

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## CIVIL DIVISION

### BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. D1047/2013

#### CATCHWORDS

Section 40 Domestic Building Contracts Act. Meaning of “fixing stage”. Builder not entitled to claim payment of “fixing stage” before fixing stage reached. Builder’s purported termination of contract, in reliance on Owner’s failure to pay fixing stage progress claim and variation works invoices, not valid when fixing stage was not reached and the builder was not entitled to issue the variation works invoices. Builder’s conduct amounting to repudiation of contract. Owner entitled to end the contract and sue for damages. Assessment of damages, including liquidated damages for delay.

<b>APPLICANT</b>	Alpha Developers and Promoters Pty Ltd (ACN:145 058 091)
<b>RESPONDENT</b>	Advance Building & Engineering Pty Ltd (ACN:105 452 855)
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member M. Farrelly
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	2, 3, 4, 5 and 9 February 2015
<b>DATE OF ORDER</b>	23 March 2015
<b>CITATION</b>	Alpha Developers and Promoters Pty Ltd v Advance Building & Engineering Pty Ltd (Building and Property) [2015] VCAT 317

#### ORDERS

1. The Respondent must pay the Applicant \$295,433.
2. Interest and Costs reserved with liberty to apply. **I direct the Principal Registrar to list any application for interest and/or costs before Senior Member Farrelly, allowing half a day.**

#### SENIOR MEMBER M. FARRELLY

#### APPEARANCES:

For the Applicant	Mr N. Phillpott, Solicitor
For the Respondent	Mr H. Mazloum of Counsel

## REASONS

- 1 On 12 August 2011 the applicant, Alpha Developers and Promoters Pty Ltd (“Alpha”) entered a building contract with the respondent, Advanced Building and Engineering Pty Ltd (“the builder”) for the construction of 5 units on Alpha’s property in Reservoir (“the contract”). The contract documents included a standard form HIA new homes contract, an “inclusion list” which briefly sets out details as to fittings, floor and wall coverings, services and the like (“the inclusion list”) and structural and engineering plans (“the plans”).
- 2 The contract specifies a total contract price of \$718,000 to be paid by way of stage progress payments, each stage progress payment identified as a percentage of the contract price. The stages are, after the deposit payment, the “base” stage, the “frame” stage, the “lock-up” stage, the “fixing” stage and the “completion” stage. Payment for each stage was to be made by Alpha within 7 days after the stage was completed and Alpha had received the stage progress payment claim.
- 3 Alpha and the builder agree that the building works commenced on about 5 December 2011. The contract provides for a construction period of 240 days. Accordingly the due date for completion, without allowance for any extensions of time, was 1 August 2012.
- 4 The contract provides for agreed [“liquidated”] damages for delay in favour of Alpha if the building works had not reached completion by the end of the building construction period. The sum of liquidated damages is to be calculated at \$250 per week for each week after the due date for completion of the building works up until one of three dates, whichever first occurs, namely the date the works are completed, the date the contract is ended or the date Alpha takes possession of the land.
- 5 Alpha made payment of the deposit, base, frame and lock-up stage payments.
- 6 On 24 October 2012, Alpha received the builder’s progress claim for the “fixing” stage. Alpha refused to make full payment of the claim until all of the works falling within the fixing stage were completed.
- 7 The builder says that the fixing stage works were indeed complete as at 24 October 2012. In an attempt to substantiate its position, in November 2012 the builder engaged a building consultant, Mr Van Hoven, to inspect the building works and to provide an opinion as to whether the works had reached fixing stage. Mr Van Hoven inspected the building works on 15 November 2012 and, on the same day, provided a brief report setting out his opinion that the builder was entitled to receive payment of the fixing stage progress claim.

- 8 Alpha did not accept Mr Van Hoven's opinion. Alpha was also concerned as to when all the building works would be completed. Mr Phillip, a director of Alpha, met with Mr Hanifa, the director of the builder, on 19 November 2012 to discuss the issues concerning them.
- 9 Mr Phillip says that at the meeting on 19 November 2012, Mr Hanifa agreed to an allowance, significantly greater than the allowance provided in the contract, for liquidated damages for delay. Mr Phillip has produced a document which he says was prepared and signed by Mr Hanifa at the meeting on 19 November 2012 ("the 19 November document") which confirms the agreement.
- 10 Mr Hanifa says that no such agreement was reached. Although he does not dispute that, at the meeting, he prepared the 19 November document, Mr Hanifa says that he did so under intimidation and unfair pressure exerted by Mr Phillip. Mr Hanifa says also that he never signed the 19 November document, as he wished to seek legal advice before committing to any agreement. He says the signature, purporting to be his signature on the 19 November document produced by Mr Phillips, is a fraud.
- 11 On 1 December 2012, the builder gave written notice of its suspension of the works until such time as it received payment from Alpha of the unpaid balance of the fixing stage progress claim and payment of a number of "variation" extra works invoices. Although Alpha subsequently made further part payment of the fixing stage invoice, leaving a balance of \$10,000 remaining unpaid, the parties remained in dispute and no further building works were carried out by the builder.
- 12 In the period December 2012 to March 2013, Mr Van Hoven was further engaged by the builder to assist the parties to reach resolution of their disputes. Mr Van Hoven carried out further on site inspections with Mr Phillip and produced further reports and advices to the parties, but the parties remained in dispute.
- 13 By notice dated 5 April 2013, prepared by the builder's then lawyers, the builder purported to terminate the contract, principally on the ground that Alpha had breached the contract by failing to make full payment of both the fixing stage invoice and the outstanding variations invoices.
- 14 Alpha says that the builder's purported termination of the contract was unjustified and amounted to a repudiation of the contract. Alpha says it "accepted" the repudiation and brought the contract to an end by notice dated 17 June 2013 from Alpha's lawyers to the builder's lawyers.
- 15 In this proceeding, Alpha seeks damages which include the extra cost it says it has incurred in engaging another builder, SJ Builders Pty Ltd ("SJ Builders"), to complete the building works. SJ Builders is related to Alpha in that Mr Phillip is one of 10 directors of Alpha and the primary representative of Alpha overseeing the contract. He is also the sole director and primary shareholder of SJ Builders.

- 16 The damages claimed by Alpha are:
- (a) \$303,128 being the extra cost, over and above the contract price, it says it has incurred in engaging SJ Builders to complete the building works;
  - (b) \$87,500 as liquidated damages for delay for the period from the due date for completion of works under the contract, 1 August 2012, to the date that Alpha brought the contract to an end, 17 June 2013. Alpha says such damages are calculated in accordance with the agreement it says was reached on 19 November 2012. Alternatively, Alpha seeks \$11,250 as liquidated damages for the same period, calculated at the rate prescribed in the contract, \$250 per week; and
  - (c) \$26,016 as “un-liquidated” damages for the period 18 June 2013 until the approximate date that the building works were completed by SJ Builders, 23 October 2013. The sum is calculated at the rate of \$6,504.60 per month which Alpha says is the interest it incurred on construction loans and its loss of rental income for the period claimed.
- 17 The builder says that its termination of the contract was justified and valid, and by way of a counterclaim it seeks damages from Alpha in the sum of approximately \$133,200, made up as follows:
- (a) \$26,187.99 being the unpaid balance of the fixing stage invoice and the variations invoices;
  - (b) \$10,239.92 as interest accrued, at the prescribed contract rate of 15%, in respect of the abovementioned unpaid sums and in respect of the alleged late payment of other progress claim payments made by Alpha;
  - (c) An additional \$7,892.86 as “liquidated damages” for the cumulative delay in respect of the abovementioned unpaid sums and late payments;
  - (d) \$4,500 as the value of materials allegedly left on site by the builder and not returned to it;
  - (e) \$6,500 as monies alleged to have been loaned by the builder to Alpha and not repaid;
  - (f) \$77,880 as the value of building works, post fixing stage, alleged to have been carried out by the builder before the contract was terminated.
- 18 For the reasons set out below, I find that the fixing stage works were not completed by the builder and the builder was not entitled to demand full payment of the fixing stage invoice. I find also that the builder has no entitlement to payment of the variations invoices. As a consequence of

these findings, I find that the builder was not entitled to terminate the contract, and in purporting to do so, the builder repudiated the contract. I find that Alpha was entitled to “accept” the builder’s repudiation and bring the contract to an end, as it did. Alpha is entitled to damages assessed as the reasonable extra cost to Alpha, over and above the cost it would have incurred had the works been completed by the builder pursuant to the contract, to complete the building works under the contract, including the rectification of defects in the works carried out by the builder. Alpha is also entitled to liquidated damages for delay, assessed at the rate specified in the contract. I am not satisfied that a “collateral” agreement as to delay damages was reached at the meeting between Mr Phillip and Mr Hanifa on 19 November 2012.

## **THE HEARING**

19 The matter was heard over 5 days, 2, 3, 4, 5 and 9 February 2015. Mr Phillpott, solicitor, represented Alpha. Mr Mazloum of Counsel represented the builder.

20 For Alpha, lay evidence was given by:

- Mr Phillip;
- Mr Vettivel, project manager of SJ Builders; and
- Mr Curcio, an electrical contractor engaged by SJ Builders.

21 For the respondent, evidence was given by:

- Mr Hanifa;
- Mr Van Hoven, the building consultant engaged by the builder;
- Mr S. Islam, a plumber engaged by the builder;
- Mr S. Toppino, a renderer and some-time site supervisor engaged by the builder;
- Mr S. Gatt, an electrical contractor engaged by the builder; and
- Mr A. Singh, a carpenter employed by the builder.

22 Concurrent expert evidence was given by:

- Dr I. Eilenberg, a building consultant engaged by Alpha;
- Mr J. Rosier, a quantity surveyor engaged by Alpha;
- Mr A. Lorenzini, a building surveyor engaged by Alpha;
- Mr I. Forrest, a building consultant engaged by the builder; and
- Mr M. McCarthy, a quantity surveyor engaged by the builder.

Each of these expert witnesses also produced written reports.

23 Concurrent expert evidence as to the alleged signature of Mr Hanifa appearing on the 19 November document was given by handwriting experts

Mr Holland, engaged by Alpha, and Mr Joyce, engaged by the builder. Mr Holland and Mr Joyce also produced written reports.

## CHRONOLOGY AND EVIDENCE

- 24 The deposit, \$35,900 being 5% of the contract price, was paid by Alpha in four instalments, the final instalment being paid on 14 November 2011, before the building works commenced.
- 25 Warranty insurance certificates in respect of each of the 5 units were issued on 25 October 2011 by QBE Insurance (Australia) Limited.
- 26 A building permit was issued on 3 November 2011.
- 27 The building works commenced on about 5 December 2011.
- 28 Alpha paid the base, frame and lock-up stages progress claims.
- 29 On 21 October 2012, the builder issued its fixing stage progress claim invoice in the sum of \$179,500. The invoice was received by Alpha on 24 October 2012.
- 30 On 31 October 2012 Mr Phillip sent an email to Mr Hanifa advising that he did not consider all of the works falling within the fixing stage to have been completed. The works that he considered requiring completion, before full payment of the fixing stage invoice was payable, included:

*“all architraves, cornices and BIR shelves ... all downpipes, garage doors and rear door ...”*

The email concluded with Mr Phillip advising that:

*“I will deduct liquidate [sic] damage amount from fixing invoice.  
I can release partial payment for fixing invoice.”*

- 31 On 2 November 2012 Alpha made part payment of \$100,000 of the fixing stage invoice.
- 32 In early November, Mr Hanifa engaged Mr Van Hoven, a consultant and licensed building inspector, to inspect the works and to provide his opinion as to whether fixing stage had been reached. On 15 November 2012, Mr Van Hoven inspected the works and provided a brief report to the builder. The report includes the following comments:

The contract states ... that “FIXING STAGE IS: Internal cladding, Arcs, Shelves, Baths, Basins, Troughs, Sinks, Cabinets, Cupboards are fitted and fixed.”

At my inspection all these items were completed so the units have all reached Fixing Stage. It should be noted that the skirtings over tiled areas were on site, but cannot be fitted until the tiling is done ...

## CONCLUSION AND RECOMMENDATION

As the only item outstanding for Fixing is putting the skirtings over tiles, I recommend the Fixing payment for this stage IS RELEASED, as per Contract.

33 Mr Van Hoven's reference to the definition of *fixing stage* in the contract is not accurate. The only definition of *fixing stage* in the contract is the reproduction of the definition found in section 40(1) of the *Domestic Building Contracts Act 1995* ("the Act"):

*fixing stage* means the stage when all internal cladding, architraves, skirting, doors, built-in shelves, baths, basins, troughs, sinks, cabinets and cupboards of a home are fitted and fixed in position.

34 Mr Van Hoven's comment that fixing stage had been reached is at odds with his concluding comment that an item of the fixing stage – installing skirtings over tiles – had not been done.

35 On 17 November 2012, Mr Hanifa sent an email to Mr Phillip attaching a copy of Mr Van Hoven's report. In the email, Mr Hanifa says "*with this report you have no right to hold any of our money*".

36 On 18 November 2012, Mr Phillip sent a brief response email to Mr Hanifa advising that he did not accept Mr Van Hoven's opinion. In the email, Mr Phillip also raised his concern as to when the building works would be completed, noting that the construction period was already well in excess of that provided in the contract. After sending the email, Mr Phillip telephoned Mr Hanifa and arranged a meeting at Mr Hanifa's office for the following day, 19 November 2012.

37 There is dispute as to what, if anything, was agreed at the meeting on 19 November 2012. There is no dispute that, at the meeting, Mr Hanifa typed up the 19 November document, addressed to Alpha, which states:

Ref, 121 Cheddar Road, Reservoir

The project on the above property will complete all the works as per contract and handover on 7<sup>th</sup> of December 2012.

I agreed to deduct \$20,000 as liquidated damage from 3rd August 2012 to 3rd of November 2012.

If the project is not finished by the above mentioned date the liquidated damage will be \$500 per unit.

Abu M Hanifa

Director"

38 Mr Phillip says the 19 November document was signed at the meeting by Mr Hanifa, and that Mr Phillip took the signed document with him when he left the meeting. Mr Phillip says the document confirms an agreement reached whereby:

- the builder agreed to deduct \$20,000 from the contract price as liquidated damages for delay covering the period 3 August 2012 until 3 November 2012; and
- if the building works were not completed by 7 December 2012, liquidated damages would thereafter accrue at the rate of \$500

per week for each of the five units forming the building works.

- 39 As noted above, the contract specifies liquidated damages at \$250 per week.
- 40 Mr Phillip says that, at the time of the meeting, he believed that the contract provided for liquidated damages of \$250 per week *for each of the five units*, a total of \$1,250 per week. He says that the sum of \$20,000, being the agreed sum of liquidated damages for the period 3 August 2012 to 3 November 2012, was calculated as the approximate entitlement of Alpha for the period 3 August 2012 to 3 November 2012 calculated at \$1,250 per week. By my calculation, \$1,250 per week for the period 3 August 2012 to 3 November 2012 equates to \$16,428, not \$20,000.
- 41 Mr Phillip says that, having reached the agreement on 19 November 2012, Alpha was prepared to make further part, but not full, payment of the fixing stage invoice. On 19 November 2012, a further part payment in the sum of \$42,000 was made.
- 42 Mr Hanifa denies that agreement was reached on 19 November 2012. He says he produced the 19 November document under intimidation from Mr Phillip. Mr Hanifa strenuously denies signing the document. He says he was not prepared to sign it, and commit to any agreement, until he had first had the opportunity to discuss the matter with his solicitor. Mr Hanifa says the signature on the 19 November document produced by Mr Phillip is a fraud.
- 43 On 27 November 2012, Mr Hanifa sent a letter to Alpha, in which Mr Hanifa says, amongst other things:
- You [Mr Phillip] brought something to me on 19th November and asked me to get it on my letterhead. I told I cannot sign it unless I show it to my solicitor. My solicitor highly hated it as you tried to trick me there. So the content in that letter is null and void. There is to no autograph [signature] from me anyway. ... We observed the liquidated damage \$250 per week for the whole project, not for per unit.
- 44 In the letter, Mr Hanifa also asserted the builder's entitlement to receive full payment of the fixing stage invoice and a number of other invoices, totalling \$16,187.99, for variation extra works. The builder's entitlement in respect of the variation works invoices is discussed later in these reasons.

### **Works cease**

- 45 On 1 December 2012, the builder gave written notice to Alpha of the builder's suspension of the building works. The notice states:

Notice of suspension of works

The building works were slow in your project as you never paid money in a prompt way mentioned to you many times in the past.

We were waiting anxiously for the money to finish your project but you are not paying money and on the top trying to threat us in many ways.

Thus, we exercise our right, as per clause 35.1 of our contract signed on 12<sup>th</sup> of August 2011.

Due to non payment:

- for the Fixing Stage balance \$37,500
- for the variations \$16,187.99

we stop works on your project.

As soon the money is paid we will resume the works.

- 46 On 12 December 2012, Mr Phillip telephoned Mr Hanifa to discuss the suspension of the building works. Mr Phillip says he told Mr Hanifa that the builder was not entitled to suspend the works . Mr Phillip says also that Mr Hanifa told him that the builder could finish the project by 7 February 2013. Mr Phillip says that he told Mr Hanifa that the completion date would need to be confirmed in writing before Alpha made any further payments to the builder. Mr Phillip says that he and Mr Hanifa met later that day and, at that meeting, Mr Phillip gave Mr Hanifa a cheque in the sum of \$27,500 in exchange for a letter from Mr Hanifa confirming a completion date of 7 February 2013. The letter, produced in evidence, is addressed to Alpha and signed by Mr Hanifa. It states :

As discussed today on the phone the remaining works on this project would be done by 7<sup>th</sup> of February 2013 following which the handover will take place on or before this date.”

- 47 Mr Hanifa has a different version of his communications with Mr Phillip on 12 December 2012. Mr Hanifa agrees that he provided the abovementioned letter and that he received payment of \$27,500 from Mr Phillip. However, Mr Hanifa says that Mr Phillip agreed to pay *all* outstanding invoices, not just \$27,500 as a further part payment of the fixing stage invoice.

- 48 Later the same day, Mr Phillip sent a letter to the builder which states, amongst other things:

As you did not finish all the work for fixing stage and work not as per drawing, I am holding \$10,000 from fixing stage invoice and will pay the \$10,000 once you finish all fixing stage work as per our contract and drawing. [sic]

In the letter Mr Phillip also refers to the works variations invoices:

[the invoices] are not valid as per the contract...

I did not make any changes in plans. If you made any changes in plan and without my written approval you are responsible for that... You do not have any right to make any amendments in project. I did not request you any variations in the project. [sic]

- 49 In early December 2012, Mr Hanifa further engaged Mr Van Hoven to assist in attempting to settle the dispute between Alpha and the builder. Mr Van Hoven says that, from this time onwards, he adopted a “mediator” role.
- 50 Mr Van Hoven met with Mr Phillip on site on 10 December 2012 to discuss Mr Phillip’s concerns. On 18 December 2012 Mr Van Hoven provided to the builder a further report in which Mr Van Hoven states, amongst other things:

He [Mr Phillip] produced a typed and signed document for the job to be completed by a certain date and that stated you agreed to deduct \$250 per unit per week, being \$1,250 a week total. The figures added up to approx \$20k. This is not what you told me.

He then proceeded (without any prompting) to talk about your signature was not the same, suggested you tried to sign it differently and showed me other signatures from you on the Contract for comparison. He said you signed in front of him.

I told him if you had signed it, then I would advise you had incorrectly signed an incorrect document and that you would be silly to sign that...

After I mentioned this to you the next day you advised me he wanted you to sign a penalty agreement to deduct this money from the stage claim, but you told him you would not sign it without Legal advice first.

I now believe he signed it himself, attempting to copy your signature and was hoping to use this FORGED document to obtain funds from you illegally. I suggest you discuss Fraud with your Solicitor...

#### Recommendation

- 1 Finish the reasonable Fixing items as per Contract and plans, then Invoice for the Fixing balance. Advise the owner which items you will do for this. He can agree or refuse. Once you have done the items, don't proceed any further until the balance is paid.
- 2 Advise the owner in writing why some of the finishes vary from the plan and advise him that he agreed in front of witnesses.
- 3 Advise the owner in writing of time lost for bad weather from the wetter Winter and any delays from him.
- 4 If you can't agree contact ....[names of solicitors provided].

51 It is surprising that Mr Van Hoven produced the above report at a time he considered himself to have adopted the role of "mediator". Having regard to the report and other reports produced by Mr Van Hoven, and Mr Van Hoven's evidence given at the hearing, it is apparent that Mr Van Hoven, although well intentioned, has little appreciation as to the distinction between the roles of mediator, referee, advocate and independent inspector. In my view, Mr Van Hoven became emeshed in the dispute between Mr Hanifa and Mr Phillip, and his "assistance" proved, in the end, to be quite unhelpful.

52 Mr Van Hoven conducted further site inspections and produced further reports. I do not wish to dwell on the evidence and further reports of Mr Van Hoven, save to say that Mr Van Hoven remained ambivalent or confused as to whether fixing stage was reached, as is apparent from the following statements taken from his report dated 20 March 2013:

The Contract states ... that "FIXING STAGE IS: Internal cladding, Arcs, Shelves, Baths, Basins, Troughs, Sinks, Cabinets, Cupboards are fitted and fixed."

At my inspection [on 8 March 2013] most of these items were completed, so the units have all reached fixing stage...

I noted in all units the troughs, vanities, kitchens, doors, arcs, stairs, gutters, eaves, external cladding, tiles pointed, handles on, etc were all generally done...

As the only item outstanding for Fixing is putting the skirtings over tiles, finishing the shower bases and sorting out UN-agreed variations on the job, I recommend the Fixing payment for this stage IS RELEASED to me until [various works listed elsewhere in the report] are completed or agreed on by both parties...

- 53 On 21 March 2013, the builder's then lawyers sent a "*letter of demand*" to Alpha, by which the builder demanded payment of \$26,187.99 by 27 March 2013. The sum demanded was the unpaid balance of the fixing stage invoice, \$10,000, together with six unpaid invoices for variation extra works totalling \$16,187.99. The letter concludes as follows:

Our client instructs that he is willing to return to the Development to complete the Completion Stage, pursuant to the Contract, subject to:

- i Payment of the outstanding sum of \$26,187.99 by the Due Date; and
- ii The provision of a guarantee from the Commonwealth Bank to our client, that upon completion of the Completion Stage, payment for that Stage will be made, upon release of the funds, directly by Commonwealth Bank to our client.

In the event that you do not make full payment of the full Debt Due by the Due Date we hold instructions to formally terminate the Contract for breach and to immediately commence recovery proceedings, plus interest and legal costs.

- 54 On 27 March 2013, Alpha's lawyers forwarded to the builder a "*NOTICE OF INTENTION TO END THE CONTRACT*". The notice sets out alleged breaches of the contract on the part of the builder:
- (1) Demanding/receiving monies in respect of the fixing stage payment claim before being entitled to do so, that is, before the fixing stage has been completed;
  - (2) Issuing variation works invoices, and demanding payment of same, when the builder was not entitled to do so;
  - (3) Wrongful suspension of the building works; and
  - (4) Failing to complete the building works within the 240 day construction period specified in the contract.

The notice required rectification of the alleged breaches within 10 days.

- 55 By notice from the builder's then lawyers to Alpha dated 5 April 2014, the builder purported to terminate the contract by reason of Alpha's alleged breaches of the contract, including Alpha's failure to pay the outstanding balance of the fixing stage invoice and the works variations invoices. It is surprising that the notice refers to Mr Van Hoven's reports as confirmation that the fixing stage had been completed.

- 56 In April 2013, shortly after it received the above “termination” notice, Alpha engaged Dr Eilenberg to inspect the building works and to provide his opinion as to whether or not the works had reached fixing stage. Dr Eilenberg inspected the premises and provided a report dated 25 April 2013. The report provides a number of photos and lists various works not completed at the time of his inspection. It is Dr Eilenberg’s opinion that fixing stage was not completed.
- 57 On 31 May 2013, the relevant building surveyor, Mr K Houdalakis, issued a building direction requiring certain works to be carried out forthwith in order that the works comply with the building permit. The required works were stated as:
- “(1) Reconstruct internal stairs without the use of second hand materials and ensure stair construction satisfies Australian Standards and BCA clause 3.9.1.3
  - (2) Reconstructing one floor at top of stair to be level,
  - (3) Reconstruct poorly constructed brickwork including sea bricks,
  - (4) Clean out all perpend weepholes and ensure damp proof flashing complies with BCA clause 3.3.4.5,
  - (5) Construct eave to unit 4 and 5 entry in accordance with architectural drawings.”
- 58 By letter dated 17 June 2013 from Alpha’s lawyers to the builder’s then lawyers, Alpha gave notice to the builder that the builder’s conduct, including the builder’s purported termination of the contract, amounted to a repudiation of the contract, and that Alpha “accepted” the repudiation and elected to terminate the contract.
- 59 Also on 17 June 2013, Alpha’s lawyers sent a further letter by email to the builder’s then lawyers attaching a copy of Dr Eilenberg’s report. In the letter, Alpha’s lawyers advise that Alpha intended to complete the building works, including the rectification of defects in the works as set out in Dr Eilenberg’s report and as set out in Mr Houdalakis’ building direction notice dated 31 May 2003. The letter also advised the builder’s lawyers that if the builder, or any consultants engaged by the builder, wished to inspect the property, such inspection could take place on any week day between 17 June and 23 June 2013. Neither the builder nor the builder’s then lawyers responded to this letter.
- 60 On 20 June 2013, Mr Rosier, a quantity surveyor engaged by Alpha, inspected the property for the purpose of preparing an estimate of the cost of engaging an alternative builder to bring the building works under the contract to completion, including the rectification of any defective works. Mr Rosier subsequently prepared a report dated 15 July 2013 which details his cost estimate at \$384,928.
- 61 On 10 July 2013, five days prior to Mr Rosier providing his cost estimate report to Alpha, Alpha entered a building contract with SJ Builders for the completion of the building works, including rectification of defective

works, for a total contract sum of \$395,000 (the “SJ contract”). The SJ contract was signed by Mr Phillip in his capacity as director of SJ Builders, and by “Mr S Thomas” in his capacity as a director of Alpha. The SJ contract describes the building works to be carried out as:

“Five units, remaining fixing stage works, fix the defects, complete the work as per inclusion list.”

- 62 SJ Builders subsequently completed the building works. An occupancy permit was issued on 23 October 2013.
- 63 To date, Alpha has paid SJ Builders \$207,169.52. Mr Phillip says that the balance of the SJ contract price will be paid by Alpha to SJ Builders after the conclusion of this proceeding. Mr Phillip’s evidence in this regard is not challenged and I am satisfied that Alpha has a contractual obligation to pay to SJ Builders the full SJ contract price, namely \$395,000.

### WHAT IS “FIXING STAGE”

- 64 Section 40 of the Domestic Building Contracts Act 1995 (“the Act”) provides:

40 Limits on progress payments

(1) In this section—

base stage means—

- (a) in the case of a home with a timber floor, the stage when the concrete footings for the floor are poured and the base brickwork is built to floor level;
- (b) in the case of a home with a timber floor with no base brickwork, the stage when the stumps, piers or columns are completed;
- (c) in the case of a home with a suspended concrete slab floor, the stage when the concrete footings are poured;
- (d) in the case of a home with a concrete floor, the stage when the floor is completed;
- (e) in the case of a home for which the exterior walls and roof are constructed before the floor is constructed, the stage when the concrete footings are poured;

*frame stage* means the stage when a home's frame is completed and approved by a building surveyor;

*lock-up stage* means the stage when a home's external wall cladding and roof covering is fixed, the flooring is laid and external doors and external windows are fixed (even if those doors or windows are only temporary);

*fixing stage* means the stage when all internal cladding, architraves, skirting, doors, built-in shelves, baths, basins, troughs, sinks, cabinets and cupboards of a home are fitted and fixed in position.

- (2) A builder must not demand or recover or retain under a major domestic building contract of a type listed in column 1 of the Table more than the percentage of the contract price

listed in column 2 at the completion of a stage referred to in column 3.

Penalty: 50 penalty units.

TABLE

Column 1	Column 2	Column 3
Type of contract	Percentage of contract price	Stage
Contract to build to lock up stage	20%	Base stage
Contract to build to lock-up stage	25%	Frame stage
Contract to build to fixing stage	12%	Base stage
Contract to build to fixing stage	18%	Frame stage
Contract to build to fixing stage	40%	Lock-up stage
Contract to build all stages	10%	Base stage
Contract to build all stages	15%	Frame stage
Contract to build all stages	35%	Lock-up stage
Contract to build all stages	25%	Fixing stage

- (3) In the case of a major domestic building contract that is not listed in the Table, a builder must not demand or receive any amount or instalment that is not directly related to the progress of the building work being carried out under the contract.

Penalty: 50 penalty units.

- (4) Subsections (2) and (3) do not apply if the parties to a contract agree that it is not to apply and do so in the manner set out in the regulations.
- (5) If a court finds proven a charge under subsection (2) or (3) against a builder, it may order the builder to refund to the building owner some or all of the amount the building owner has paid the builder under the contract.
- (6) This power is in addition to the power the court has to impose any other penalty.
- (7) Despite section 7, this section does not apply to a contract between a builder and the Crown or a public statutory authority.

65 The contract is a “*major domestic building contract*” within the meaning of the Act and there is no dispute that the Act applies to the contract.

- 66 Section 40(2) of the Act sets out the maximum percentage of a contract price that a builder is entitled to claim for each of the base, frame, lock-up and fixing stages. Section 40(1) of the Act provides definitions for each stage.
- 67 Pursuant to s40(4) of the Act, parties are permitted to agree on a scheme of progress payments different to the scheme outlined in s40(2), provided such agreement is reached in accordance with *Domestic Building Contracts Regulations 2007* (“the Regulations”).
- 68 Regulation 12 of the Regulations provides:

**Progress payments**

For the purposes of section 40(4) of the Act, when parties to a major domestic building contract agree that sections 40(2) and (3) of the Act do not apply to that contract, the manner of agreement is to include in the major domestic building contract—

- (a) a warning in the form of Form 1 in the Schedule which is signed by the building owner before the execution of the contract; and
- (b) a clause in the form of Form 2 in the Schedule.

- 69 The Form 1 warning in the schedule to the Regulations is as follows:

**FORM 1**

[Regulation 12\(a\)](#)

**WARNING TO OWNER—CHANGE OF LEGAL RIGHTS**

Section 40 of the [Domestic Building Contracts Act 1995](#) provides that a builder cannot charge more than a fixed percentage of the total contract price at the completion of each stage of building a home.

The Act also allows the parties to a contract to agree in writing to change the stages and the percentage of the contract price to be paid at the completion of each stage.

There are several ways in which a particular contract can vary from the normal, and it is these exceptional cases which have caused the law to allow for these changes.

Examples would include—

- where it is very expensive to prepare the land for building for example, where the site is steep or rocky;
- where the house is so large that it will take a long time to complete, and intermediate progress payments are therefore required;
- where exceptionally expensive finishes are required, meaning that the final stage will represent a much larger proportion of the whole price;
- where an architect is engaged to independently assess the value of completed work for progress payments.

You should not agree to progress payments different from that provided in the Act unless your house is unusual in some way and you are SURE THAT

DIFFERENT PROGRESS PAYMENTS ARE NECESSARY and you understand clearly why the change is needed in the case of your particular house.

If you have any doubts, you could contact

Housing Industry Association

The Master Builders' Association of Victoria

Consumer Affairs Victoria

Royal Australian Institute of Architects

.....

I acknowledge that I have read this warning before signing the contract

Signature of Building Owner

70 The form 2 clause in the schedule to the Regulations is as follows:

**FORM 2**

Sch.

[Regulation 12\(b\)](#)

**PROGRESS PAYMENTS**

The parties agree—

- (i) that the progress payments fixed by section 40 of the [Domestic Building Contracts Act 1995](#) do not apply; and
- (ii) that instead the percentages of the contract price and amounts payable are as follows—

Name of stage	If this stage is not the same as a stage defined in section 40(1) of the <a href="#">Domestic Building Contracts Act 1995</a> , what does this stage mean?	Percentage of total contract price	\$

71 The contract sets out information and forms in compliance with the Act and provides two options for the parties in respect of progress payments. The first option, “*Method 1*”, is to be completed if the parties agree on the progress payment regime set out in s40(2) of the Act. The second option, “*Method 2*”, is to be completed if the parties opt for a modified schedule of progress payments pursuant to s40(4) of the Act.

72 When Mr Hanifa and Mr Phillip signed the contract on 12 August 2011, they selected *Method 2* which specified a schedule of progress payments, in a table compliant with Form 2 of the Regulations, as follows:

- Deposit \$35,900 being 5% of the contract price [5% is the maximum allowed for the deposit under s11 of the Act]
- Base stage \$107,700, identified as 15% of the contract price
- Frame stage \$143,600, identified as 20% of the contract price

- Lock-up stage \$179,500, identified as 25% of the contract price
- Fixing stage \$179,500, identified as 25% of the contract price
- Completion stage \$71,800, being the remaining 10% of the contract price

73 Mr Phillip also signed the “Form 1” warning included in the contract.

74 Mr Hanifa says that the *Method 2* option was chosen in order that the parties would “*have some flexibility about definition of the stages*”.

75 On around 16 November 2011, before the building works commenced, Mr Hanifa and Mr Phillip agreed to amend the schedule of progress stage payments as follows:

- The deposit was unchanged, \$35,900 being 5% of the contract price
- The base stage was amended to \$71,800, and identified as 10% of the contract price;
- The frame stage was amended to \$107,700, and identified as 15% of the contract price;
- The lock-up stage was amended to \$251,300, and identified as 35% of the contract price;
- The fixing stage remained unchanged, \$179,500 identified as 25% of the contract price; and
- The completion stage remained unchanged, \$71,800, identified as 10% of the contract price.

76 The amendments were made by handwritten changes to the *Method 2* progress payments table in the contract.

77 The amendments meant that the progress stage payment sums became the same as the stage payment sums prescribed in s40(2) of the Act. Mr Hanifa says that Mr Phillip requested the amendments because the bank providing finance to Alpha required that the progress stage payments in the contract be the “standard” payments prescribed under s40(2) of the Act.

78 The builder submits that the definitions as to stages set out in s 40(1) of the Act have no application when parties to a contract agree, as they are permitted to do under s40(4) of the Act, that s40(2) of the Act does not apply. The builder draws this conclusion because the contract reproduces the table found in s40(1) of the Act, but the table appears under the heading:

CONSTRUCTION STAGES *APPLICABLE TO METHOD 1* PROGRESS  
PAYMENTS

(italics added)

79 The builder says further that, notwithstanding that the contract prescribes progress payments that match the payments regime prescribed in s40(2) of

the Act, by selecting *Method 2*, it is clear that the parties agreed that s40(2) of the Act would not apply.

- 80 In simple terms, the builder says that in selecting *Method 2*, the parties intended to “*have some flexibility about definition of the stages*”, and that the amendments to the progress payment schedule, which brought the payments schedule in line with the schedule in s40(2) of the Act, did not alter this intention.
- 81 I do not accept the submission.
- 82 It is difficult to accept that Alpha’s bank, if it required the amendments to the schedule of payments so that it was the same as the schedule prescribed in s40(2) of the Act, was also agreeable to there being “some flexibility” about the definition of stages for progress payments.
- 83 More importantly, the *Method 2* table in the contract includes, at the top of the table, the statement, mandated by the Regulations:

If this stage is not the same as a stage defined in s40(1) of the Domestic Building Contracts Act 1995, what does this stage mean?

- 84 The table does not include any explanation as to how or why the listed stages for progress payments have a meaning different to the stage definitions contained in s40(1) of the Act. This was the case before the amendments to the payments schedule were made, and it remained the case after the amendments were made.
- 85 In my view, in circumstances where the contract invites an explanation as to why a stage definition is not the same as the definition contained in s40(1) of the Act, and no explanation is provided, it follows that the stages listed in the contract have the same definition as provided in s40(1) of the Act.
- 86 For the above reasons, I find that “fixing stage” as referred to in the contract means “fixing stage” as defined in s40(1) of the Act, namely:

*fixing stage* means the stage when all internal cladding, architraves, skirting, doors, built-in shelves, baths, basins, troughs, sinks, cabinets and cupboards of a home are fitted and fixed in position.

### **WAS FIXING STAGE REACHED?**

- 87 Mr Lorenzini, a building surveyor, was engaged by Alpha in the course of this proceeding to provide his opinion as to whether the builder had completed the fixing stage works. In reliance on the status of works as set out in Dr Eilenberg’s report, Mr Lorenzini opines that the works, as at the time Dr Eilenberg inspected them, had not reached fixing stage.
- 88 Mr Forrest, a building consultant engaged by the builder, has a different opinion. As Mr Forrest was first engaged by the builder’s then solicitors in January 2014, at which time SJ Builders had completed construction of the five units, his opinion is based upon the status of the works as set out in Dr Eilenberg’s report. Mr Forrest says that the works, when they were inspected by Dr Eilenberg, had reached fixing stage.

- 89 There is no dispute that, at the time of Dr Eilenberg's report, 25 April 2013:
- many skirting boards had not been installed
  - not all architraves had been installed
  - not all cornices had been installed
  - floor and wall tiling to bathrooms and laundries was yet to be done. Tiling to some living areas was also yet to be done.
  - toilets had not yet been installed.
  - in most units, shower basis had not yet been installed
  - a number of laundry troughs and sinks had not been installed
  - tilt garage doors to units 1, 2 and 3 had not been installed
- 90 Mr Forrest's opinion, that fixing stage had been reached, differs from the opinions of Dr Eilenberg's and Mr Lorenzini's because Mr Forrest has a different opinion as to what building works are caught within the definition of *fixing stage*, as such term is defined in the Act.
- 91 Fixing stage, as defined in the Act, means the stage when, amongst other things, architraves, skirting, troughs and sinks are *fitted and fixed in position*.
- 92 Mr Forrest says that, as "tiling" is not specifically referred to in the fixing stage definition, or in any of the other stage definitions in the Act, tiling necessarily falls within the *completion* stage, which follows fixing stage. He says that it is common practice in the building industry to install skirtings after floor tiles have been installed, and to install troughs and sinks after wall tiling is completed. Mr Forrest says that the meaning of *fixing stage* should accord with common practice, and for this reason he says that the fitting and fixing in position of skirtings, troughs and sinks falls within *completion* stage.
- 93 I do not accept Mr Forrest's contention.
- 94 In my view, the words "*fitted and fixed in position*" in the fixing stage definition in the Act give very clear definition as to when the trigger for a very substantial contract payment is reached. The terminology is clear and unequivocal. The architraves, skirtings, troughs and sinks are to be *fitted and fixed in position*. It is not enough that architraves, skirtings, troughs and sinks are *ready* for installation.
- 95 If a builder wishes to fix the skirtings, troughs and sinks in position after he has done tiling works, then unless expressly provided for otherwise in a building contract in a manner permitted by the Act and the Regulations, the tiling works fall within the fixing stage.
- 96 For the above reasons, I am satisfied that the builder never completed the fixing stage works under the contract.

## THE BUILDER'S VARIATIONS INVOICES

97 In its suspension of works notice dated 1 December 2012, and in its notice of termination of the contract dated 5 April 2013, the builder refers to Alpha's failure to make payment of invoices for variation extra works. Alpha disputes the builder's entitlement to claim payment for the alleged variation works. I will deal with each variation invoice in turn.

### Floor joists

- 98 On 19 March 2012 the builder issued an invoice in the sum of \$1,584 in respect of the "*supply of 300 floor joists in place of 250 for unit 1, 2 and 3.*" The builder says that the engineering plans specified 250 mm joists, however on the recommendation of the supplier of framing trusses, the builder upgraded the joists to 300 mm. No certification of the change was obtained from the engineer who had provided the drawings and specifications for the building works under the contract. Mr Hanifa says that, in circumstances where the joists were upgraded, as opposed to downgraded, no such certification was necessary.
- 99 Mr Hanifa says that the variation was discussed with, and approved by, Mr Phillip prior to the works being carried out. Mr Hanifa says that one of his contractors, Mr Toppino, who acted as a site supervisor, was present when the discussion took place. When giving evidence, Mr Toppino had no recollection of being present at any such discussion.
- 100 Mr Phillip says that he did not approve any such variation works and that he first he learned of them was *after* they had been carried out and the builder had issued its variation invoice for the works.
- 101 The builder says further that the works do not constitute "variation" works. In this regard the builder refers to one of the contract documents, a floor plan, which contains a note stating that the first floor joists are "*250 deep posi struts*", and that the joists are to be "*to manufacturer's design and specification.*" Alpha says that, as the 300 mm posi struts installed are those recommended by the truss manufacturer, there is no variation to the works prescribed in the contract.
- 102 Alpha says also that, even if the works constitute a variation to the contract works, the builder is not entitled to payment because the builder has failed to comply with the provisions in the contract which provide that when the builder seeks to vary the works, before carrying out the variation works:
- the builder must provide written notice to Alpha of the effect and likely cost of such works, and
  - the owner must sign such written notice.
- 103 I am not satisfied that the builder is entitled to the variation payment claimed. First, I am not satisfied on the evidence that Mr Phillip discussed, let alone approved, the alleged variation works.

104 Second, in the circumstance where the engineer's specifications on the floor plan are, in my view, equivocal, I consider the builder ought to have sought clarification from the engineer, together with the engineer's certification, that the variation works were necessary. In the circumstance where the builder has failed to seek such clarification, I am not satisfied that the works in question constituted necessary variation works.

### **Extra electricity pit**

- 105 On August 10, 2012 the builder issued a variation invoice for the "*installation of extra pit for electricity*" in the sum of \$2,956.80.
- 106 The builder accepts that, under the contract, it had responsibility for the connection of electricity to the site. Origin, the electricity supplier, required two connection pits. The builder says that at the time the contract was signed, the builder allowed for only one connection pit, and as such, the requirement for a second pit constitutes necessary variation extra works.
- 107 Alpha says that, with the builder having contractual responsibility for the connection of electricity, the builder has no entitlement to make the variation claim. Mr Phillip says also that he had no discussion with the builder prior to the installation of the pits.
- 108 In my view, the builder has no entitlement to claim the second pit as variation extra works.
- 109 The inclusion list in the contract confirms the builder's contractual responsibility for the connection of electricity to the site. There is no specification as to the number of electricity pits that may be required. Nor does the contract specify any "*provisional*" sum allowance for the cost of connecting the electricity. Had a provisional sum been specified, the builder may well have been entitled to claim the extra cost over and above the specified provisional sum.
- 110 It may be that the cost of connecting the electricity was greater than the builder anticipated. However, there being no specification in the contract as to how many connection pits were allowed for, and there being no *provisional* sum in the contract for the connection of electricity, and there being no written and signed variation notice in respect of the alleged extra works, I find that the builder is not entitled to the variation extra charge as claimed.

### **Manholes and power points**

111 On 15 October 2012 the builder issued a variation invoice in the sum of \$1,386 in respect of:

- the installation of a manhole entrance to the ceiling in each of the five units; and
- providing double power point for all five units.

The invoice includes the comment "*verbal approval on phone*".

- 112 As with all the variations claims, there is no written variation notice confirming Alpha's consent to the alleged variation works. Mr Phillip says there was no discussion with the builder in respect of the manholes or extra power points.
- 113 Alpha refers to a note on the plans which states "*confirm manhole access to roof spaces on site*". Having regard to this note, and accepting Alpha's submission that there is nothing out of the ordinary in providing access to roof space via a manhole, I am satisfied that the installation of manholes does not amount to variation works under the contract.
- 114 In respect of the alleged extra double power points, the builder has produced no documentation, such as an electrical fittings layout plan, to support its contention that the double power points constitute additional works over and above the works under the contract. Mr Gatt, the electrical contractor engaged by the builder, gave evidence that he was not given a plan or other document specifying the electrical fittings. He says that he made his own plan of the electricity fittings layout following an inspection and discussion on site with Mr Phillip and Mr Hanifa. Mr Gatt did not produce his own plan in evidence. Mr Gatt also gave no evidence that *extra* power points, over and above his allowance in his plan, were installed.
- 115 On all the evidence I am not satisfied that the double power points constituted variation extra works.
- 116 For the above reasons, I find that the builder was not entitled to claim the variation extra charge.

### **Yarra Valley water charge power**

- 117 On 20 October 2012, the builder issued an invoice in the sum of \$6,122.99 for "*development contribution for Yarra Valley water price*". The charge is related to the cost of connecting water to the site. Mr Hanifa confirmed in evidence that the builder did not in fact incur the cost claimed. He says that responsibility for the expense lay with Alpha and, at the time he issued the variation invoice, he believed Alpha was refusing to make the payment. In any event, because the builder has not incurred the expense, the builder now concedes that it has no entitlement to the variation extra charge claimed.

### **Kitchen bulkheads and extra shelving**

- 118 On 10 November 2012 the builder issued a variation invoice in the sum of \$3,451.80 for the installation of kitchen "overheads" (bulkheads) in each of the five units and for alleged extra shelving to wardrobes. Again, there is no written and signed variation notice in respect of the alleged extra works.
- 119 In relation to the kitchen bulkheads, Mr Singh, a carpenter employed by the builder, gave evidence that he installed the bulkheads because they were simply necessary for aesthetic reasons. He says he did not discuss the matter with Mr Phillip.

- 120 The builder makes no reference to any contract documents which might indicate that the bulkheads constituted variation extra works. On the evidence before me, I am not satisfied that the bulkheads constituted variation extra works.
- 121 The same applies to the alleged extra wardrobe shelving. The builder has produced no documentation which might indicate the provision of extra shelving, over and above the works included in the contract at the time the contract was entered. There is insufficient evidence for me to find that the alleged extra shelving constituted variation works.
- 122 Accordingly, I find that the builder was not entitled to claim the variation extra charge.

### **Taps/mixers**

- 123 On 21 November 2012, the builder issued a variation invoice in the sum of \$686.40 in respect of “*extra quality mixer and fitting*”.
- 124 Mr Phillip and Mr Hanifa agree that, together, they visited the premises of the taps supplier “Plumcorp” for the purpose of confirming the taps/mixers to be installed in the units. Mr Hanifa says that Mr Phillip chose taps/mixers that were of superior quality and more expensive than the taps/mixers allowed for under the contract. He says the variation invoice covers such additional cost.
- 125 Mr Phillip says that the taps/mixers were selected in consultation with Mr Hanifa, and that Mr Hanifa confirmed to Mr Phillip that the selected items were “standard” and that there was no discussion as to any extra charge to be made by the builder.
- 126 The builder has referred me to no documents to support its contention that the selected taps/mixers were of a quality and price in excess of the taps/mixers allowed for under the contract.
- 127 The contract makes no express provision for any “*prime cost*” items.
- 128 There is insufficient evidence for me to find that the cost of the selected taps/mixers exceeded the cost allowed under the contract.
- 129 Accordingly, I find that the builder was not entitled to claim the variation extra charge.

### **Summary on Variations**

- 130 For the above reasons, I find that the builder is not entitled to payment of any of the variations invoices.

### **TERMINATION OF THE CONTRACT**

- 131 The builder’s suspension of the building works, and its purported termination of the contract by notice dated 5 April 2013, were founded on the failure of Alpha to make payment in full of the fixing stage invoice and the variations invoices.

- 132 As discussed above, I find that the builder had no entitlement to payment in respect of the variations invoices.
- 133 As also discussed above, I find that the fixing stage works were never completed by the builder. Under the contract, Alpha had no obligation to pay the fixing stage progress claim unless and until the fixing stage had been completed.
- 134 The builder submits that, even if fixing stage works were not completed, because Alpha made substantial part payments of the fixing stage invoice Alpha waived any entitlement to avoid full payment of the fixing stage invoice. That is, by making substantial part payment of the fixing stage invoice, Alpha affirmed an obligation to pay the fixing stage invoice in full, notwithstanding that the fixing stage works were not completed. I do not accept this submission.
- 135 Section 27(2) of the Act, under the heading “*Effect of payments and non-payments to builders*” provides:
- A building owner may still dispute any matter relating to work carried out under a domestic building contract even though the building owner has paid the builder in relation to the work”.
- 136 I am satisfied that although Alpha made part payments of the fixing stage invoice, it persistently and consistently asserted its position that full payment was not due until the fixing stage works were completed. The assertion was first made in Mr Phillip’s email to Mr Hanifa on 31 October 2012, 7 days after Alpha had received the fixing stage invoice.
- 137 In his email to Mr Hanifa on 18 November 2012, Mr Phillip made it clear that he did not accept Mr Van Hoven’s opinion that fixing stage had been reached.
- 138 In his letter to Mr Hanifa dated 12 December 2012, Mr Phillip says, amongst other things:
- After you emailed the fixing invoice, I had an inspection on site and noticed that the work not reached fixing stage. As per our contract you can’t request for money before reaching a particular stage... As you did not finish all the work for fixing stage and work not as per drawing, I am holding \$10,000.00 from fixing stage invoice and will pay the \$10,000.00 once you finished all fixing stage work...
- 139 I accept Mr Phillip’s evidence that Alpha made part payments of the fixing stage invoice because Alpha was concerned that the builder would walk off the site if no payment was made.
- 140 The evidence does not support the builder’s submission that Alpha waived an entitlement to withhold full payment of the fixing stage invoice until the fixing stage works were completed.
- 141 For the above reasons, I find that the builder was not entitled to suspend or terminate the contract by reason of Alpha’s refusal to make full payment of the fixing stage invoice and the variations invoices. By purporting to do so,

the builder substantially breached the contract and, in my view, repudiated the contract. Alpha was entitled to “accept” the builder’s repudiation and bring the contract to an end, as it did on 17 June 2013, and sue for damages.

## **DAMAGES FOR RECTIFICATION AND COMPLETION OF THE BUILDING WORKS**

- 142 In my view, Alpha is entitled to damages measured as the reasonable extra cost to Alpha, over and above the cost it would have incurred had the works been completed by the builder pursuant to the contract, to complete the building works, including the rectification of defects in the works carried out by the builder.
- 143 As discussed above, I find that the builder had no entitlement to the variation extra charges it claimed. Accordingly, the price Alpha would have paid for completion of the works, had the contract been fully performed, is the contract price, namely \$718,000.00. There is no dispute that Alpha paid the builder \$636,200. Accordingly, the unpaid balance of the contract is \$81,800.
- 144 Alpha engaged SJ Builders to complete the building works, inclusive of the rectification of defective works, at a contract price of \$395,000.00. As noted above, SJ Builders is related to Alpha in the sense that Mr Phillip is the director of SJ Builders, and one of a number of directors of Alpha. Mr Phillip says that the decision by Alpha to engage SJ Builders was reached at a meeting of the directors of Alpha.
- 145 Prior to entering the SJ contract, Alpha engaged Mr Rosier, a quantity surveyor, to inspect the property and to provide a cost estimate as to the cost of completing the building works under the contract, inclusive of rectification of any defective works. Mr Rosier inspected the property on 20 June 2013 and subsequently produced his report dated 15 July 2013 in which he provides a total cost estimate of \$384,928.00, calculated as follows:

-	rectification of defective works	\$45,825
-	add cost to complete unfinished works	<u>\$210,945</u>
		\$256,770
-	add 10% allowance for preliminaries and supervision	<u>\$25,677</u>
		\$282,447
-	add 20% contingency on rectification of defects allowance	<u>\$9,165</u>
	subtotal	\$291,612
-	add builders profit margin 20%	<u>\$58,322</u>

	subtotal	\$349,934
-	Add GST 10%	<u>\$34,993</u>
	TOTAL	<u>\$384,928</u>

- 146 By letter from Alpha's lawyers to the builders then lawyers dated 17 June 2013, the builder was advised of Alpha's intention to obtain expert evidence as to the cost of rectification and completion works. In that letter, the builder was offered the opportunity to inspect the works with its experts prior to any further works being carried out. The builder did not take up that opportunity.
- 147 Mr Phillip says that the directors of Alpha were content to enter the contract with SJ Builders at a price of \$395,000.00, without first seeking any alternative quotations from other builders. Mr Phillips had recently become a registered building practitioner in December 2012, and he says that the directors of Alpha trusted him.
- 148 In his witness statement filed in this proceeding, Mr Phillip says that:
- The cost of rectification and completion works to be carried out by SJ Builders was agreed with Alpha Developers on the basis of advice from the Quantity Surveyor, Mr John Rosier.”
- 149 However, the SJ contract was signed on 10 July 2013, five days *before* Mr Rosier produced his report containing his cost estimate. How could Alpha have been aware of Mr Rosier's cost estimate before Mr Rosier produced his report?
- 150 Mr Phillip says that Mr Rosier, before finalising his report, advised Mr Phillip verbally that his cost estimate would likely be in the range of \$380,000.00 to \$400,000.00, and on that basis, together with his own rough estimate, Mr Phillip nominated a price of \$395,000 in the SJ contract.
- 151 However, Mr Rosier says that prior to producing his report on 15 July 2013, he did *not* have any discussion with Mr Phillip as to what his likely cost estimate might be. I accept Mr Rosier's evidence in this regard.
- 152 There being no evidence from any of the directors of Alpha, other than Mr Phillip, I find that the SJ contract price was entirely dictated by Mr Phillip, and that Alpha made no enquiries of Mr Rosier in accepting the nominated price in the SJ contract. As it turned out, the SJ contract price happened to be only slightly higher than Mr Rosier's estimate.
- 153 The builder produces no expert report as to the reasonable cost to Alpha of engaging a new builder to complete the building works, including the rectification of any defects. Mr McCarthy, a quantity surveyor called to give evidence by the builder, gave brief evidence, without prior notice to the builder, as to what he considered to be excessive labour time allowances applied by Mr Rosier for some items of work identified in Mr Rosier's

report. As Mr Rosier actually inspected the building site, whereas Mr McCarthy did not, I prefer Mr Rosier's estimates.

- 154 In all circumstances, I think it fair to use Mr Rosier's cost estimate as the starting point for the assessment of damages.
- 155 I am satisfied that Mr Rosier's allowances for preliminaries and supervision, the contingency allowance on rectification works and the allowance for builder's profit margin are fair and reasonable.
- 156 Alpha concedes that two items of rectification work identified in Mr Rosier's report were not, in the end, carried out by SJ Builders and, accordingly, it is fair to deduct from Mr Rosier's estimate his allowance in respect of these two items:
- reconstruction of the front entry brick work arches to unit 1, and
  - reconstruction of veranda overhangs to units 4 and 5
- 157 Mr Rosier allows \$7,720, not including allowance for preliminaries, supervision, contingency and profit margin, for these two items,.
- 158 Alpha also concedes that two further items should be deducted from Mr Rosier's cost estimate. Mr Rosier allows for the installation of a tilt garage door to each of the five units. As the plans specified garage doors to units 1, 2 and 3 only, Alpha concedes that Mr Rosier's cost estimate in respect of two garage doors, \$3,600 before allowances for preliminaries, supervision and profit margin, should be deducted.
- 159 After making the above deductions, Mr Rosier's estimate is reduced to \$366,453.00, calculated as follows:

-	rectification of defective works (reduced by \$7,720)	\$38,105
-	complete unfinished works (reduced by \$3,600)	<u>\$207,345</u>
	subtotal	\$245,450
-	Add 10% allowance for preliminaries and supervision	<u>\$ 24,545</u>
	subtotal	\$269,995
-	add 20% contingency on rectification of defects allowance	<u>\$ 7,621</u>
	subtotal	\$277,616
-	add builders profit margin 20%	<u>\$ 55,523</u>
	subtotal	\$333,139
-	add GST 10%	<u>\$ 33,314</u>
	TOTAL	<u>\$366,453</u>

## **RECTIFICATION WORKS**

160 The builder says that some of the items of rectification of defective work, allowed for in Mr Rosier's cost estimate, should not be allowed because the items of work in question were not defective. I look at each challenged item below.

### **Internal stairs**

161 Mr Rosier's allows for the reconstruction of internal stairs to several of the units. Dr Eilenberg says that the stairs treads were made of second hand timber. He says also that the stairs were also generally very poorly constructed. Mr Rosier agrees with Dr Eilenberg.

162 The builder says that second hand materials were not used in constructing the stairs. The builder says also that the stairs were properly constructed.

163 Having regard to the building direction notice issued by the building surveyor, Mr Houdalakis, on 31 May 2013, I prefer the evidence of Dr Eilenberg and Mr Rosier. In respect of the stairs the building direction states:

Reconstruct internal stairs without the use of second hand materials and ensure stair construction satisfies Australian standards and BCA clause 3.9.1.3."

164 Accordingly, I make no deduction from Mr Rosier's cost estimate in respect of the stairs

### **Brickwork**

165 Mr Rosier makes allowance for rectification of some areas of brickwork including the replacement of some brick sills which have been cut short. The areas of defective brickwork are identified in Dr Eilenberg's report. The builder disputes that the brickwork was defective.

166 Having seen the photos of the brickwork in Dr Eilenbergs report, I prefer the evidence of Dr Eilenberg and Mr Rosier.

167 Accordingly, I make no deduction from Mr Rosier's cost estimate in respect of the brickwork.

### **Damp proof flashing**

168 Mr Rosier makes allowance for the repair of damp proof flashing. This item is identified in Dr Eilenberg's report. The builder questions whether any rectification works were necessary.

169 Having regard to the photo in Dr Eilenberg's report, and having regard to the building direction notice of Mr Houdalakis dated 31 May 2013, I find that the damp proof flashing required rectification as allowed for by Mr Rosier. Mr Houdalakis' direction notice states, in respect of the damp proof flashing:

clean out all perpend weepholes and ensure damp proof flashing complies with BCA clause 3.3.4.5.”

170 Accordingly, I make no deduction from Mr Rosier’s cost estimate in respect of the damp proof flashing.

### **Architraves and skirtings**

171 Mr Rosier allows for the removal and replacement of some architraves and skirtings (those that were installed) because they had been poorly cut and installed. Dr Eilenberg supports Mr Rosier’s view. The builder disputes that the works were necessary.

172 Having seen photos of the installed architraves and skirtings in Dr Eilenberg’s report, I prefer the evidence of Mr Rosier and Dr Eilenberg and find that Mr Rosier’s allowance for these rectification works is reasonable.

173 Accordingly, I make no deduction from Mr Rosier’s cost estimate in respect of the removal and replacement of architraves and skirtings.

### **Plasterboard**

174 Mr Rosier makes allowance for rectification of plasterboard in the units. He says that in many areas the finish to the plasterboard was not of acceptable quality and that further sanding, and some replacement, of plasterboard is required.

175 The builder says that the final finishing of plasterboard had not been done, as it was work to be carried out in the ‘completion’ stage of the works. The builder also disputes the extent of the problem as costed by Mr Rosier.

176 Having heard evidence from Dr Eilenberg, and having viewed the photos in Dr Eilenberg’s report, I am satisfied that Mr Rosier’s allowance for rectification of plasterboard is reasonable.

177 Accordingly, I make no deduction from Mr Rosier’s cost estimate in respect of the plasterboard repairs.

### **CONCLUSION ON RECTIFICATION AND COMPLETION COST**

178 After making allowance for deductions to Mr Rosier’s cost estimate as set out above, I allow \$366,453.00 as the reasonable cost to Alpha, following the termination of the contract, to complete the building works under the contract, including the rectification of defects in the works carried out by the builder.

179 From this figure I deduct the unpaid balance under the contract, \$81,800.00, and arrive at a sum of \$284,653.00 as the reasonable *extra* cost to Alpha, over and above the cost it would have incurred had the works been completed by the builder pursuant to the contract, to complete the building works under the contract, including the rectification of defective works.

**LIQUIDATED DAMAGES. WAS AGREEMENT REACHED ON 19 NOVEMBER 2012?**

- 180 The contract provides for agreed [“liquidated”] damages for delay in favour of Alpha if the building works had not reached completion by the end of the building construction period. The sum of liquidated damages is to be calculated at \$250 per week for each week after the due date for completion of the building works up until one of three dates, whichever first occurs, namely the date the works are completed, the date the contract is ended or the date Alpha takes possession of the land. The earliest of those three dates is the date that Alpha ended the contract, 17 June 2013.
- 181 The due date under the contract for completion of the building works, without allowance for extension of time claims, was 1 August 2012, that being 240 days after the commencement of works. Mr Hanifa gave brief and vague evidence as to delays to the progression of building works caused by:
- a robbery in which a window was broken and a kitchen stolen, resulting in approximately 2 weeks delay;
  - a carpenter called “Tony” falling from a ladder, causing a delay of approximately one week;
  - delay of approximately one week whilst larger sized floor joists were being ordered;
  - the attendance of WorkSafe Victoria at the site, causing a delay of approximately two weeks.
- 182 No documentation was produced to support the periods of delay referred to above. In my view, they represent no more than Mr Hanifa’s hasty and barely considered estimates made in hindsight. On the evidence before me, I am not satisfied that these events caused any significant delay to the progress of the building works.
- 183 In any event, there is no dispute that the builder did not exercise its entitlement under the contract to seek an extension of the construction period. The contract sets out the procedure by which the builder may claim an extension of time. The procedure requires the builder to provide to Alpha written notification of the extension of time claimed and the reason for the claim. The builder made no such claims.
- 184 For the above reasons, I am satisfied that the due date for completion of the building works under the contract was 1 August 2012.
- 185 Accordingly, I am satisfied that Alpha is entitled to liquidated damages for delay for the period 2 August 2012 to 17 June 2013. Calculated at the rate prescribed in the contract, \$250 per week, I calculate such damages as \$11,250.
- 186 Alpha says that the liquidated damages should be calculated in accordance with the “collateral” agreement reached on 19 November 2012, as follows:

- \$20,000.00 for the period up to 7 December 2012, and
- \$67,500.00, calculated a \$2,500.00 per week for the period 7 December 2012 to 17 June 2013.

- 187 For the reasons discussed below, I am not satisfied that agreement was reached on 19 November 2012.
- 188 Each of the parties called expert evidence in respect of the signature appearing on the 19 November document. Mr Joyce was called to give evidence by the builder and Mr Holland was called by the respondent. In forming an opinion as to whether the signature on the 19 November document is the handwriting of Mr Hanifa, Mr Joyce and Mr Holland each compared the signature on the 19 November document (“the questioned signature”) to other unquestioned signatures of Mr Hanifa (“example signatures”) appearing on various contract documents, correspondence and invoices.
- 189 To the untrained eye, the questioned signature is notably different to the example signatures. As a general description of the difference, I would say that the example signature has less structure and less clearly defined letters (of the alphabet) than the example signatures.
- 190 Mr Joyce and Mr Holland agree that the questioned signature has been done quickly. That is, it cannot be said to be a painstaking reproduction that lacks the flow of a fluid hand. This does not necessarily mean, however, that the questioned signature is less likely to be a forgery. A forgery may be the product of many hours of practice before the forged signature is done with a fluid hand.
- 191 Mr Joyce points to the apparent differences between the questioned signature and the example signatures. The different features of the questioned signature include:
- its larger size
  - its lack of identifiable letters compared to example signatures
  - differently configured loops, or missing loops, within and between the letters of the signature
- 192 The differences pointed out by Mr Joyce are plain enough to see. Mr Joyce’s conclusion, in essence, is that the variances between the questioned signature and example signatures cannot be fully accounted for and it would be unsafe to draw a conclusion that the questioned signature has been done by the same hand as the example signatures.
- 193 Mr Holland says that it is not the *variances* between the questioned signature and the example signature, but rather the *similarities* between them, that tell the true tale. Mr Holland points to the formation of loops

within and between letters, ballpoint pressure and the general flow of the questioned signature from beginning to end. He points also to several dots that consistently appear in example signatures and appear also in the questioned signature. In essence, Mr Holland says that, to his trained eye, these features allow him to conclude that the questioned signature has been done by the same hand as the example signatures.

- 194 Having listened carefully to the evidence of Mr Joyce and Mr Holland, I have reached the view that there is too much doubt to draw the conclusion that the questioned signature is Mr Hanifa's handwriting. It *might* be Mr Hanifa's handwriting, but I am not satisfied, on the balance of probabilities, that it *is* Mr Hanifa's handwriting.
- 195 This conclusion does not, of itself, preclude the possibility that an agreement was nevertheless reached on 19 November 2011. The fact remains that the 19 November document was prepared by Mr Hanifa. Mr Hanifa says that he produced the document only at the insistence, and under the intimidation, of Mr Phillip. Having observed the demeanour of Mr Hanifa and Mr Phillip when each gave evidence, I find it difficult to accept that Mr Hanifa would be intimidated to the extent that he would prepare a document against his will.
- 196 However, I have no difficulty accepting Mr Hanifa's evidence that he was not prepared to commit to an agreement that would substantially elevate the quantum of liquidated damages for delay, to be borne by the builder, above the allowance in the contract without first seeking legal advice.
- 197 Further, there is some uncertainty within the terms of the 19 November document. The document identifies a sum of \$20,000.00 as liquidated damages for the period 3 August 2012 to 3 November 2012. As noted above, Mr Phillip says that the sum was calculated on the basis of his [mistaken] belief that the contract specified a sum of \$250.00 per week for *each* of the five units, that is a total of \$1250.00 per week. However, when calculated at \$1250.00 per week, the sum attributable to the period 3 August 2012 to 3 November 2012 is \$16,250.00, not \$20,000.00.
- 198 Further, the 19 November document provides for a projected completion date of 7 December 2012. The last paragraph in the document provides that if the project is not finished by "*the abovementioned date*" [presumably 7 December 2012], the liquidated damages will be "\$500.00 per unit". It is not stated that the allowance would be \$500.00 per unit *per week*.
- 199 It is also unclear, under the terms of the 19 November document, what level of liquidated damages, if any at all, applies to the period 3 November 2012 to December 2012. Was there to be no liquidated damages for this period? Was the rate prescribed in contract, \$250.00 per week, to be applied for this period?

- 200 The evidence, all up, is equivocal and I am not satisfied that on 19 November 2012 the parties reached an agreement that would have the effect of replacing the allowance in the contract for liquidated damages.
- 201 I find that the liquidated damages for delay are properly assessed in accordance with the terms in the contract, and accordingly I allow \$11,250.00.

### **CLAIM FOR FURTHER “UNLIQUIDATED” DELAY DAMAGES”**

202 Alpha makes a further claim for “unliquidated” delay damages for the period commencing immediately after the contract was ended, 17 June 2013, to the date the certificate of occupancy was issued, 23 October 2013. Alpha claims the interest it incurred on construction loans in this period. It also claims lost rental income revenue it says it would have made in this period had the building works been completed in the construction period prescribed under the contract. It nominates a sum of \$6504.60 per month, a total of \$26,016.00 for the four month period, as the total of both heads of damage claimed.

203 The only evidence presented in support of this claim is the statement at paragraph 68 in Mr Phillip’s primary witness statement that:

By reason of the project not being finished on time, Alpha Developers has incurred additional interest on the loan that it took out to finance the works [reference to an attachment]. This interest is claimed from the date on which Alpha Developers terminated the contract with advanced building (i.e 17 June 2013) until the date on which the occupancy permit was issued with respect to the rectification and completion works carried out by SJ Builders (i.e 23 October 2013).

together with three pages of a bank account statement attached to the witness statement.

204 The bank statement identifies the account name as “*Alpha Developments BBL*”, and the type of account as “*better business loan*”. The statement tracks the account for the period May 2013 to December 2013. The statement indicates monthly interest “*debits*” of around \$6527.00.

205 That is the extent of the evidence in support of this claim. In my view, the evidence falls far short of what would be required to satisfactorily substantiate the claim.

206 The bank statement tells me nothing more than that an entity known as “Alpha Development BBL” was paying interest on a business loan in the latter half of 2013. Presumably, I am to assume that the business loan referred to in the bank statement is indeed the loan taken out by Alpha to finance the building works. But it may not be as there is no direct evidence that confirms this to be the case.

207 There is insufficient evidence for me to find that Alpha incurred the claimed loan interest expense by reason of the late completion of the building works.

208 As to the alleged lost rental income, there is simply no evidence at all. What Alpha intended for the units and what it did with the units upon completion of the building works is unknown. I cannot, in the absence of any supporting evidence, award Alpha damages for lost rental income.

### **CONCLUSION ON ALPHA'S CLAIM**

209 For the above reasons I find for Alpha on its claim in a sum of \$295,903, such sum comprised of

- \$284,653.00 as the reasonable *extra* cost to Alpha, over and above the contract price, to complete the building works, including the rectification of defective works; and
- \$11,250 as liquidated damages payable pursuant to the terms of the contract.

### **THE BUILDER'S COUNTERCLAIM**

210 Having regard to my findings above, the following claims brought by the builder must necessarily fail:

- (a) The claims for the unpaid balance of the fixing stage invoice and the unpaid variations invoices, inclusive of the claims for interest related to these invoices;
- (b) The claim for the value of building works, post fixing stage, alleged to have been carried out by the builder before the contract was terminated. Having assessed Alpha's damages (not including liquidated damages for delay), as the reasonable *extra* cost to Alpha, over and above the contract price which it would have been obliged to pay the builder had the works been completed by the builder pursuant to the contract, there is no allowance to the builder for the "value" of works said to have been carried out but not paid for. Or, to put it another way, having made allowance for the full contract price in assessing Alpha's damages, there is nothing left to allow the builder's way in respect of works carried out by the builder.

### **Materials left on site**

211 The builder claims \$4,500 as the cost of materials, temporary fencing and a pole, which it says were left on site but not returned to it by Alpha. The claim is raised in the builder's pleaded counterclaim, and in its defence to that counterclaim, Alpha denies the claim. As the builder has presented no evidence to support the claim, the claim must fail.

### **Alleged loan of money to Alpha**

212 The builder says that on about 28 April 2012 it loaned \$3,000 to Alpha, and that on 20 August 2012 it loaned a further \$3,500 to Alpha. The builder claims \$6,500 in respect of these alleged loans which it says have not been repaid.

- 213 Alpha denies that it borrowed money from the builder as alleged.
- 214 The builder has produced no documents to support this claim.
- 215 Mr Phillip says that neither he, nor Alpha, borrowed money from the builder or Mr Hanifa. He says that he, personally, made a loan to Mr Hanifa which was repaid.
- 216 Mr Hanifa says in his witness statement:
- We were borrowing money from each other like friends. I paid him back whatever I borrowed from him... But he never paid me back the money he borrowed from me.
- 217 The builder also relies upon the evidence of Mr Topino, who says that he was present in a coffee shop in Epping Plaza when he saw Mr Hanifa hand cash to Mr Phillip. Mr Topino says he was standing several metres away from Mr Hanifa and Mr Phillip and, although he was not involved in the conversation between Mr Hanifa and Mr Phillip, he says he heard the amount of \$3,500 mentioned and saw cash handed by Mr Hanifa to Mr Phillip.
- 218 Mr Hanifa's evidence on the alleged loans is vague. He says little more than that Mr Phillip asked to borrow the money and that he was prepared to loan it. There is no evidence as to the alleged purpose of the loans. There is no evidence linking the alleged loans to the building works.
- 219 On the evidence before me, I find that if loans were made, they were likely loans as between Mr Phillip and Mr Hanifa in their personal capacities. There is insufficient evidence for me to find that the corporate entity, Alpha, borrowed money from the corporate entity, the builder, and that those loans remain unpaid. Accordingly, this claim fails.

### **Delay damages and/or interest on the late payment of progress claims**

- 220 The contract provides that Alpha must make payment to the builder of progress payment claims within 7 days after both the relevant stage has been completed and Alpha has received the written progress claim. The contract also provides that if payment is not made within 7 days after it becomes due, the builder is entitled to interest on the unpaid amount at the rate of 15% per annum from the date the payment became due until the date the payment is made.
- 221 The builder says that Alpha was late in paying the base, frame and lock-up stage invoices. The builder claims interest, at the rate prescribed in the contract, in respect of those late payments. The following table sets out the dates of the invoices, the dates the invoices were received by Alpha, the due date for payment of the invoices and the actual dates that Alpha made payments:

	<b>Date on Invoice</b>	<b>Date invoice received by Alpha</b>	<b>Due date for payment</b>	<b>Amount Paid</b>	<b>Date Paid</b>
<b>Base Stage</b>	7 Dec 2011	12 Dec 2011	19 Dec 2011	\$3,462	13 Dec 2011
<b>\$71,800</b>				\$20,000	14 Dec 2011
				\$48,338	19/12/2011
<b>Frame Stage</b>	2/04/2012	4 April 2012	11 April 2012	\$20,000	12 April 2012
<b>\$107,700</b>				\$87,700	16 April 2012
<b>Lock-up Stage</b>	6 July 2012	9 July 2012	16 July 2012	\$238,500.49	17 July 2012
<b>\$251,300</b>				\$12,799.51	20 August 2012

222 Having regard to the dates payments were made as set out above, I find:

- there was no late payment in respect of the base stage;
- the first part payment of the frame stage invoice, \$20,000, was made one day after the due date. The balance of the invoice, \$87,700, was made 4 days later. Accordingly, I allow interest on the full amount of the frame stage payment for a delay of one day, which at 15% per annum equates to \$44 (rounded off to the nearest dollar). I allow a further 4 days interest on the late payment of the second payment, \$87,700, which equates to \$144 (rounded off to the nearest dollar). Accordingly, the total allowed in respect of the frame stage payments is \$188.
- the first part payment of the lock-up invoice, \$238,500.49, was made one day after the due date. The balance of the invoice, \$12,799.51, was made 34 days later. Accordingly, I allow interest on the full amount of the lock-up payment for a delay of one day, which at 15% per annum equates to \$103 (rounded off to the nearest dollar). I allow a further 34 days interest on the late payment of the second payment, \$12,799.51, which equates to \$179 (rounded off to the nearest dollar). Accordingly, the total allowed in respect of the

lock-up stage payments is \$282.

223 Accordingly, I allow a total of \$470 as interest in respect of Alpha's late payment of the frame and lock-up stage payments.

### **Liquidated Damages**

224 The builder makes a further peculiar claim for "liquidated damages". It appears, from its pleaded counterclaim, that the sum claimed, around \$7,892, is calculated at the contract prescribed rate for liquidated damages, \$250 per week, for approximately 31½ weeks. The 31½ weeks claimed is apparently the sum total of all delays on the part of Alpha in making payment of all invoices issued by the builder.

225 The claim is misconceived. The builder cannot claim interest in respect of late payments and then make an additional claim for liquidated damages for delay in respect of those same late payments. In any event, the builder's entitlement to liquidated damages for delay under the contract is limited to the extra time taken to complete the building works by reason of delays caused by Alpha.

226 I have above already made allowance, pursuant to the contract, for Alpha's late payments in respect of the frame stage invoice and the lock-up stage invoice. The builder has no other sustainable claim for delay damages arising from Alpha's late payments of sums due under the contract.

### **CONCLUSION ON THE BUILDER'S COUNTERCLAIM**

227 For the above reasons, I find for the builder in the sum of \$470 on its counterclaim.

### **CONCLUSION**

228 For the reasons set out above, I find that the applicant has succeeded on its claim in the sum of \$295,903 and the builder has succeeded on its counterclaim in the sum of \$470. I will set counterclaim sum off as against the claim sum, with the result that I will order the builder to pay Alpha \$295,433.

229 I will reserve the question of interest with liberty to apply, and in doing so I note that Alpha has not yet made full payment to SJ Builders of the SJ contract sum.

230 I will reserve the question of costs with liberty to apply.

**SENIOR MEMBER M. FARRELLY**