipulated for a panel door. That proved impossible as was the roller door. This is an issue of design not workmanship. The builder is responsible for the workmanship in the building. A separate organisation provided the design. A design flaw does not render liable someone whose liability extends solely to workmanship as is the case with the present builder. (*Minchillo v Ford Motor Company of Australia Limited* [1995] 2 VR 594). This item is not allowed.

84 Item 32 – stumps installed incorrectly. According to Mr Simpson :

> The new stumps installed under the new wall between the WC and the hallway have been installed without proper packing in accordance with AS 1684.2 section 4.2.1 as referenced through the Building Code of Australia which states that packing of minor deficiencies in depth is permitted, provided the packing is a corrosion-resistant, incompressible material over the full area of support.

Mr Croucher's report records that :

> Mr Watkins asserts packing was carried out by using a full width FC sheet glued into place with Construction Adhesive.

Photographic evidence proved that Mr Simpson was right and Mr Watkins' assurance was incorrect. The item should be allowed.

85 Item 33 – lights not sealed. Mr Simpson withdrew this item.

86 Item 34 – bathroom and toilet floor not waterproof. Mr Simpson said that:

> The floor substrate has not been installed in accordance with Table 3.8.1.1 of the Building Code of Australia which determines that for timber floors, including the particleboard, plywood and other timber based floor materials the area outside the shower area should be waterproof for the whole of the floor.

Mr Croucher conceded that the floor should be waterproofed. However, he said that :

> Mr Watkins advises two layers of FC sheet have been placed above existing flooring in both areas and a 40mm angle has been installed between the sheets to the perimeter. Vinyl flooring has been laid to both floors. Each layer of FC sheet and the vinyl flooring are all deemed to be water resistant, if used singly, by the BCA.

He said therefore that the method was adequate if not in accordance with the Building Code. Given that at least one of Mr Watkins' previous assurances has been proven incorrect, I would not be prepared to make a finding based upon his assurance on this point. I accept Mr Simpson's view and would allow this item.

87 Item 35 – window in shower not waterproof. Mr Simpson said :

> The builder has constructed a window in the shower enclosure with timber sill and timber architraves.
>
> This does not comply with Table 3.8.1.1 of the Building Code of Australia …

Mr Croucher disagreed with the reference to the Building Code of Australia. He agreed however that the window as installed did not comply but said :

> However [it] can be adopted [scil adapted] by sealing a piece of clear glass or Perspex over the architraves of the window.

In cross-examination, he conceded that there would be problems with condensation and cleaning. If such a thing were done, he suggested that the Perspex might be removable. I do not regard this expedient as satisfactory and I accept Mr Simpson's view on this point.

88 Item 35 - shower not fully tiled. According to Mr Simpson :

> The waterproof membrane in tiling does not extend 1500mm horizontally from the shower outlet in accordance with Figures 3.8.1.1 and 3.8.1.2 and 3.8.1.3 of the Building Code of Australia.

Mr Croucher said that the code was not properly quoted. He said :

> The requirement is for walls to be water resistant for a horizontal distance of 1500mm from the shower outlet and up to a height of 1800mm from floor level. The as installed tiles do not comply with this requirement. It will be necessary to fully tile the west wall of the bathroom to a height of 1800mm. There is nor requirement to install a waterproof membrane to the wall.

I accept the opinion of Mr Croucher on this point.

89 Item 37 – bath holding water. Mr Simpson said :

> Water is ponding in the bath to a depth of 2mm, with the fall of the base graded away from the shower outlet.

Mr Croucher conceded that the bath was defective by reference to the manufacturer's standards if water which would cover a 5 cent piece remains 30 minutes after the bath is drained, there is a defect. My observations at the view indicate that at least this amount of water is ponding. Mr Croucher said :

> A very slight depression was observed in the bath that occurred during the manufacturing process but was not considered to warrant any attention. A defect is not noted.

Mr Croucher's own evidence demonstrates that there is a defect. He conceded in answer to a question from me that it is the responsibility of the builder to provide satisfactory items, such as bath tubs. In my view, the bath needs to be removed and replaced with a satisfactory bath. I accept the opinion of Mr Simpson on this point.

90 Item 39 – insufficient pitch in the roof above the kitchen. Both experts agree that a minimum pitch level of 5 degrees should be provided. According to Mr Simpson, the actual pitch is 4.384 degrees. According to Mr Croucher, the pitch is 4.7 degrees. In either case, the Building Code of Australia has not been complied with. I accept this item as a defect.

91 Item 40 – framing inspection and final inspection. It appears that the required frame inspection has not been carried out. Mr Simpson says that the process requires an extensive removal of plaster and an engineering fee. He estimates a $5,000.00 charge. Mr Croucher said that in his experience these inspections can be made with a much lesser level of exposure. Without anything to shed much light on the contrary opinions of the two experts, I accept the opinion of Mr Croucher and his costings on this item.

92 Generally, I accept the costings made by Mr Simpson. He was extensively cross-examined on these and made substantial concessions. Nevertheless, I believe ultimately he took a realistic attitude to the cost of reinstatement. He mentioned his own experience as a rectifying builder. I was somewhat concerned as to the mode of his presenting of evidence. His updated report was provided only at the last minute and outside the timeframes laid down in the Tribunal's case management directions. At one time when he was being heavily pressed on a costing, he described his evidence as being *"off the top of my head"*, which is not what one wants to hear relative to expert evidence. Nevertheless, a rectifying builder is in an unenviable position in rectifying someone else's work. He may be uncertain as to exactly what will be found once he starts removing existing items. It follows therefore that a builder quoting to do rectification work will err on the side of generosity on issues such as margins and time allowances. That is, generosity towards himself. Hence, to provide realistic compensation for the defects which I have found, one should not be parsimonious in the allowances that are made for costing.

93 I have in most cases, and except where I have expressly stated to the contrary, adopted the costings found by Mr Simpson. The *"Simpson*

Report" and the *"Croucher Report"* are both exhibits in evidence. Any defects not expressly dealt with are allowed in accordance with Mr Simpson's revised costings as shown in the annexed table. For the avoidance of doubt however, I append to these Reasons a copy of Mr Simpson's costings evidence, revised according to Mr Riegler, in accordance with the concessions which he made in cross-examination.

COMPLETION

94 Mr Croucher calculated the cost of completion at $54,096.00. This allowed a 10 percent contingency, a margin of 20 percent and 10 percent goods and services tax. Mr Simpson's calculation was $53,385.00, but this allowed for no margins. His evidence before the Tribunal was that there should be a mark-up of 35 percent, 20 percent margin, plus 15 percent contingencies, though this leaves the question of goods and services tax uncertain.

95 The evidence of Mr Simpson was that more supervision is required for a builder completing than for one rectifying. He did not however have a satisfactory answer as to why some of his labour costs were higher, independent of any supervision issues, for completion, as distinct from rectification. I generally felt, as explained above, that the allowance for rectification should avoid being too parsimonious in the knowledge that it will be necessary to secure the engagement of a builder to carry out these rectification works for the sum awarded. These issues are less acute in the case of completion.

96 In the case of completion work, I found Mr Croucher's figures generally more convincing. Even at the end of the hearing, the situation of goods and services tax on the completion work costings provided by Mr Simpson remained uncertain. I believe I should use Mr Croucher's estimate as the starting point, but allow a further $10,000.00 to cover contingencies and the possibility that somewhat higher rates or time allowances would be required by a builder engaged to complete. This would yield a cost of completion in the sum of $64,000.96, inclusive of goods and services tax.

VARIATIONS

97 Mr Riegler, on behalf of the Respondents, sought reduction of his clients' liability for a number of extras or variations charged to them over and above the contract price of $132,300.00. He seeks to challenge their liability, both for items which have already been paid, as well as those for some in the unpaid invoice of 29 December 2005. With respect to all those amounts, his submission is that there is no consideration for the amounts paid or demanded, either because the items were properly within the original scope of works under the contract and should have been performed by the builder under the terms of the contract without extra charge, or, alternatively, that the ability to claim those amounts is removed by provisions of the *Domestic Building Contracts Act* 1995.

98 The first item challenged is the payment already made in the sum of $1,395.00 for warranty insurance. Mr Riegler says that s 31 of the *Domestic Buildings Contracts Act*

> expressly states that the contract must state what the contract price is. In the present case, the contract expressly states what the total contract price is. It is of no consequence that the owners mistakenly believed after the contract was signed that they had a further obligation to pay an additional $1,395.00 in respect of warranty insurance.

99 It was not suggested by Mr Riegler that there was any prohibition on a builder's seeking to pass on the cost of warranty insurance to the owner. The printed form of the contract states

> The cost to the owner for this insurance [that is, the warranty insurance] is $1,385.00.

The figure is written in in manuscript.

100 In my view, if the warranty insurance was a liability which simply had to be absorbed by the builder and could not separately be charged, the cost to the owner of the insurance would be '*nil*'. The singling out of this figure by the printed form suggests to me that it is a separate charge to the owner and not to be regarded as part of the contract price. The attempt to recover this sum from the builder fails. None of the considerations relative to *"extras"* arises. This charge is on the original contract.

101 The next extra which was challenged was the sum of $1,307.90, charged for "*cornice in the WC, bathroom and hall*". Mr Watkins said that his original quotation allowed only for "*cove"* cornice, that is, the plainest and most basic, rather than the three-step cornice which was ultimately fitted at the request of the owners. The charge made of $1,307.90 included no less than $800.00 for 16 hours labour. Mr Vondrasek complained that labour would have been needed to fit the cornice, whatever type it was. Mr Watkins' evidence to me was that somehow the three-step cornice required four times as long to install. I found this evidence difficult to credit.

102 The owners felt that since the house under renovation already included three-step cornice, it was to be assumed that the quotation and the contract covered the installation and supply of three-step cornice. Mr Watkins said that there was "*cove cornice*" in the house prior to renovation. Photographic evidence of the house before renovation demonstrated however that there was three-step cornice in the lounge before renovation.

103 Clause 15.2 of the contract provides -

> The builder must use the builder's best endeavours to supply building materials that match the existing materials as near as reasonably practical.

104 Since the three-step cornice was in fact installed, there was no difficulty in obtaining its supply. In my view, the obligation to supply three-step

cornice is to be regarded as within the original contractual obligation. This item should not have been charged.

105 The next item challenged was relocation of stormwater under house - $958.10. This variation which has already been paid for resulted, it was said, from a need to create the fall necessary to drain the new areas. No new stormwater drain is provided for in the plans. Mr Riegler submitted that these sorts of unexpected items should be covered by contingency and quotation, or be made the subject of "*provisional sums*" in the contract. In my view, this work was outside the scope of the original contract. It is properly to be characterised as an extra. Its recoverability depends upon the operation of particular provisions in the *Domestic Building Contracts Act* 1995 to which I will turn later.

106 The next "*extra*" under challenge is "*prepare and stop archway to lounge*" - $935.00. This "*archway"* was, according to Mr Vondrasek, partially completed when the builder quoted for the job. Mr Vondrasek assumed that the "*archway*" would be completed as part of the contract. There is nothing that would place this "*archway*" within the scope of the works. The plans do not identify it as amongst the things to be constructed. It seems to have been an assumption on Mr Vondrasek's part that it would be completed within the scope of the contract. It is properly to be characterised as an extra. Once again, its recoverability depends upon provisions in the *Domestic Building Contracts Act*.

107 The next *"extra"* under challenge is *"extra stump to floor"* - $226.37. Mr Riegler simply submitted that :

> This represents work done under the contract.

Since there were no specifications in the contract, there is no reason to think that constructing the building depicted in the plans does not require the provision of any additional stumps that may be necessary. Hence, I consider that this item was within the scope of the contract and it should not be allowed as an "*extra*".

108 Mr Riegler then challenged the "*extra*" which has already been paid for in the sum of $4841.10 for "*extra concrete, removal of soil and jack hammering*". Mr Watkins said that his quotation had covered excavations only to 700mm and the additional charge was to cover the additional excavation. The plans which formed part of the contract and supplied the specifications are not limited to 700mm, hence there is no basis for this item being regarded as an "*extra*". The matter is complicated by the fact not only that it has already been paid but also by the fact that, according to Mr Vondrasek, this sum represents a reduced amount on a substitute invoice issued as a result of negotiations which he had with Mr Watkins.

109 The owners paid $4475.60 for the erection of a brick front and side fence. The brick front fence is depicted on the plans and therefore should be within the scope of the contract. It cannot properly be charged for as an

extra. The side fence is in a different category however. The plan depicts the existing paling fence remaining in place. The construction of the brick side fence is therefore not within the scope of the contract and something that could legitimately be billed as an "*extra*".

110 The charge of $4950.00 for strip flooring to hallway, kitchen and laundry is challenged in part. Mr Riegler noted that the construction of similar flooring elsewhere in the renovation was made at $102.00 per square metre including an allowance for 10 percent wastage. If this *"extra"* is to be charged for a reasonable sum only, he submitted it should be $3478.20 and not the higher figure.

111 Amongst the items on the unpaid invoice of 29 December is a charge of $4059.00 inclusive of goods and services tax for *"electrical extras"*. Mr Riegler said that one of the items charged for was *"separate power for oven"*. The electrical contractor Mr James Watkins (Mr Lloyd Watkins' son) conceded that it was invariably necessary to provide a separate power circuit for an oven. Mr Lloyd Watkins said that it depended on the type of oven whether a separate power circuit was required or not. In any event, said Mr Riegler, the burden to prove that the charges were reasonable had not been discharged.

112 Mr Lloyd Watkins' position was that his quotation covered only basic electrical coverage for the new areas, that is, a batten for a single central light fitting and one GPO (power point) per room. The multiplication of power points and lights in various places was, he said, properly to be regarded as an "*extra*" and outside the scope of the quotation and his contract. He said the requirement for downlights rather than the single central light flowed from the owners' decision to have ceiling fans in the centre of a number of rooms.

113 In my view, the approach adopted by the builder that the quotation and the contract covered only the most basic of wiring requirements could not be regarded as other than proper. The full range of wiring except, in my view, in light of the evidence of Mr James Watkins, the separate circuit for the oven was not necessarily within the scope of the original contract and therefore was properly the subject of an extras charge. Whether in accordance with the provisions of the *Domestic Building Contracts Act* such charge was reasonable, I will consider later.

114 The final *"extra"* under challenge was an amount unpaid but billed on 29 December 2005 in the sum of $4,900.00 described as *"renew complete sewer system in 100mm pipes and fittings to points of discharge"*. The plumbing contractor involved, Mr Blake, said that he rendered two accounts to Mr Watkins' company totalling approximately $6,500.00. These covered all civil works, including the hot and cold water service and gas. If he were to have rendered a separate bill for the sewer renewal, it would have been $5000.00. Mr Riegler submitted that the cost of renewing the sewer was half of what was charged. The evidence would suggest that the amount

charged in the account of 29 December 2005 for the sewer renewal was approximately on the mark. Since a new sewer is not depicted on the plans, I believe it is properly to be regarded as an extra.

115 Next, I turn to consider whether those amounts which I have found are not comprehended within the original scope of works under the contract and are in a general sense extras, they should properly be charged as such in accordance with the provisions of the *Domestic Building Contracts Act* 1995.

116 The question of variation whether initiated by builder or by owner is dealt with in sections 37 and 38 of the Act –

> **37. Variation of plans or specifications—by builder**
>
> (1) A builder who wishes to vary the plans or specifications set out in a major domestic building contract must give the building owner a notice that—
>
> (a) describes the variation the builder wishes to make; and
>
> (b) states why the builder wishes to make the variation; and
>
> (c) states what effect the variation will have on the work as a whole being carried out under the contract and whether a variation to any permit will be required; and
>
> (d) if the variation will result in any delays, states the builder's reasonable estimate as to how long those delays will be; and
>
> (e) states the cost of the variation and the effect it will have on the contract price.
>
> (2) A builder must not give effect to any variation unless—
>
> (a) the building owner gives the builder a signed consent to the variation attached to a copy of the notice required by sub-section (1); or
>
> (b) the following circumstances apply—
>
> (i) a building surveyor or other authorised person under the **Building Act 1993** requires in a building notice or building order under that Act that the variation be made; and
>
> (ii) the requirement arose as a result of circumstances beyond the builder's control; and
>
> (iii) the builder included a copy of the building notice or building order in the notice required by sub-section (1); and

(iv) the building owner does not advise the builder in writing within 5 business days of receiving the notice required by sub-section (1) that the building owner wishes to dispute the building notice or building order.

(3) A builder is not entitled to recover any money in respect of a variation unless—

(a) the builder—

(i) has complied with this section; and

(ii) can establish that the variation is made necessary by circumstances that could not have been reasonably foreseen by the builder at the time the contract was entered into; or

(b) the Tribunal is satisfied—

(i) that there are exceptional circumstances or that the builder would suffer a significant or exceptional hardship by the operation of paragraph (a); and

(ii) that it would not be unfair to the building owner for the builder to recover the money.

(4) If sub-section (3) applies, the builder is entitled to recover the cost of carrying out the variation plus a reasonable profit.

(5) This section does not apply to contractual terms dealing with prime cost items or provisional sums.

38. Variation of plans or specifications—by building owner

(1) A building owner who wishes to vary the plans or specifications set out in a major domestic building contract must give the builder a notice outlining the variation the building owner wishes to make.

(2) If the builder reasonably believes the variation will not require a variation to any permit and will not cause any delay and will not add more than 2% to the original contract price stated in the contract, the builder may carry out the variation.

(3) In any other case, the builder must give the building owner either—

(a) a notice that—

(i) states what effect the variation will have on the work as a whole being carried out under the contract and whether a variation to any permit will be required; and

(ii) if the variation will result in any delays, states the builder's reasonable estimate as to how long those delays will be; and

(iii) states the cost of the variation and the effect it will have on the contract price; or

(b) a notice that states that the builder refuses, or is unable, to carry out the variation and that states the reason for the refusal or inability.

(4) The builder must comply with sub-section (3) within a reasonable time of receiving a notice under sub-section (1).

(5) A builder must not give effect to any variation asked for by a building owner unless—

(a) the building owner gives the builder a signed request for the variation attached to a copy of the notice required by sub-section (3)(a); or

(b) sub-section (2) applies.

(6) A builder is not entitled to recover any money in respect of a variation asked for by a building owner unless—

(a) the builder has complied with this section; or

(b) the Tribunal is satisfied—

(i) that there are exceptional circumstances or that the builder would suffer a significant or exceptional hardship by the operation of paragraph (a); and

(ii) that it would not be unfair to the building owner for the builder to recover the money.

(7) If sub-section (6) applies, the builder is entitled to recover the cost of carrying out the variation plus a reasonable profit.

(8) This section does not apply to contractual terms dealing with prime cost items or provisional sums.

117 The variations relative to the stormwater drain and the sewer renewal were initiated by the builder in the circumstances already described. It is common ground that the steps laid down by s 37 of the statute were not carried into effect. It follows that, in accordance with s 37(3), the amounts sought were recoverable by the builder only if **the Tribunal** is satisfied that there are exceptional circumstances that the builder will suffer significant or exceptional hardship and that it would not be unfair to the owners for the builder to recover the money. The initiative for the "*extras*" relative to the archway to the lounge, the side fence and the electrical "*extras*" came from the owners. The $935.00 charge for the archway does not add more than 2 percent to the original contract price. Labour of 16 hours is provided for.

In itself, however, this should not lead to a major delay. It seems to me therefore that the charge made for the archway was properly made and the builder was entitled to recover that sum.

118 For reasons already given, the cost of the front fence cannot and should not have been charged as an "*extra*". Mr Riegler submitted that the allowance which could be made for $3,424.40, inclusive of goods and services tax for the side fence. This would add more than 2 percent to the original contract price and so the recovery of this sum of money would not be authorised by s 38(2). The procedure laid down in s 38(3) was not availed of by the builder. Hence the builder would have to rely on s 38(6) to entitle him to recover that amount. Given that the builder carried out the work and that the sum of money involved is more than trivial and therefore significant (and for these purposes sums little as $200.00 have been regarded as *"significant") Pratley v Racine* [2004] VCAT 2003; *Ryan v E J Lowe T/as Urbane Buildings* [2005] VCAT 2031 [13]), I accept that the builder would suffer significant hardship if not able to recover the cost of the side fence and since the side fence was constructed at the request of the owners in circumstances where Mr Vondrasek concedes that it did not form part of the plans which the builder agreed to build from, it would not be unfair to the owners for the builder to make that recovery.

119 The *"electrical extras"* in the sum of $4059.00 also exceed 2 percent of the original contract price. Hence, recoverability of that amount depends upon s 38(6)(b). Mr Riegler submitted that it was not proven that the charges were reasonable in all the circumstances. Mr James Watkins junior, who was the sub-contracting electrician, gave evidence as to the cost of the provision of a range of electrical installations. For reasons given previously, I accept that these are beyond the original scope of the contract which, in the absence of additional specifications, required only the bare minimum of wiring. The evidence of Mr Watkins junior was fairly vague but ultimately I believe it was sufficient to establish the reasonableness of the charges for electrical extras.

120 The charge for a new circuit connection for the electric oven is not in my view properly allowable as an "*extra*". Mr Watkins junior in contradiction to the evidence given by his father said that an electric oven always requires a separate circuit. The electric oven was within the scope of the contract – it is one of the prime cost items. Therefore, all wiring work necessary for its installation is within the scope of the contract. Doing the best I can, I would reduce the charge for electrical extras by $4059.00 and allow it in the sum of $3,859.00 inclusive of goods and services tax. This conclusion is subject to one further consideration as to the fairness to the owners of allowing recovery of this reduced sum to which I will turn below.

121 I now turn to the "*extras*" which were initiated by the builder, namely, the relocation of stormwater under house and sewer renewal. The charge for reconstruction of the stormwater drain has already been paid. The requirements of s 37 of the Act were not met by the builder. Hence, the

builder would be entitled to recover this amount only under s 37(3)(b). Again, having regard to the sum of money involved, to deny recovery would create a significant hardship for the builder and since the work has been done, it would not be unfair to the owners for the builder to recover the money subject again to the further issue of fairness to which I will turn later.

122 Similar considerations apply to the charge for sewer renewal in the sum of $5390.00 inclusive of goods and services tax.

123 The final and additional consideration of "fairness" to the owners, relative to the above "extras", arises out of the fact that on the findings I have made, the charges for the cornice in the sum of $1,370.90, $226.37 for an extra stump, $4,848.10 for extra concrete, removal of soil and jack hammering; and $4,475.60 being the cost of erecting the front as distinct from the side fence, all of which have been paid, were not in fact recoverable by the builder, and the owners would have been entitled to refuse to pay them. Mr Riegler submits that it would be possible for these payments simply to be re-characterised, as in reduction of the primary contract price, and treated as progress payments rather than as payments for extras, such that the owners' liability to pay the original contract price would be reduced accordingly, but they would be relieved of the obligation to pay these things as "extras". Effectively, this entailed a re-characterisation of the payments which have already been made. Mr Riegler conceded that his clients' pleading did not raise any "money count" counterclaims or set-offs. It was not pleaded, for instance, that the monies for these alleged "*extras*" were paid under a mistake. It was not pleaded that they were paid upon a consideration that had failed. Nevertheless, this was the submission made by Mr Riegler and was said to form the basis for the contention that these payments should in effect be re-credited to the applicants' account, with the debits for the "*extras*" in question being removed. Both in the course of his opening and also in his closing submissions I queried with Mr Riegler the propriety of the course which he proposed. He cited no authority in support of that course.

124 In *Roxborough v Rothmans of Pall Mall Australia Limited* (2001) 208 CLR 516, the High Court of Australia, held that monies paid being part of the price of goods sold and delivered could be recoverable as monies paid upon a failure of consideration where the amounts in question were a "*distinct and severable*". Part of the consideration in that case included a State impost held by the High Court in an earlier decision to be invalid. The resemblance of this situation to the payment of the amount of an invoice where a distinct severable and identifiable part relates to an "*extra*" which is not properly recoverable is clear enough. Had such a cause of action been pleaded by the owners in the present case, I believe the evidence would have made it good with respect to the "*extras*" in question here, except perhaps with respect to the charges for the construction of the fences. The figure relied upon by Mr Riegler as being the "*valid extra*",

and the cost of erection of the side wall emerged after extensive cross-examination as to quantities. That sum was not distinct and severable on the face of the invoice in the way the others were or in the same way as the invalid State impost in *Roxborough's* case was. The Court reached its decision despite the fact that a claim that the monies in question were paid under mistake necessarily fail because all of the retailers who made the payment were aware that the validity of the State impost was under constitutional challenge. *Roxborough v Rothmans of Pall Mall Australia Limited* (1999) 95 FCR 105, 207 [99]. Where a person doubts that money is properly due but pays anyway "*for the sake of peace*", the payment is regarded as voluntary and one to close a transaction and is not recoverable as money paid under a mistake if the doubt as to the validity of the demand is subsequently proved to be correct. *Springvale Wash Sand Pty Ltd v City of Springvale* [1969] VR 784. In the present case at least one of the invoices in question, the demand for further monies for excavations, jack hammering and so forth, had been the subject of negotiation and reduction. As to all paid *"extras"* Mr Vondrasek said payment was made *for peace"*. That consideration in itself would be fatal to a claim for money paid under mistake; but in light of *Roxborough's* case it would not necessarily be fatal to a claim for monies paid upon a consideration which has totally failed or which is non-existent. Nevertheless, no such "*Roxborough*" count has been pleaded, even although pleadings are discretionary in the Tribunal and it is frequently said that the Tribunal is "*not a court of pleading*". Where pleadings are directed they define the issues.

125 The respondents had the opportunity to plead the "*Roxborough*" count by way of set offs or counterclaim and failed to do so. I raised the matter in both opening and closing submissions and no applications to amend the pleading were made. It would make nonsense of the process of directing pleadings in the Tribunal if, in those circumstances, I were now to give effect to a cause of action simply because I felt that the facts made it out even although it remained unpleaded in the circumstances described.

126 Mr Riegler cited no authority for the proposition that payments made can retrospectively be re-characterised. Accordingly, even although the owners had a good defence to the claims for "*extras*" now under consideration, on the present pleading there is no basis for the payments which have already been made to be reopened.

127 Nevertheless the situation seems to be that the builder, in a general sense, has made good a claim for unpaid "*extras*" under the 29 December 2005 invoice totalling $11,727.20, but the owners have made good claims to be re-credited with amounts of $6,375.37 which had previously been paid by them, but have failed to make recovery simply because of the state of the pleadings or because payment has already been made. As a matter of general fairness, the builder is already unfairly ahead in circumstances where, as Mr Vondrasek said, he felt obliged on behalf of himself and his wife to make payments which he disputed to keep the job going. These

payments, for the reasons given, cannot now be recovered. However, the fact that the builder was "*ahead*" on these now invalid but irrecoverable "*extras*" makes it unfair for the owners to be held liable for all of the unpaid "*extras*" which, other things being equal, I would have held them obliged to pay. Accordingly, the owners are exonerated from liability for any of the challenged but unpaid extras except for the amount that the unpaid extras exceed the overpaid extras *viz* $5,351.83.

LIQUIDATED DAMAGES

128 Mr Riegler on behalf of the owners submitted that they should be awarded $4870.76 being liquidated damages at a weekly rate of $130.00 per week from 24 June 2005 to 14 March 2006. These are the dates upon which the works should have been completed and the date on which, according to the owners' contentions which I have accepted, the contract was discharged. The claim is made at the appropriate rate in contrast to the notice given in the owners' letter of 9 January 2006.

129 Mr Pumpa, on behalf of the builder, submitted that I should exercise a power under s 53 of the *Domestic Building Contracts Act* to vary terms of the building contract to extend the date for completion so as to relieve the builder from any liability for liquidated damages.

130 I agree with Mr Riegler's observation that there was no evidence or serious argument which would justify that course. The most that can be said is that the principal of the builder company made reference to a number of items which he undertook at the owners' request either with or without charge. No doubt these matters had some effect on the time line. Nevertheless, the builder had taken more than twice the period allocated under the contract by Christmas and had not even completed the lock-up stage. As previously noted, as from 14 December, Mr Watkins senior was going to take a holiday break in any event and was recuperating from shoulder surgery. I do not accept that the period from 14 December 2005 to 9 January 2006 represented any delay imposed by the owners.

131 It is possible that more elaborate evidence and arguments might have made out a credible view of things that would attribute delays to particular owner initiated extras. In the absence of such evidence and argument, I do not believe there is any basis to make the order which Mr Pumpa sought on behalf of the builder. Hence, the owners are entitled to recover the liquidated damages which they have claimed.

RELIEF

132 The findings which I have made will lead to a quite complex exercise in accounting. To avoid the dangers of my making a miscalculation, I propose simply to publish these reasons, and to invite the parties to make their own calculation and bring in short minutes to give effect to these reasons.

COSTS

133 I have heard no submissions as to costs and so I will reserve them.

ITEM NO.	COMMENTS	QUANTITIES	AMOUNT	AMOUNT WITH 50% MARK UP
Item 1, 2 and 3	**Fascia and Gutter** Mr Simpson conceded that these items could be rolled into one. He stated that Items 1 and 2 could be done in 4 hrs, plus a further ½ hr to renew/align the gutter brackets.	4½ hrs @ $50 per hour. Materials $50	$275	$412.50
Item 4	**Apron Flashing**	2 hrs @ $50 per hour	$100	$150
Item 5	**Galvanised pipe** (deleted)	2 hrs @ $50 per hour	$0	$0
Item 6	**Galvanised iron flashing clipped to zincalum**	2 hrs at $50 per hour materials $50	$250	$375
Item 7	**Lead in contact with zincalum** Mr Simpson conceded that this item can be reduced by 1 hr if Items 1 and 2 were being done at the same time	2 hrs @ $50/hr Materials $30	$130	$195
Item 8	**Gutter rusting** Mr Simpson conceded that if this item was being done at the same time as Items 1 and 2, then only 2 hrs is required to install the end stops and pop.	2 hrs @ $50/hr Materials $90	$190	$285
Item 9	**Down pipe from the upper roof** Mr Simpson conceded that if this item was being done at the same time as items 1 and 2, then the labour time could be reduced to 1 hr.	1 hr @ $50/hr Materials $90	$140	$210
Item 10	**Rusted roof**	20 hrs @ $50/hr Materials $850	$1850	$2775
Item 11	**Valley Gutter** Mr Simpson and Mr Croucher agreed that the existing Valley gutter could be modified to remedy any deficiency in the as constructed gutter.		$500	$500
Item 12	**Laundry external door** Mr Simpson conceded that it might take only 7½ hrs to complete this rectification.	7.5 hrs @ $50/hr Materials $250	$625	$937.50
Item 13	**Laundry substrate** Mr Simpson stated that he and Mr Croucher agreed that the appropriate rectification was to put cement sheet over what was there. Mr Simpson conceded that if the work was carried out with other work the labour time would be reduced to 2 hrs.	2 hrs @ $50/hr Materials $44	$144	$216
Item 14	**Laundry door to garage**	10 hrs @ $50/hr Materials $250	$750	$1125

Item 15	**Kitchen floor** Mr Simpson gave evidence that there was no reason why that floor could not have been built so that the finished level of the strip flooring was level with the parquetry, given that the applicant had constructed a new subfloor.	38 hrs @ $50/hr Materials $900	$2800	$4200
Item 16	**Meals area GPO**	1 hr @ $60/hr	$60	$90
Item 17	**Ceiling water damaged**	9 hrs @ $50/hr Materials $50	$500	$750
Item 18	**Over painting**		$50	$75
Item 19	**Excessive gap around meals area door**		$120	$180
Item 20	**Tripping hazard between lounge and dining room**	31 hrs @ $50/hr Materials $750	$2300	$3450
Item 21	**Poor plaster repairs**	7 hrs @ $50/hr Materials $360	$400	$600
Item 22	**Study window**		$100	$150
Item 23	**Cupboards in study** Mr Simpson gave evidence that he had previously purchased similar hinges at $90 each.	4 hrs @ $50/hr Materials $360	$560	$840
Item 24	**Plaster above vanity poorly finished** Mr Simpson conceded that the labour time could be reduced by ½ hr if this item was done with other painting items.	3.5 hrs @ $50/hr Materials $50	$25	$337.50
Item 25	**Door does not comply with BCA**	5 hrs @ $50/hr Materials $50	$300	$450
Item 26	**Toilet seat damaged**	1 hr @ $50/hr Materials $50	$100	$150
Item 27	**Study floor uneven** The evidence before the Tribunal was that the applicant had uplifted a considerable section of the study floor to make repairs to the sub floor. It is submitted that it was incumbent upon the applicant to have levelled that area when reinstating the existing floorboards, prior to laying the new strip flooring over the same. Mr Simpson conceded that the cost of the floor sander could be deleted, given that it is a cost that would be incurred when completing the works in any event.	92 hrs @ $50/hr Materials $1200	$5,800	$8,700
Item 28	**Tripping hazard between Hall way and meals area**	26 hrs @ $50/hr Materials $500	$1800	$2700

Item 29	**Door between Hall way and garage**	2 hrs @ $50/hr Materials $500	$120	$180
Item 30	**Over painting on door hinges**		$50	$75
Item 31	**Garage roller door** The respondents no longer claim this amount.		$0	$0
Item 32	**Stumps installed incorrectly** Photographs taken by Mr Simpson revealed that the instructions provided to Mr Croucher by Lloyd Watkins were incorrect. Mr Croucher conceded that the methodology adopted by the applicant was incorrect. Mr Simpson conceded that the labour time for the carpenter could be reduced to 4 hrs by using a different rectification methodology. Mr Simpson gave evidence that rectification was likely to cause consequential damage.	10 hrs @ $50/hr Materials $100	$600	$900
Item 33	**Lights not sealed** This item has been withdrawn		$0	$0
Item 34 Item 35 Item 36	**Bathroom and toilet floor not waterproof** Mr Simpson conceded that this item could be done in conjunction with Items 35 and 36. In those circumstances, the labour time could be reduced to 6 hrs. Tiles would cost $630 and waterproofing would cost $200.		$1130	$1695
Item 37	**Bath holding water** Mr Croucher gave evidence that he had made investigations with the manufacturer of the bath. He stated that the retention of water was regarded by the manufacturer as a defect. It is conceded that this work can be done at the same time as items 33, 34 and 35. Accordingly, the respondents only claim the labour associated with plumbing and the associated materials.	3 hrs @ $50/hr Materials $600	$750	$1125
Item 38	**Skylight on roof**		$250	$375
Item 39	**Insufficient pitch in roof above the kitchen**		$1500	$2250
Item 40	**Framing inspection**		$5,000	$7.500
TOTALS			**$29,469.00**	**$43,953.50**