**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

VCAT REFERENCE NO. D355/2008

**DOMESTIC BUILDING LIST**

## CATCHWORDS

Domestic building work – oral agreement to change brand of windows from that specified – builder installs windows – owners refuse to sign variation – builder's right to payment – oral agreement to vary contract as to payment of lock up claim – builder performs oral contract – owners refuse to pay – significance of failure to comply with s.37 Domestic Building Contracts Act 1995 - extension of time – liquidated damages – repudiation by owners – allowance for items of incomplete and defective work - how assessed – counterclaim treated as set-off

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|---|---|
| **APPLICANT** | Mardel Constructions Pty Ltd (ACN 090 939 601) |
| **FIRST RESPONDENT** | Jogendra Sinha |
| **SECOND RESPONDENT** | Poonam Sinha |
| **WHERE HELD** | Melbourne |
| **BEFORE** | Senior Member R. Walker |
| **HEARING TYPE** | Hearing |
| **DATE OF HEARING** | 8 – 12 December 2008; 2-12 and 18 March 2009 |
| **DATE OF ORDER** | 19 May 2009 |
| **CITATION** | Mardel Constructions Pty Ltd v Sinha (Domestic Building) [2009] VCAT 903 |

## ORDER

1. Order the Respondents to pay to the Applicant $187,870.90.
2. The counterclaim is struck out.
3. Costs reserved.

**SENIOR MEMBER R. WALKER**

**APPEARANCES:**

| | |
|---|---|
| For the Applicant | Mr R. Andrew of Counsel |
| For the Respondents | Mr A. Herskope of Counsel |

## REASONS

### Background

1 The Applicant ("the Builder") is a registered builder carrying on domestic building work. The Respondents ("the Owners") are the owners of land at 4 Peak Street East Malvern.

2 On 5 May 2007 the parties entered into a domestic building contract ("the Contract") whereby the Builder would construct two units on the Land for the Owners at a price of $525,000.00.

3 On 22 February 2008 the Builder invoiced the Owners for the lock up stage payment of $157,500.00. A dispute then arose and, following a conciliation conducted by Building Advice & Conciliation Victoria ("BACV"), some further work was done by the Builder but no further payment was made by the Owners. Both parties thereafter purported to determine the contract. The units have since been completed by another builder.

### The dispute

4 The Builder now claims payment of the lock up stage, interest and loss of profit on the remaining works. The Owners deny any indebtedness to the Builder and claim damages of $95,124.00 being the alleged cost of rectifying the work, $248,865.00 for the cost of completion, liquidated damages of $31,086.00, loss of rent and various other sums, less the balance due under the contract. The "pleadings" do not exactly reflect those claims but that is how the case was conducted.

### Hearing

5 The matter came before me for hearing on 8 December 2008. Mr Andrew of Counsel appeared on behalf of the Applicant and Mr Herskope of Counsel appeared for the Owners. The hearing proceeded until 12 December and was then adjourned part heard. The hearing resumed on 2 March 2009 and concluded on 18 March 2009.

### The witnesses

6 The principal witness for the Builder was Mr Osborne. The principal witness for the Respondents was Mr Sinha. Most of the communications and conversations took place between those two men.

7 In general, I preferred the evidence of Mr Osborne. His manner in the witness box was restrained and matter-of-fact. He appeared to answer questions directly and without embellishment and the documentary evidence tended to support his account. He was not shaken in cross examination.

8 On the issue of credit, Mr Sinha acknowledged having altered the price on the copy of the building contract that he gave to the bank. The contract price was $525,000.00 but he altered the bank's copy to show a contract price of over $800,000.00. I am satisfied that he did this in order to obtain a

larger loan from the bank than he might otherwise have been able to receive. The reason advanced by Mr Sinha for doing this was to obtain funding for aspects of the job that the Owners were undertaking over and above the work to be done by the Builder. Even so, the purpose of the deception was to mislead the bank as to the contract price. Mr Sinha said that he was given the impression that he "had to do it in that way". I do not accept that evidence. If the Owners wanted finance for matters beyond the scope of the Builder's contract they ought to have made an application for that to the bank and told the truth. The bank would then have been able to decide, on correct information, whether it was prepared to advance that additional money or not.

9 Mr Sinha is an educated man with a Bachelor's degree in Mechanical Engineering. English is not his first language but his studies for this degree were in English. He has held managerial positions in substantial companies in Australia, including his own business. He has completed an earlier development in Melbourne and has recently undertaken studies in Building with a view to becoming a registered building practitioner. Despite the odd minor grammatical or spelling mistake, his English is excellent. It is unlikely that he would have believed that there was nothing wrong with deliberately misleading the bank in this way. Both Mr Sinha's conduct in this regard and his implicit suggestion under oath that he thought it was all right must affect his credit.

10 He said in re-examination that Mr Osborne had signed the altered contract and so was a party to the deception. Mr Osborne could not be asked about that because the issue was first raised in the cross-examination of Mr Sinha and since it went solely to credit it could not be pursued. He produced, in re-examination, what appears to be a copy of the altered contract signed by Mr Osborne but it is a photocopy and I am unable to make any finding as to its authenticity. The allegation that Mr Osborne was involved in deceiving the bank is serious and has not had an opportunity to challenge it, albeit because of the way the matter was first raised by his counsel.

11 The suggestion that Mr Osborne was involved only arose in re-examination and I am concerned that there was no suggestion of that during his cross-examination. At first, Mr Sinha admitted in cross-examination that Mr Osborne rang him to say that the bank had called him and queried why the base claim was so low and Mr Osborne asked Mr Sinha about that. Later, Mr Sinha suggested that Mr Osborne knew about the bank loan and denied that Mr Osborne told him what the bank had said to him. He then admitted that he told Mr Osborne that he had altered the contract. The transcript of this part of his evidence is difficult to follow but the account that he gave during cross-examination was substantially different from what he said in re-examination. His suggestion that Mr Osborne was party to the deception all along does not lie easily with his earlier evidence and looks like recent invention.

12 As will be apparent from these reasons, I found some of Mr Sinha's sworn evidence to be inconsistent with the letters and emails that he wrote. I also found much of his evidence difficult to believe.

13 On 20 November 2007 a variation was sent to the Owners by the Builder concerning a number of variations that have been requested. This set out various sums claimed by the Builder with respect to the variations. Mr Sinha altered the document by changing the Builder's claims for a number of items to zero and altering some of the wording. He altered it in such a way that it looked very similar to the original document. The alterations were not simply a strike through and substitution of figures and words. Rather the document was recreated using a similar font and layout. He then signed it and sent it back to the Builder without telling Mr Osborne that the document had been altered. Mr Osborne noticed the alterations and in an email to Mr Sinha suggested that what he had done was fraudulent. The failure by Mr Sinha to draw the changes he had made to Mr Osborne's attention is a matter of some concern. If there was a dispute concerning the form of variation the Builder had sent to him, Mr Sinha should have raised it openly with Mr Osborne.

14 He did not respond to the allegation by Mr Osborne that he had been fraudulent. Indeed, in cross-examination he said that there was no requirement that he tell the Builder he had altered it and that it was up to the Builder to check the document when he got it back.

15 At various times he accused the Builder of "conspiring" against him and "pressurising" him but neither allegation is borne out by the evidence.

16 His explanation for his lack of contact with the Builder while he was overseas in November and December about the matters he claimed to be concerned about was not credible, in that he did contact the Builder when he wanted to.

17 The extent of the lack of "puttage" to Mr Osborne during cross-examination in this case is a matter of concern. Counsel for the Owners is experienced and highly regarded for his competence. Their solicitor is also very experienced in this area and conducts a great deal of litigation in this List of the Tribunal. What is put to a witness in cross-examination reflects what counsel's instructions then are. Counsel, being fallible, may well forget to put one or two matters in cross-examination and a client might forget to tell his legal advisors about matters, particularly those that do not appear important to him. However, where a large amount of novel material emerges from a witness that is not in his witness statement and was not put earlier to the other side, one must wonder whether some or all of those matters have just come into the witness' head.

### The dispute about the lock up payment

18 The issue upon which the parties finally parted company was the dispute over the lock up payment. According to Mr Osborne, he first issued an

invoice for the lock up stage in early February 2008. In response he, received an email from the Owners dated 10 February 2008 listing 14 matters to be done before lock up would be paid for. Looking at this list it is apparent that most of the items on it do not relate to the lock up stage. For example, the list includes such things as "All driveways to be done" and "All inside stairs to be completed". These are clearly not part of lock up. Indeed, apart from roof tiles which he complained were incomplete, none of the items were lock up items. This email suggests either that Mr Sinha was ignorant of what "lock up" meant, or that he was trying to get as much other work done as he could before making the lock up payment.

19 A meeting took place on site between Mr Osborne and Mr Sinha on 13 February but nothing was agreed. Thereafter, on 14 March 2008, a meeting occurred at the Office of Consumer Affairs at which a mediator, Mr Bruno Panozzo, attempted to achieve a resolution of the dispute. Mr Osborne claims that an agreement was reached but this is denied by Mr Sinha. Objection was taken on behalf of the Owners to the receipt of any evidence as to what occurred at this meeting. Plainly, the meeting was held on a without prejudice basis but, for reasons given orally at the time, I ruled that I would hear evidence limited to the issue of whether a concluded agreement had been reached between the parties as alleged by the Builder. Evidence as to the result of this meeting was then given by Mr Osborne, Mr Sinha and Mr Panozzo.

20 According to Mr Osborne's evidence, at a time when Mr Panozzo had left the room to get water it was agreed between himself and Mr Sinha that:

(a) the Builder would pour the concrete for the two garage floors; and

(b) the amount provided in the Contract for lock up would then be paid by the Owners, less:

(i) $5,000.00, which would be withheld by the Owners until the porches had been constructed; and

(ii) a further $10,000.00, which would be withheld by the Owners until the question of liquidated damages was sorted out at the end of the project.

**Was there an agreement to pay lock up?**

21. Mr Panozzo said that there was an in principle agreement for the Builder to do some work and for payment of the lock up claim to be made with the retention of $15,000 but he said there was no overall agreement as to all matters in dispute. He could not recall whether he left the room to get water but does not think that he would have done so because of the time of day. He said that the Builder was to go back and concrete the garages and secure the house and "put a window up" to bring it to lock up stage. The money was then to be paid. His evidence was a little vague and lacking in detail. It is clear that the window openings in the basement were boarded over by the Builder to secure the unit. Otherwise, I do not recall that anyone else

mentioned a window in the context of lock up. What he meant by that was not fleshed out. He acknowledged that, understandably, he had no precise recollection of what happened that day although he indicated that he had refreshed his memory from his notes. He acknowledged during cross-examination that he should have prepared terms of settlement.

22. Unlike Mr Osborne, who absented himself while Mr Panozzo gave his evidence, Mr Sinha remained in the hearing room.

23. I thought that Mr Sinha's evidence as to this alleged agreement was somewhat evasive. At first he insisted that the whole proceeding was privileged and that no evidence could be given about it. He then denied that any agreement at all, even a partial agreement, had been reached.

24. On the Monday following the conciliation, 17 March, Mr Sinha sent an email to Mr Osborne in which he said that he would be sending him minutes of the meeting that had taken place at BACV. No such minutes were ever prepared. Mr Sinha said that he did not prepare them because, when he tried to write something, he realised halfway through that a lot of the issues had not been resolved. He said that he had this realisation on Monday while thinking about the draft minutes. However his email in which he stated that he would be sending minutes of the meeting was sent at 6.37 p.m. on that Monday night, which is inconsistent with what he now says. In any case, implicit in the realisation he says that he had, is that some other issues had been resolved and that is consistent with Mr Osborne's account.

25. Mr Osborne sent an email to Mr Sinha the following day acknowledging that they were "working together" and had "both moved on". In an email of 19 March, Mr Sinha gave a direction to the Builder concerning the concreting of the garages, which suggests that he was expecting that they would be concreted. In his email of 28 March he acknowledged that: "We have agreed on certain things as per our meeting with Bruno Panozzo (BACV)".

26. In a letter the Owners sent to Slidders Lawyers on 16 May 2008 they acknowledged that an agreement had been reached at the meeting, although they suggested that other things had also been agreed (see below). In his evidence before me Mr Sinha denied on several occasions that even a partial agreement was ever reached. That is not consistent with the contents of his solicitor's letter of 16 May 2008 or his email of 28 March.

27. Following the meeting, the Builder went back to the site, secured the building, concreted the two garage floors and then sent a revised claim to the Owners for $142,500.00, being the amount provided in the Contract for lock up less the total of the two amounts Mr Osborne said was agreed to be retained. No payment was made.

28. Although the agreement described by Mr Osborne is not precisely in accordance with Mr Panozzo's evidence it is generally consistent with it

and Mr Panozzo acknowledged that his recollection was less than perfect. I found Mr Osborne's account of what happened to be more credible than the somewhat evasive evidence of Mr Sinha. His account is also consistent with Mr Sinha's emails and with what actually transpired. I am satisfied that such an agreement was reached and that the Builder complied with it but that the Owners did not.

29. I should here refer to the cross-examination of Mr Osborne concerning this point. It was as follows:

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|---|---|
| Mr Herskope: | Now you've read Mr Sinha's witness statement ? |
| Mr Osborne: | Yes |
| Mr Herskope: | And you know what he says about what occurred ? |
| Mr Osborne: | Yes. |
| Mr Herskope: | And in essence Mr Sinha's evidence is to the effect that he disputes that any agreement was reached during the course of this conciliation. |
| Mr Osborne: | Yes. |
| Mr Herskope: | Do you dispute that ? |
| Mr Osborne: | No. |
| Mr Herskope: | We've all got the answer. |

30. Mr Herskope submits that I should interpret this exchange as an admission by Mr Osborne that no agreement was reached during the course of the conciliation. I do not interpret it in that way. The final question is quite likely to have been interpreted by the witness as asking whether he disputed that that was the effect of Mr Sinha's evidence. That is the way that I interpreted the question. That Mr Osborne probably understood it the same way appears from his re-examination. It is quite clear from Mr Osborne's evidence that he did not admit that no agreement was reached. Moreover, it is clear from Mr Sinha's own emails and letters that an agreement was reached.

### The consequence of the agreement

31. On the basis that, at least, the lining of a small Dutch Gable had been overlooked, Mr Herskope submits that the Units had nonetheless not reached the lock up stage and says that the lock up payment was therefore not due. Mr Croucher said that lock up was reached except for the Dutch Gable. Mr Lees suggests other possible items but I prefer Mr Croucher's evidence about this. Mr Andrew says that the omission of the lining of the Dutch gable was "de minimis". Given its position and size that certainly seems open to argument. It is a vertical triangle in the upper roof not visible from most points on the ground. The base of the triangle is 2.4 metres wide and the apex is 1.2 metres above the base. For an intruder to gain entrance

he would first have to know that it was there, climb up a ladder onto the roof and then climb up the roof and climb through the opening.

32. However to ask whether or not lock-up would otherwise have been achieved misses the point. An agreement was reached that, if the Builder poured the garage slabs, which were not part of lock up under the Contract, and if $15,000 was withheld, that would be treated by the parties as being lock up and the Owners would pay the balance of the lock up payment. That was an agreement to vary the Contract in that manner. The Builder has wholly performed its part and the Owners have not. They were therefore in breach of the Contract as amended by the agreement.

### The windows

33. A major issue in the case was the brand of windows used. The specifications required that Dowell windows be supplied. The Builder attempted to order the windows from Dowell in August 2007 but was told that there would a 5-6 week delay on delivery.

34. Mr Osborne says that, on 26 September 2007, he explained the difficulty of delivery to Mr Sinha and asked him if windows manufactured by an alternate supplier, A & L Windows, would be satisfactory. In response to this request, Mr Sinha visited the premises of A & L Windows looked at windows and spoke to the staff. Following that visit he spoke to Mr Osborne by telephone. Mr Osborne said that he assured Mr Sinha that the width of the reveals on the windows that would be supplied by A & L Windows were within a couple of millimetres of the reveals in the equivalent Dowell windows. He says that Mr Sinha then said "That's fine, go ahead" or words to that effect.

35. Mr Sinha denies having agreed to change the windows but his evidence is contradictory and most unreliable. I prefer the evidence of Mr Osborne and the documents. From these it is clear that he agreed to the change.

36. The windows were delivered to the site by A & L Windows on 10 October 2007 and stored in one of the garages until they were installed on about 1 November. Nothing was said by the Owners about the windows prior to their installation although Mr Sinha visited the site quite frequently and so probably saw them. Mr Sinha's evidence to the contrary was somewhat confused and seemed to shift ground.

37. On 9 November Mr Sinha sent an email to the Builder which talks about the supplier of the windows having been changed to A & L windows. The only issue raised by him in that email is the width of the "channel" which the Owners wanted increased to 40mm. There is no suggestion in that email that the change of window supplier was not authorised. Rather, the suggestion is that, when the change was made, Mr Osborne promised the Owners that the windows would be made with a 40mm wide "channel". It became apparent during the hearing that Mr Sinha did not know what the various parts of a window are called and seems to have confused reveals

with sashes. According to a sketch done during the hearing, he thought that the side of the sash frame was called a "channel".

38. A written variation concerning the change of windows supplier was sent by the Builder to the Owners on 14 November 2007 but they never signed it. By that stage the windows had already been installed on 1 November. There was therefore no written variation entered into with respect to the change. In late November the Owners went overseas and did not return until January. Although they were aware of the change of windows and had seen them in place, they made no complaint about them either before they left or while they were away. Yet they did send instructions to the Builder on another matter.

39. It was not until well after their return, in an email of 22 January 2008 that the Owners unequivocally said the windows were unacceptable, stating: "You have failed to get written consent/agreement from the owner before making this change to the contract specifications"

40. The Builder agrees that the A & L windows were slightly cheaper than the Dowell windows would have been and has offered a credit for the difference. However in several emails, Mr Sinha insisted that the A & L windows be removed from both buildings and that Dowell windows be installed in their place. In one email he seeks either a change of windows to Dowell or for the Builder to "come to some kind of agreement of compensation amount to cover losses" (sic.). In cross-examination he said that he wanted $16,000 in compensation as well as the windows changed to Dowell.

41. During his cross-examination, Mr Sinha claimed that he had heard of Dowell windows before entering into the contract. He agreed that he had not specified them to the architect. He said that when the house was designed he had it in his mind to put in good quality windows yet no specific window was identified on the drawings. He said under cross examination that when he and Mr Osborne were going through the specifications he paid a lot of attention to the detail. When it was pointed out to him that the sash sizes were not specified in the specifications he said that Mr Osborne had told him at the time that the Dowell windows had a 42mm sash and they looked good. That is not in his witness statement and it was not put to Mr Osborne.

42. In his email of 24 January, Mr Sinha says that he never agreed to accept A & L windows instead of Dowell windows, adding the words: "If that was the case you would have got me to sign a variation form, as you have always done throughout this project from the beginning". That seems an odd thing to say. If he had not agreed to accept the windows that would be all that he would have needed to say. The presence or absence of a written variation would be another matter.

43. In this email he also says: "If you had mentioned in your contract A & L windows, I would not have accepted your quote". I do not believe that

statement. In the first place, it is quite inconsistent with his visit to A & L Windows and his agreement, evidenced by his correspondence, to accept them as a supplier. In the second place it was the Builder that specified Dowell windows in the specification. It was not something that the Owners had either requested or decided upon themselves.

44. He denied that Mr Osborne had mentioned any thing about delivery times in his request to change the supplier. I think it is unlikely that Mr Osborne would have given no reason at all. It was Mr Osborne who had specified Dowell windows in the specification in the first place. He had not simply used A & L windows without consulting the Owners. He contacted Mr Sinha and asked his permission and I think it is unlikely that in doing so he would not have given some reason for the change. Under cross examination he agreed that Mr Osborne had told him about a lead time when he was requested to change the windows but he said that this was during a second conversation. That there was a second conversation is not in his witness statements and it was not put to Mr Osborne.

45. Mr Sinha insisted that he had never agreed to the use of the A & L windows, that he had objected to them from the start but agreed to have a look at them. He claimed that he then said that they looked cheap but the objections to the windows do not appear until well after they were installed. There is nothing said by Mr Sinha in any of the written communications beforehand to indicate that he thought the windows from A & L looked cheap or that they were not to be used.

46. He insisted that he had a clear recollection of the first conversation when he said that he wanted Dowell windows. It is not clear why he would have said this because at that stage he had not seen the A & L windows and he said in cross examination that he was open to change. That he was indeed open to change at the time is borne out by his visit to the premises of A & L.

47. I am satisfied that, in the conversation between Mr Osborne and Mr Sinha referred to, the Owners agreed to the change of supplier. However, the Owners are now taking the point that, because the variation was not in writing it is not binding upon them and they are seeking to obtain some advantage from that. Mr Sinha went down to A & L windows and was quite happy with them. It is clear that he has changed his mind about them after they were installed.

48. Having represented to Mr Osborne that the Owners would accept A & L windows in place of Dowell windows and the Builder having acted on the faith of that representation by purchasing and installing the A & L windows the Owners are estopped now from asserting that those windows are not in accordance with the contract. The absence of a written variation does not mean that the change was not requested or desired by the Owners.

49. Reliance is placed by the Owners upon s. 37 of the *Domestic Building Contracts Act 1995*, which requires a builder who wishes to vary the plans

or specifications set out in a major domestic building contract to give to the building owner a notice setting out certain matters. Sub-section (3) provides:

> "(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."

50. It should be noted that the section does not make an agreement to carry out such a variation unlawful (*Dover Beach Pty Ltd & anor v. Geftine* [2008] VSCA 248). It simply provides that the builder is not entitled to recover any money with respect to it. In this case the Builder is not seeking to recover any money from the Owners with respect to the variation. In fact, the Owners are entitled to a credit because the A & L Windows were cheaper.

51. It was not suggested by either of the expert witnesses that the A & L windows were defective. During the on site inspection Mr Sinha showed me a laundry window in the rear unit with the sash half hanging off. On inspecting the window there was no apparent damage to the frame to account for its odd position nor any explanation from Mr Sinha as to what had happened to it. The effect that I observed could easily be achieved with a screwdriver otherwise, considering how this type of window operates – one such window is Exhibit 7 – one would expect some damage to the aluminium extrusion in the frame and I could see none. I cannot make a finding on the basis of this window that the A & L windows were defective.

52. Finally, it should be noted that, although the Owners are claiming the cost of replacing the windows with Dowell windows, when they installed the windows in the basement of Unit 2, they installed A & L Windows, not Dowell windows. They also rendered around the A & L windows making it impractical now to remove them. It is clear that it is not their intention to replace them.

### The claim for an extension of time

53. Mr Osborne gave evidence that, on 3 March 2008, he delivered a letter to the Owners' home enclosing Bureau of Meteorology records from July 2007 to February 2008. The letter reads as follows:

> "As per John's request for more substantial documented proof of rainfall over the building period. (This is in reference to our previous claim for an extension of time due to inclement weather as per the contract). Please find enclosed the Bureau of Meteorology records for July through to end of February.
>
> As per clause 34 of the contract page 32 we are claiming an extension of time for 52 days of wet weather and its effects on the building process.
>
> Also as your payment has not been received by the due date for lockup payment, as per the contract, the project has now been stopped.
>
> We are also asking that you provide proof of your capability to pay , in the form of a letter from the Westpac Bank. This is to be provided within 7 days.
>
> I have answered your queries in regards to the lock up payment several times and you now have 10 days to rectify this breach of contract as per section 16, item 2(b) Building and Construction Industry Surety of Payment Act 2002."

54. The Owners deny ever having received a copy of this letter. According to Mr Osborne's evidence he personally hand delivered it in a manila envelope to the Owners' house and gave it to their son who answered the door. The Owners' son, Mr Sinha junior, denies that any such letter was delivered to him.

55. An email sent by the Builder to the Owners on 12 March 2008 refers to the letter having been delivered on 4 March. It states:

> "As for your confirming that you have finance, as letter delivered to you on 4/3/08, we have still received nothing from you or your bank. We therefore doubt your ability to pay the remainder of the contract."

The Owners responded to this letter but their response does not deny that such a letter was delivered. Although the email refers to a letter delivered on 4 March and not 3 March, there is no suggestion of any other letter having been delivered to the Owners by the Builder at or about that time.

56. In response to the request for proof of finance, an undated letter from the Westpac Bank was provided. This states that Mr Sinha has funds available up to $798,000.00 to be drawn for construction purposes. Mr Sinha said that the bank gave the letter to him on 16 or 17 March and that, as soon as he got it, he faxed it to the Builder. Despite the fact that this was less than a fortnight after Mr Osborne said the envelope was delivered to his son, Mr Sinha denies that the request for proof of finance was the letter in that envelope. He says that the request for proof of finance was made to him verbally by Mr Osborne.

57. When asked why he did not query the paragraph in the 12 March email referring to the earlier letter said to have been hand delivered to his home

on 4 March, he said that he verbally challenged it. He then gave an elaborate account of him saying to Mr Osborne that no such letter had ever been delivered to him. He claimed that he asked Mr Osborne to whom he had delivered the letter and that Mr Osborne said to him "Don't worry. That's the same letter which I've asked you before". Mr Sinha says that he took that to be a reference to their phone conversation. None of this was in his Witness Statement or put to Mr Osborne and it seems very unlikely. The contents of the letter were of great significance and I do not believe that Mr Osborne would have said "Don't worry." It is more likely that he would have immediately delivered another copy of the letter. The matters raised in the letter were simply too important to ignore.

58. As to the conflict between the evidence of Mr Osborne and the Owner's son Mr Sinha junior, I think perhaps the Owners' son has forgotten about the incident. I am satisfied that Mr Osborne is a credible witness and that the document is not contrived. Some corroboration is also provided by his email of 12 March.

### Termination of the contract

59. On 3 April 2008 the Owners sent a letter to the Builder purporting to be a notice pursuant to Clause 43.2 of the contract. The document, where relevant, is as follows:

> "We would like to bring your attention to the following issues which you have been notified by emails in the past many times, but to my frustration nothing much has been done to rectify the breach.
>
> 1. In your specifications dated 5 May 2007 you have specified to supply and install DOWELL make windows to both units. But you have supplied and installed A & L make (a cheaper make) windows without getting any variations signed by the owners. You are in substantial Breach of Variation Clause 23.4 of the above contract dated 5 May 2007. Also you are in breach of Section 37 of the Domestic Building Contracts Act 1995. You have been a lot more than 10 days to fix this problem since I have notified this issue.
>
> 2. As per the above contract dated 5th May 2007, you were supposed to finish this project within 158 days including 10 days of inclement weather (on production of inclement weather certificate) and 48 days of weekends, public holidays, roaster days off and other foreseeable breaks in the continuity of the work. This contract commenced on 29 May 2007 when you were given all necessary endorsed documents.
>
> 3. As on date today you still haven't finished lock up stage and you are late by 143 days in this project. Your liquidation damage to the date today works out $32,685.00 at $1,600.00 per week for both units. You have gone past the limit of 1.5 times the number

> of days of completion as per Section 41, Clause 1 of the Domestic Building Contracts Act 1995. Again by delaying this project so much you are in substantial breach of contract". (sic).

60. The letter then proceeds with a copy of s41 of the *Domestic Building Contracts Act* 1995 and then concludes with the following paragraph:-

> "We hereby give you a minimum 10 days' notice to remedy the above issues, under the contract dated 5th May 07, Clause 43.2, and Section 41(1)(a)(2) of the Domestic Building Contracts Act 1995. If you failed to remedy by 15 April 07, then I may terminate your contract under the abovementioned sections/clause".(Sic.)

The letter is signed by both Owners.

61. In response to this, a letter was sent by the Builder's solicitors, Messrs Slidders, dated 11 April 2008. In this letter his solicitors recite the history of the ordering of the windows following Mr Sinha's agreement to the substitution. It disputes the start date of the contract and refers to extension of time claims. The letter then continues as follows:-

> "We refer to clause 43.4 of the building contract which states "The owner is not entitled to end this contract under this clause when the owner is in substantial breach of this contract".
>
> We are instructed that you have committed and remain in substantial breach of the building contract in the following respects:
>
> (a) Failure to make pay Revised Lockup Progress Payment dated 31 March 2008 within 7 days (i.e. by 7 April 2008) in breach of clause Item 7 of Schedule 1 and Clause 30 of the Building Contract; and
>
> (b) failure to provide evidence and capacity to pay contract price as requested by Mardel Constructions on 3 March 2008.
>
> Your notice of intention thereby constitutes repudiation of the building contract.
>
> We expressly reserve our client's rights in relation to the above issues.
>
> We confirm that Mardel Constructions is and has at all material times been ready willing and able to perform its duties under the building contract.
>
> You are hereby placed on notice that, if you attempt to terminate the building contract for either contractual or statutory reasons, my client shall commence legal proceedings seeking damages flowing from breach of contract plus interest and legal costs." (Sic.)

62. In response to this, the Owners forwarded a further letter dated 16 April 2008 to the Builder's solicitors. This disputed various matters raised in the solicitors' letter. It alleged that the Builder was itself in substantial breach of contract and could not terminate the contract under clause 42.4. It then continued:

"The builder has been served the Notice of Intention To Terminate the Contract on 3 April 2008, with 19 days notice to remedy, which expired on 15 April 2008. The builder has failed to remedy within the notice period, therefore we as owners of 4 Peak Street, Malvern East 3146 are giving **NOTICE OF TERMINATION to the Builder, of the Building Contract dated 5th May 2007 for 4 Peak Street, Malvern East, Vic with immediate effect**.

Therefore, Mardel Constructions Pty Ltd (Mr Matthew Osborne) is no longer acting as builder for this property at 4 Peak Street, Malvern East, Vic.

We are terminating this contract dated 5th May 2008 under the following section/clause:

**Clause 43.3 of the Building Contract** "If the builder does not remedy the substantial breach stated in the notice to remedy the breach within 10 days of receiving that notice, the owner may end this contract by giving a further written notice to that effect".

**2 Section 41:** Ending a contract of completion time of cost blows out for unforeseeable reasons.

(i) A building owner may end a major domestic building contract if:

(a) the contract has not been completed within one and a half times the period it was supposed to have been completed by.

Owners are suspending any further payment to builder under clause 44, until the project is completed.

Owners will engage another builder to finish the remaining contract under the clause 44. Owners will also exercise their rights under clause 44.1 of the contract, to deduct the loss incurred to complete this project by another builder.

Any remaining financial negative or positive balance will be dealt with at the end of completion of this project.

You will be advised in the near future of the progress at this end. We would like to get contact details of the trades people engaged in the construction process to date like plumber, electrician, drainer, bricky, etc. We will require Plumbing Industry Compliance for the plumbing work done including drainage. We will also require Electrical Safety Certificate for the electrical work done and Roof Tiling Certificate. Any other documentation related to this project must be sent to the owners' address within 7 days of this letter/ notice. Any delay in receiving the above can further delay this project, which will not be in the interest of you.

We will fight strongly any legal proceedings by you and can counterclaim further financial loss due to loss of opportunity to sell these units in the last year of the property boom, if it wasn't delayed and any legal costs associated with it."(Sic.)

The letter is signed by both Owners.

63. In response, on 1 May, Slidders wrote to the Owners referring to the notices they had sent, to the Builder's response, to the Builder's notice and to the Owners' response. The letter then continued as follows:

> "Significantly, we note that the owners' response to notice:
>
> - states that the owners are unwilling to remedy the breaches outlined in the Builder's Notice of Intention; and
> - Fails to either respond to or directly dispute the Builder's position outlined paragraphs 1, 2(a), 2(b), 2(c), 2(d), 3, 4 and 5 of the Builder's Notice of Intention;
>
> Further, both Response and Notice and the Purported Termination Letter purport to terminate the Building Contract in circumstances where Owners lack any rights to terminate on the basis that:
>
> (a) the Owners have failed to comply or adequately respond to the Builder's Notice of Intention;
>
> (b) the Builder has comprehensively responded to the Owners' Notice of Intention; and
>
> (c) the Owners have breached and remain in breach of the Building Contract.
>
> The above conduct amounts to a repudiation of Building Contract. You are hereby placed on notice that the Builder accepts your repudiation."

64. The letter then goes on to claim the following sums from the Owners as damages:

| | |
|---|---|
| The unpaid lock up stage invoice of | $142,500.00 |
| Interest at 16% pursuant to clause 31 of the contract | $1,495.08 |
| Loss of profit on the balance of the contract work | $45,000.00 |

65. In response to this letter the Owners wrote a letter to Slidders Lawyers on 16 May 2008. In the course of this letter the Owners said that a partial agreement was reached at the conciliation at BACV but "never got finalised" because the Builder failed to do what was agreed in the meeting. The letter then set out 8 items that were allegedly "some" of the items that were agreed. These were said to be:

> "(a) Pouring slab to both garages;
>
> (b) 4 windows to basement unit 2 never got installed;
>
> (c) Drainage around basement never completed;
>
> (d) Lintel issues to basement windows never fixed causing major structural defects in the building;
>
> (e) All electrical, gas and water connections done to wrong locations for Unit 1. All to be relocated;

(f) All windows never changed to correct specifications;

(g) To finish the project within 4-6 weeks from 14th March 2008, ie. by 30th April 2008. Not much was done as on 3rd April 2008. The only job which was carried out by the builder between 14th March and 30th March 2008 was 2 wrongly poured slabs, which is going to cost more to fix them now.

(h) Job further got delayed by the negligence and incapability of the builder, causing further liquidation damage to already high LD accumulated."

The letter then proceeds with further complaints.

66. Obviously, the last of these is a complaint and cannot have been the subject of any agreement at the conciliation. As to the others, Mr Osborne asserts that the first was agreed but it was never put to him that any of the other matters referred to were agreed to at the conciliation, possibly because Mr Sinha's position during the hearing was that nothing at all was agreed. As to (d), (e) and (g), experts have inspected both buildings for both sides and provided reports. There is no suggestion from either expert that there are structural effects in either building, that the services for Unit 1 have been wrongly connected or that the slabs were "wrongly poured and need to be "fixed". I am not satisfied that there was any agreement as to these items apart from pouring the slabs for the garage.

### Did the Owners validly terminate the Building Contract?

67. Termination of the Building Contract by the Owner is governed by Clause 43 which provides (where relevant):

> 43.2 If the Builder is in substantial breach of this Contract the Owner may give the Builder a written notice to remedy the breach:
>
> - specifying the breach;
> - requiring the substantial breach to be remedied within 10 days after the notice is received by the Builder; and
> - stating that if the substantial breach is not remedied as required, the Owner intends to end this Contract.
>
> 43.3 If the Builder does not remedy the substantial breach stated in the notice to remedy the breach within 10 days of receiving that notice, the Owner may end this Contract by giving further written notice to that effect.
>
> 43.4 The Owner is not entitled to end this Contract under this clause when the Owner is in substantial breach of this Contract.

68. The substantial breaches relied upon by the Owners in their noticer are:

(a) Suppling and installing A & L windows without getting any variation signed by the Owners.

(b) Failing to "fix" this problem after being notified of it by the Owners.

(c) Failing to complete lock up stage; and

(d) Being "late by 143 days in this project".

The complaints about time are not specifically specified as breaches but seem to relate to the claim to determine the Contract under s.41 of the *Domestic Building Contracts Act 1995*.

69. I find that the fitting of A & L windows was agreed to by the Owners and so it was not a substantial breach. Hence the first two specified breaches are not established. I also find that it was agreed that, if the Builder concreted the garage floors and the Owners retained the agreed amount of $15,000, the lock up payment would be made. Although the Owners were to pay less than the lock up payment and although the work had proceeded in some respects well beyond lock up it was agreed that lock up would have been achieved. The Builder concreted the garage floors well before this notice was sent and so the complaint that lock up was not achieved is not established because of the agreement the parties had reached. I make this finding notwithstanding that, unknown to the parties, a small Dutch Gable had not been lined. Whether or not that was *de minimis* as Mr Andrew has suggested, an agreement was made, the Builder performed it and the Owners are bound to perform their part of it.

70. As to the claim about time, there are several problems:

(e) To be relied upon in support of such a notice, the breach must be substantial (Clause 43.1);

(f) It ignores the claim for wet weather days, which I find were claimed;

(g) It ignores engineering problems that are referred to in a number of the emails between the parties. These included such things as drainage and the support of the basement windows. No extensions were sought by the Builder with respect to these but they should be considered when it is asserted that the breach is substantial or that the Builder has, by delay, repudiated the Contract;

(h) It ignores the suspensions of work by the Builder due to non-payment of the lock-up claim. Indeed, at the time this notice was served, building work had been and was still suspended.

71. The Builder had run over time but the contract allowed the Owners liquidated damages for that. The only way the Builder could have dealt with that complaint in a notice under Clause 43 was by resuming work but since the work was suspended due to the Owners' default, it was not obliged to do so.

72. Another difficulty faced by the Owners was that, at the time they served the notice they were in default themselves in having failed to pay the lock up claim. By Clause 42.1, the owner is in substantial breach if (inter alia) he does not pay a progress claim as required by Clause 30. In this contract, that meant that the payment should be made with 7 days after the stage is completed and a written claim for the stage had been received from the Builder. That occurred on 31 March, following the conciliation agreement,

the pouring of the slabs and the making of the revised claim allowing the $15,000 retention. Being in substantial breach themselves they were not entitled to serve a notice of termination pursuant to the contract by reason of Clause 43. 4.

### Termination by the Builder

73. The deficiencies of the Owners' notice were brought to their attention by the Builder's solicitors' letter, dated 11 April 2008. Notwithstanding that, the Owners pressed on and, by their letter of 16 April 2008, they purported to terminate the Contract, saying that they were suspending any further payment to Builder until the project was completed, that they proposed to engage another builder to finish the construction and deduct the loss incurred from the money due to the Builder.

74. The Owners' letter of 16 April, was sent when they were in substantial breach of the contract in that they had refused to pay the lock up claim. I find that, by sending that letter, by their purported termination of the Contract when they had no right to do so and by their expressed intention to engage another builder, the Owners evinced an intention no longer to be bound by the Contract.

75. The Builder by its solicitors treated this letter as a repudiation of the Contract which it accepted by their letter of 1 May. I find that it was entitled to do that. The acceptance of this repudiation by the Builder's solicitors is unequivocal. The Contract therefore came to an end on receipt by the Owners of their letter of 1 May.

76. Before considering the Builder's claim for damages, it is necessary to consider the alleged defects and incomplete work.

### Defects and incomplete work

77. In this regard, there are two questions I have to determine:

    (i) In what respects was the work for which the Builder is seeking payment either incomplete or defective;

    (j) What was the reasonable cost of completing or rectifying any such items of incomplete or defective work.

78. The Owners have tendered a witness statement from the replacement builder, Mr Matvik, in which he states:

> "As at the time of making this witness statement, Matvik has rectified all of the defects as per Mr Lees' report [dated 1 August 2008 ] and a couple of other defects not appearing in Mr Lees' report."

Annexed to the witness statement are a number of invoices for progress payments but they contain no detail at all of what was done. He said that he agreed to do this work on a "do and charge" basis, that he charged $97,900 which has been paid.

79. Mr Andrew consented to the witness statement being received into evidence as though it were sworn and without cross-examination but he said that he would challenge the evidence contained in it in some respects.

80. Since the statement went in by consent without the witness being called for cross-examination there is no elaboration of what the witness says in the statement. He does not say what the "couple of other defects" were or break down his charges between those defects that have been proved before me and the alleged defects that have not. Further, it is apparent from my inspection of the site that some of what the witness says is false, in that he has not carried out all the rectification work suggested by Mr Lees.

81. The statement is of little use to me. What I have to find is not what the Owners might have paid someone else to do whatever that person did but rather, what allowance should reasonably be made to complete what I find to be incomplete and to remedy what I find to be defective. For that I must look to the expert evidence of Mr Lees and Mr Croucher.

82. In calculating their figures, the two experts have taken different approaches. Mr Lees has allowed what in my experience is a normal builder's profit and overheads figure of 20%. He explained how that figure was broken down. He has also allowed a substantial sum for preliminaries, which he has then apportioned over the various items. The purpose of a "preliminaries" allowance is to take account of the cost of a replacement builder setting up on site. Mr Lees has also included the cost of a site foreman to oversee and co-ordinate the various trades. Mr Croucher has simply added a margin of 35% to each item to take account of both profit and overheads as well as any preliminaries.

83. This is not a case where the Builder has wrongfully refused to complete the work or abandoned the site, leaving defective work unrectified. The breach was by the Owners who prevented it from completing the work or doing anything further. Any allowance in regard to any item of incomplete work, (assuming of course that it is part of something for which he has charged or is charging the Owners) should therefore be, not what it would reasonably cost the Owners to carry it out but what it would reasonably have cost the Builder to carry it out. Anything more than that is a loss caused by the Owners' own wrongful conduct in repudiating the contract and excluding the Builder from the site. The cost to the Builder should include the Builder's profit and GST because they would have been included in whatever the Builder has charged for the particular item. However, no preliminaries should be included since the Builder was already on site and would not have incurred those in completing the work. To allow the Owner to recover a proportion of preliminaries for incomplete work would be to make the Builder pay for a loss that the Owners have caused.

84. The position with defects is not the same. There, the Builder has presented defective work to the Owners and received or requested payment for it. Unless it appears that the Builder would have fixed the item if he had not

been expelled from the site, the Owners should recover the reasonable cost of having someone else fix the defects.

85. I cannot use Mr Lees' approach because any rectification will be done by the completing builder who is already on site. The appropriate course therefore is to allow a margin of 20% on the cost of completing incomplete work and 35% on the cost of rectifying defective work. These figures are not set in stone for all cases. They are drawn from the evidence given by the experts in this case.

86. What is a defect and what is incomplete work is not always easy to determine.

87. Mr Sinha gave evidence that all of the rectification and completion work had been done except that the windows had not been replaced. When I went on site, that was plainly not the case. For example, the window sills had not been altered as Mr Lees had suggested, nor had the lightweight cladding been cut back. I am unimpressed by Mr Sinha's evidence and although a statement from the replacement builder was tendered that does not provide any explanation of what he had done. The amount he has charged seems very high indeed, considering the extent of the complaints about the work. It is unlikely that the amount charged relates only to these claimed defects.

### The expert evidence

88. There are two expert reports from Mr Lees for the Owners and three from Mr Croucher for the Applicant. The most relevant for present purposes are the report dated 1 August 2008 from Mr Lees and the report dated 22 September from Mr Croucher. Mr Lees other report focussed upon the cost of replacing the windows. Of Mr Croucher's other reports, the first was concerned principally with the question whether the work had reached lock up stage by the time of his inspection on 30 June 2008 and the last is to do with the current sate of the development, which I saw on the inspection.

### Brick sills - $0

89. The complaint is that the brick sill under each window was formed flat using split bricks. Mr Lees said that this would not allow a fall away from the window. He said that two courses of bricks should be removed and a brick sill be formed sloping away from the window. He also pointed out that, in one window, the sill was above the level of the window frame.

90. Mr Croucher said that the plans required a decorative moulding around the window and that the sills had to be constructed to match. The plans do show such a moulding.

91. During the on-site inspection I noted, not only that the sills had not been removed and reconstructed as Mr Lees suggested, but that they had been finished in accordance with what Mr Croucher said was required. I do not find this item established.

**Sill flashings - $1,125.00**

92. Mr Lees said that sill flashings had not been provided to the windows. Mr Croucher agrees that some kind of sill flashing should be installed. The Units have now been completed and it is not known whether any sill flashing was installed. This is incomplete work. Mr Lees' figure, allowing a margin of 20%, is $1,125.00. Mr Croucher's figure is higher, but it includes a profit of 35%, which is inappropriate for incomplete work. I accept Mr Lees' figure.

**Wall junction flashing - $377.70**

93. Mr Lees and Mr Croucher had a substantial disagreement as to whether the wall junctions were properly flashed. Mr Croucher acknowledged that the flashing needed some dressing but Mr Lees went considerably further and said that the required space had not been left between the bottom of the wall panels and the roof. Mr Croucher said there was no such requirement and I note that the Units have been completed without doing the extra work suggested by Mr Lees. The further dressing of the flashing is incomplete work. I will therefore allow $377.70, being Mr Croucher's figure after reducing the margin to 20%.

**Gaps above the windows - $159.70**

94. One window had been removed and only temporarily re-installed. That was admitted. Mr Lees said that excessive gaps had been left above the other windows. The Builder said that those windows were installed at the levels required by the plans and demonstrated on site the necessity of matching the window heights to the brick courses where, as here, there is face brick work. Mr Croucher agreed with the Builder but allowed the cost of putting infill panels above the windows which is what has been done. I am satisfied with the explanation provided by the Builder and Mr Croucher. This is incomplete work and I will allow Mr Croucher's figure with the reduced margin.

**Sisalation- $464.65**

95. Mr Lees said that sisalation had not been completed effectively. Mr Croucher agreed. This is incomplete work. The dispute was whether foil bats were required between the studs in order to achieve a 5 star rating. There being insufficient evidence that this is required for these units to achieve the required rating and it not appearing whether foil bats were installed after the Builder was excluded from the site, I am not satisfied of that. I will allow Mr Croucher's figure with the reduced margin.

**Intrusion of window reveals - $1,198.56**

96. Mr Lees pointed out that the windows next to the wall panels had been installed so that the reveals extended 45mm into the room past the studs. That was because the panels were thinner than bricks. Since the reveals would stand proud of the internal face of the plaster, either the windows needed to be altered or the excess needed to be trimmed off. It is not known

which course was adopted by the replacement builder but, after hearing the debate as to this by the experts, I am satisfied that it was practicable to trim the reveals without removing the windows. This is incomplete work and would have needed to have been done during the frame straightening stage before plaster could be hung. I will allow the cost of doing that as calculated by Mr Croucher, again, with the reduced margin.

**Timber connection brackets - $319.44**

97. Mr Lees said that the connecting brackets had been nailed using galvanised clouts. The Builder denied that and said that he had used the nails supplied by the truss manufacturer. I am unable to find that the wrong nails were used. Mr Croucher agrees that more nails were needed. This is incomplete work and I accept Mr Croucher's costing for putting in additional nails with the reduced margin.

**Support of Bay window - $1,928.52**

98. The bay window was cantilevered. Mr Lees said that the plans showed that it should have been supported on a strip footing and dwarf wall. Mr Croucher agrees that one of the plans shows a strip footing but says that the engineering drawings do not detail a strip footing and the ground floor plan of the architectural plans does not detail it either. Although I accept that the plans are flawed I find that, in one part of them, a dwarf wall was required and so I find that a dwarf wall should have been installed. This is therefore incomplete work. I note that the replacement builder has constructed it. Mr Lees' costing of the wall is $2,388.00. Mr Croucher's figure with the reduced margin is $1,928.52. Since I am considering what it would have cost the Builder to do the work I will take the lower figure.

**Window head to the bay window - $90.00**

99. Mr Lees says that the head to the bay window was significantly bowed. This was not disputed. This is defective work. Mr Croucher's figure with the 35% margin is $90. Mr Lees figure with a 20% margin but no preliminaries is $242. Apart from the margin, the difference lies in the time taken. Mr Croucher allows 1 hour and Mr Lees has allowed 3.5 hours. The scope of work is quite small. If the Builder had not been excluded from the site it could have been done during the frame straightening stage before the plaster was hung. Mr Croucher's figure therefore seems to me to be more appropriate.

**Connection of framework to steel beams - $0**

100. Mr Lees says that the timber framing was not bolted to the supporting steel beams. The Builder says that it was fixed with powder driven Ramset nails. The photographs in Mr Lees' report are taken from below and the Ramset nails referred to would not have been visible from that position. I am unable to find that the framework was not attached as required.

**Hold down straps - $40.92**

101. Mr Lees says that the hold down straps installed in the brickwork have not been fixed to the timber framework. This is incomplete work. Mr Lees' costing includes the previous item which I have not allowed. I therefore accept Mr Croucher's costing, which is $40.92 with the reduced margin.

**Sub-floor clearance - $422.00**

102. Mr Lees says that the sub-floor clearance is insufficient in the front of Unit 1 and that the ground level needs to be lowered. His figure for doing that is $422.00. This is incomplete work. Mr Croucher's figure, with the reduced margin, is $382.80. The difference lies in the time and since Mr Lees saw the extent of the problem directly while Mr Croucher was relying on photographs I will allow his figure.

**Packing to stumps - $297.00**

103. Mr Lees says that some packers need to be replaced with non-compressible material. His costing is $264.00 before preliminaries. This is defective work. Mr Croucher's costing is considerably higher. Again, the difference lies in the time and since Mr Lees saw the extent of the problem directly while Mr Croucher was relying on photographs I will allow Mr Lees' figure, increasing the margin to 35%.

**Northern brick wall in Unit 2 - $441.00**

104. There is a small section of wall isolated by a construction joint that has no brick ties. Mr Lees says that it needs to be demolished. He says that to do that will take 8 hours and his figure for that is $710.00. This is defective work. Mr Croucher says that to do it will take 4 hours and his figure with the 35% margin is $441.00. From the photograph it seems to be a very small section of wall and so I accept Mr Croucher's figure.

**Insufficient ties to brickwork in the north, east and west walls - $3,192.75**

105. I accept that extra ties must be inserted in these walls. This is defective work. Mr Lees' figure for this is $4,422.00. Mr Croucher's figure (with the reduced margin) is $1,788.00. The difference lies in the hours worked. Mr Lees has allowed 64 hours and Mr Croucher 16 hours. This is an extraordinary difference between two equally qualified experts. I note that Mr Lees has assessed the task after the internal linings have gone in. Certainly, the work should have been done beforehand. It does not appear what the replacement builder did about this, when he did it or how long he took. I will allow a reduced time of 40 hours and recalculate Mr Lees' figures on that basis with a 35% margin. That produces an amount of $3,192.75.

**Brickwork to the south wall- $3,457.08**

106. The problem here is an unusually wide cavity (100mm) which has produced a gap around the window and lack of brick ties. Apparently the Builder gave extra long ties to the bricklayer but they were not installed. Mr Lees

says that the advice of an engineer should be sought in regard to the retrospective fitting of the brick ties. Whether the plans required a gap of this dimension or not, brick ties should have been provided. This is defective work. There is a huge gap between the time allowed by Mr Lees and Mr Croucher for installing the ties. Mr Lees "allows" $2,000 while Mr Croucher calculated $440. There is no reason to prefer either view on the time that would be taken. I will allow $1,500 for the time. Otherwise, I accept Mr Lees' costing for this item because he has allowed for the engineer whereas Mr Croucher has not. His figure, less $500, will be recalculated with a 35% margin.

**Basement walls - $0**

107. This complaint relates to the inability of the Builder to fit the basement windows because of incorrect and insufficient engineering details. The Builder complained about this to the Owners. Being unable to fit the windows the Builder had to temporarily block the window openings and support the structure above with temporary props. I do not accept that this is a defect nor incomplete work since it was agreed what lock up would amount to and this was not included.

**Steel column installation- $539.00**

108. I accept that the column will need to be refitted and the flooring repaired. This is defective work. Considering the apparent scope of work Mr Lees' figure seems high. I accept Mr Croucher's figure of $539.00.

**Garage door - $653.00**

109. This was removed by the Builder to allow the pouring of a slab and had not been reinstalled before the Owners repudiated the contract. It had to be reinstalled and the brickwork made good. This is incomplete work. I will allow Mr Lees' figure of $653.00.

**Agricultural drainage - $2,439.00**

110. This problem arose because of a difficulty in levels encountered on site. The levels set by the engineer allowed for water to flow from the silt pit into the agricultural drain instead of vice versa. It could not be constructed in that way and so the Builder sought instructions which had not been received. I do not accept this to be a defect but it is incomplete work It is unclear from the evidence how much of Mr Lees' costings would be claimable by the Builder as an extra so I can make no finding about that. That is unfortunate because plainly, the order of construction has been disrupted and retro-fitting anything is more costly. Mr Croucher agrees with Mr Lees' costing of $2,439.00.

**Dutch gable - $670.60**

111. This is a decorative feature on the roof and, because of its position, it is not noticeable and so was missed. Nevertheless, it has not been lined as required. This is incomplete work. Mr Croucher's costing includes the hire

of a boom lift which would be necessary to gain access due to the height Mr Lees' costing does not include that and allows for materials which were on site. I therefore prefer Mr Croucher's costing but since this is incomplete work I reduce the margin to 20%.

**Brick parapet walls to Unit 2 - $450.12**

112. Flashing on these was missing. This is incomplete work. The experts differ slightly on the time involved. The areas in question do not seem large. I will allow Mr Croucher's figure but since this is incomplete work I reduce the margin to 20%.

**The windows - $0 damages but credit of $$2,734.00**

113. For the reasons given, the Owners claim for the cost of replacing the A & L windows with Dowell windows fails. However the Owners are entitled to a credit because the A & L windows were cheaper. I note that the Builder has never disputed that entitlement.

**Brick cleaning - $1,161.60**

114. The bricks were dirty and needed to be cleaned. There is little difference in the costings of the experts. I will allow Mr Croucher's figure but since this is incomplete work I reduce the margin to 20%.

**Conclusion as to defective and incomplete work and allowance**

115. The amount to be allowed to the Owners with respect to defective and incomplete work and the credit for the windows will therefore be the total of the above figures, which is $22,161.64.

**The claim for liquidated damages**

116. The construction period was 168 days (Schedule 1 Item 1) with 10 days allowed for bad weather. By Clause 10, construction was to commence within 21 days after the Builder received the deposit and certain other information and after the building permit was issued.

117. By Clause 17, the Owners were required to show the Builder the boundaries of the land and to this end, according to Mr Osborne's evidence, they were to provide a survey of the land and identify a temporary bench mark on a permanent fixture. This would have been important because the finished floor levels were marked on the plans. The site slopes down from the road and a bench mark would have to be established before anything could be done.

118. The Building permit was obtained on 28 May 2007 but there was no survey and no bench mark provided by the Owners as agreed. According to Mr Osborne, he sent out his own surveyor twice to do the set out but the markings that he found were incorrect. Eventually Mr Sinha provided the bench mark. Mr Osborne said that he then spoke to Mr Sinha on about 7 June 2007 and said that, either he would submit a delay claim or the start

date would be considered to be 25 June. He said that Mr Sinha agreed to the start date being 25 June.

119. Mr Osborne said that Mr Sinha told him that he had not paid the earlier surveyor because he had made some mistake. Whether that relates to the incorrect markings or not does not appear from the evidence. The agreement to the start date of 25 June is denied by Mr Sinha who points to a letter he wrote to the Builder on 18 July 2007 setting out a number of matters. In the middle of the letter he says that the new start date for the project is agreed to be 14 June. Mr Osborne's signature is at the foot of the letter. This was put to him in cross-examination but he denied that his signature was intended to agree to this commencement date. The letter contains many other matters and his signature on it is equivocal.

120. Mr Sinha does not go into any detail about the matters to do with the survey and the bench mark, both of which would be required before work could start. He just refers to the letter. Yet Mr Sinha has manufactured at least two other documents in this case to suit his purposes. As with the windows, he does not specifically deny Mr Osborne's evidence by giving a contrary account. In this case he just points to a document. With the windows he points to the absence of a document.

121. Mr Sinha has not gone into any detail about any discussions with Mr Osborne at or about that time. He does not say whether or not the presence or absence of any bench mark was discussed or whether that delayed the start of the job. He must have the survey that finally established bench mark but he has not produced it to contradict Mr Osborne's account as to when it was obtained.

122. Even if there had been no problem with the survey and the bench mark, under the contract, the Builder would not be required to start as early as the 14 June, which is the date Mr Sinha put in his letter, since that was only 16 days after the issue of the Building permit, not the 21 allowed in the contract.

123. Finally, I prefer the evidence of Mr Osborne to that of Mr Sinha. I therefore find that it was agreed that work was to start on 25 June. Indeed, it would appear that it was not possible to start any earlier.

124. From 25 June 2007, 168 days would expire on 10 December unless the Builder is entitled to an extension of time. Only 10 days had been allowed for inclement weather and by a letter received by the Owners on 25 July the Builder gave notice to the Owners that that allowance had been used up. That was disputed by Mr Sinha by a letter faxed on the same day but the Builder has produced records from the Bureau of Meteorology whereas the Owners have provided no evidence.

### Claims for extensions

125. The procedure prescribed for obtaining extensions of time are set out in Clause 34 of the Contract. That provides, inter alia, that the Builder was

entitled to an extension of time if the building work were delayed by inclement weather in excess of the time allowed, which was 10 days. By Clause 34.1 the Builder was required to give the Owners a notice in writing informing them of the extension of time and stating the cause and extent of delay. If the Owners wished to dispute the extension they were required to give the Builder written notice including reasons for the dispute, within 7 days of receiving the notice.

126. Apart from wet weather, according to Mr Osborne's evidence, there were a number of causes for delay for which the Builder could have sought an extension. These were:

    (k) There was no engineering design to support the structure above the basement windows;

    (l) The porch on the rear unit could not be built as drawn for reasons that he gave. He asked for a new design and did not get it until after the BACV meeting;

    (m) The silt pit for the agricultural drainage around the basement was at the wrong level. He asked for a new design and got it about a week and a half after the BACV meeting;

    Mr Osborne said that he tried to work around these problems but they started to cause delays. Nevertheless, it does not appear that any notices claiming any extension were given because of them.

127. Three days extensions were claimed due to variations and were agreed to by the Owners:

| **Variation** | **Date** | **Period claimed** |
|---|---|---|
| VO 1 | 28 August 2007 | 1 day |
| VO 3 | 24 January 2008 | 1 day |
| Vo 4 | 24 January 2008 | 1 day |

128. The claim for an extension of time due wet weather was made in the letter delivered by the Builder to the Owners' home on either 3 or 4 March 2008. That claimed an extra 52 days for wet weather and was accompanied by weather data sheets obtained from the Bureau of Meteorology. No notice disputing the claim was made by the Owners.

129. The notice does not say 52 working days. The building period is expressed in calendar days including weekends, public holidays and rostered days off. Hence a notice served pursuant to the Contract that simply states 52 days should be interpreted as meaning 52 days in that sense. When one adds the agreed 3 days and the 52 days for inclement weather to the building period, it expires on 3 February.

### Suspension of work

130. Suspension of work is dealt with in Clause 35of the Contract. That provides that the Builder may suspend the building works if the owners did not make

a progress payment within 7 days after it became due. If the Builder suspended the work it was required to give notice to the Owners by registered mail. The Owners were required to remedy the breach within 7 days and if they did, the Builder was required to recommence work within 21 days after the Owners remedied the breach and gave notice of that to the Builder. Clause 35.2 provides that the completion date is extended to cover the period of the suspension.

131. By the same notice that claimed the extension due to inclement weather, the Builder gave notice o the Owners that it had suspended the building works due to non-payment of the lock-up stage. As stated above, this notice was not served by registered post as required by Clause 35.1. It was delivered by hand to the Owners' home on 3 or 4 March 2008 and given to their son. However the clause as drafted does not make the serving of the notice the act of suspension. The suspension comes about by the Builder ceasing work in reliance upon the Clause in the permitted circumstances. The notice under Clause 35.1 only gives notice of that state of affairs, namely, that the building works have been suspended. In any case, it is quite clear that the Owners had no intention of paying the lock up stage to the Builder at that time, whether a notice was served upon them or not.

132. The lock-up stage was never paid and so the building works remained suspended from that date. The Builder did some work after the meeting at the BACV but that was pursuant to the agreement reached at that meeting. I cannot find that the work recommenced under the contract. Since there is some doubt as to whether the notice was served on 3 or 4 of March but since the letter is dated 3 March it is clear that work had been suspended by then.

133. The amount provided in the contract for liquidated damages is $1,600 per week, an amount that Mr Panozzo from the BACV described as astronomical. It is described on page 14 of the contract as a penalty. However evidence was given on behalf of the Owners by a real estate agent that the units would reasonably have commanded a combined rental of $1,700 as at 1 April 2008. Although large in comparison with other contracts I have seen I cannot say that the amount of liquidated damages fixed by the contract is a penalty.

134. From the expiration of the building period until the contract was suspended on 3 March is 4 weeks and one day. Liquidated damages at the contract rate are therefore $6,628.56.

### The Builder's claims

135. The Builder claims the amount of the lock up payment invoice which is $142,500. In his final address Mr Andrew sought the whole of the Lock up amount of $157,500 being the amount of the invoice plus the $15,000 that was agreed to be retained until the porches were constructed and the question of liquidated damages was determined. In breach of the agreement the Owners paid nothing. Whether one says that the whole of the lock up

payment was retained, or that there was nothing retained because there was nothing paid, it amounts to the same thing. By paying nothing and then repudiating the contract and excluding the Builder from the site they deprived the Builder, not only of the amount of the invoice but also of the opportunity to build the porches and so release the $5,000 that was to be retained until the porches were constructed.

136. In these circumstances, the whole of the lock up payment is due. The invoice amount ($142,500) is due pursuant to the contract and attracts interest at the contract rate. The sum of $10,000 is due because the question of liquidated damages has now been determined. The $5,000 is due because the Builder was prevented from constructing the porches by the Owners' wrongful repudiation of the contract. I should add that, since the porches were not part of lock up, if the Builder had constructed them the Owners would have been required under the contract to pay for them in addition to releasing the $5,000.

137. The Builder also claims loss of profit on the balance of the contract sum. The evidence of Mr Osborne is that a profit of 15% would have been made on the contract over all. He was criticised in cross-examination for not producing the accounts of the Builder to prove that it was making a profit but this confuses the profitability of this particular contract, which is what I am concerned with, with the Builder's business as a whole, with which I am not concerned.

138. According to Mr Lees, 20% is a reasonable profit margin to expect on this project. There is no evidence to suggest that this job was underquoted. Further, it is clear that the contract was, at Mr Sinha's insistence, back loaded; that is, that far too little of the contract price was attributed to the lock-up stage. That situation was further aggravated by the Builder's agreement at the BACV meeting to pour the two slabs which were not part of lock up. For these reasons, Mr Osborne's evidence that the Builder would have earned 15% profit on the rest of the work is, if anything, an underestimate. I therefore accept his evidence and will allow the claim. The balance of the contract price was $210,000 and 15% of that is $31,500.00.

### The claim for interest

139. The contract rate for overdue progress payments is 16% p.a.. This can only be applied to the final lock-up invoice. That ought to have been paid within 7 days following the date of invoice, that is, by 7 April 2008. By Clause 31, interest runs until payment is made. Calculated up to the date of judgment, namely, 19 May 2009, the amount is $25,361.10.

### The respective claims as proven

140. The Builder's claim is established as follows:

| | |
|---|---|
| Lock-up claim | $157,500.00 |
| Loss of profit on the balance of the contract price | |

| | |
|---|---|
| (15% of $225,000.00) | 33,750.00 |
| Interest on Lock-up claim at contract rate of 16% p.a. from 7 days following date of invoice | $25,361.10 |
| Total | $216,661.10 |

141. The Owners' counterclaim is established as follows:

| | |
|---|---|
| Allowance for defects, incomplete work and on change of windows: | $22,161.64 |
| Liquidated damages: | $6,628.56 |
| Total | $28,790.20 |

**Order to be made**

142. Given the nature of the claim and counterclaim it is appropriate to treat the counterclaim as a set off, reduce the Builders claim by the amount of the counterclaim and make a single order on the claim. There will therefore be an order that the Respondents pay the Applicant $187,870.90. Costs will be reserved for further argument.

**SENIOR MEMBER R. WALKER**