VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. BP474/2016

BUILDING AND PROPERTY LIST

CATCHWORDS

Domestic building contract – repudiation by builder – repudiation by owners – termination – meaning of completion of 'frame stage' – approval by building surveyor – meaning of 'Approved Subject To' – completion of lock-up stage – suspension of works by builder – builder's refusal of access to the property – election to affirm the contract – value of incomplete work – value of defective work – variations – sections 8, 19, 37, 38, 40, 53 *Domestic Building Contracts Act* 1995

APPLICANTS	Jennifer Barbour, Mr Timothy Barbour
RESPONDENT	Australian Elegant Homes Pty Ltd (ACN 137 707 905)
WHERE HELD	Melbourne
BEFORE	Senior Member S. Kirton
HEARING TYPE	Hearing
DATE OF HEARING	15, 16, 19, 20, 21, 22, 23 March, 18 May 2018
DATE OF ORDER	12 September 2018
CITATION	Barbour v Australian Elegant Homes Pty Ltd (Building and Property) [2018] VCAT 1242

ORDERS

1. The respondent must pay to the applicants the sum of $371,406.25.

2. Interest, costs, and reimbursement of fees reserved with liberty to apply. I direct the principal registrar to list any such application before Senior Member Kirton for one hour.

3. The parties must file and serve any affidavit/s they wish to rely on in any application/s for costs and their calculations in respect of interest at least seven days before the hearing of the application/s.

SENIOR MEMBER S. KIRTON

APPEARANCES:

For the Applicants	Mr A. Broadfoot QC with Mr H. Forrester, of counsel
For the Respondent	Mr K. Oliver, of counsel

REASONS

BACKGROUND

1. There is a half-finished house in North Balwyn, owned by the applicant owners ("the owners"), which has been left incomplete since August 2015. That was the date when the building contract between them and the respondent builder ("the builder") was terminated. The central issue for determination in this proceeding relates to the circumstances in which the building contract came to an end. If it was repudiated by the builder, as the owners allege, then they say they are entitled to damages, including for the costs of completing the project, repairing defects and delays. On the other hand, if the builder's contention that the owners repudiated the contract is accepted, then the builder says that the owners' claims must fail, and it is entitled to payment for the work carried out by it. There are also a number of disputed variation claims to be decided.

2. Much of the background to the present dispute was uncontroversial. The owners originally owned a large block of land (number 43 in the street), with an existing house located on it. The owners lived in that house from time to time. In 2010, they obtained a modification to the single dwelling covenant on the site and subdivided the block in two. The newly formed rear block was given number 41, with the original house retaining number 43. Access to no.41 is via a driveway running along the western boundary of no.43.

3. The owners decided to build a house on the vacant block and were introduced to the builder by their bank manager. The builder then introduced the owners to an architect, who they retained to design the dwelling. It was designed as a three-story rendered dwelling, with much of the bottom level been taken up with the garage, a lift well, and a below-ground store room and gym. The block of land is steeply inclined, and as a result the new house had to be cut extensively into the slope.

4. The owners and the builder entered into a standard form Master Builders Association New Homes Contract on 5 June 2014. The contract price was $940,500. The building permit was issued on 15 July 2014 and works commenced about that time.

5. It is common ground[1] that at the time of entering into the building contract, the architectural plans had not been finalised. The incompleteness of the design was due to the urgency of obtaining a building permit before an impending change to the building or planning regulations, which change was thought would reduce the maximum height limit of the proposed house. The owners and the builder disagree on whose idea it was to have the permit issued speedily, but nothing turns on that question. However, one

[1] Mrs B' witness statement paragraph 16; Mr Bishara witness statement paragraphs 13 and 14

consequence of the incomplete design was that it led to uncertainty as to what was required to be built during the project.

6. The building work progressed throughout the second half of 2014 and into 2015. However, by February 2015 disagreements had arisen, which culminated in the owners' then solicitors writing to the builder on 11 August 2015, stating that the builder had repudiated the building contract, the owners accepted that repudiation and the contract was at an end. The builder's solicitors replied by letter dated 31 August 2015, in which they stated that the owners had repudiated the contract and the builder accepted that repudiation and terminated the contract. As stated above, the central issue for determination therefore relates to the termination of the building contract.

THE OWNERS' CLAIM

7. In support of their argument that by 11 August 2015 the builder had evinced an intention to no longer be bound by the building contract, the owners rely on the following factors (individually or in combination):

   a. invalid frame stage claim

   b. invalid lock-up stage claim

   c. invalid suspension of work

   d. wrongful refusal of access to the site

   e. improper demands for money and refusal to build in accordance with the approved drawings

   f. nature and extent of defective work

   g. failure to return to work

   h. alternatively, the builder's letter of 31 August 2015.

8. They say that as a consequence of the builder's repudiation they are entitled to[2]:

   a. Compensation for the reasonable costs of completing the works less the amount remaining in the contract. The quantum of the completion costs was agreed between the experts during the hearing at $687,196[3]. The balance remaining under the contract was $329,175. The amount due to the owners for the completion of the works is therefore $358,021.

[2] Applicants closing submission Part D
[3] Joint report 27 March 2018

b. The cost of repairing defects based on an independent contractor undertaking that repair work. Their expert Mr Lorich's original opinion was that the cost of rectification of the defects was $178,018, although this opinion was modified during the course of the hearing, as detailed in Part E below; and

c. Lift storage costs of $25,025 to May 2018 plus a further six months storage at $715 per month while the building works are being completed.

9. They also seek refunds of amounts already paid to the builder, as variations, which they say it was not entitled to, namely:

a. recovery of the payment made for the variation for the sleeper retaining wall of $8810; and

b. recovery of the payment made for the excavation of $32,500.

10. Further, the owners claim interest and costs.

THE BUILDER'S COUNTERCLAIM

11. On the other hand, the builder says that its conduct was not repudiatory, and that it follows that the purported termination of the building contract by the owners was itself repudiatory conduct, which entitled it to terminate the contract, which it did by letter dated 31 August 2015 when it accepted the owners' repudiation.

12. The builder says that:

a. it is entitled to recover the reasonable cost of carrying out the work, less any amounts already received;

b. this amount includes the progress payments up to lock-up stage, plus an extra $89,194.50 for variations either agreed or to which it is entitled;

c. the owners are not entitled to any damages for defective work, as they prevented the builder from rectifying the defects[4]; and

d. the owners are not entitled to any damages for delay.

13. Further, or alternatively, the builder says that the owners elected to continue with the building contract by the letter from their then solicitors dated 14 April 2015. As a consequence of this election, the owners were prevented from subsequently terminating the contract.

14. The amounts claimed by the builder total $102,554.50, as follows:

[4] Builder's closing submission paragraph 4

Progress payments due up to lock up stage	$658,350.00
plus variations	$89,194.50
less paid	($652,635.00)
plus extra work performed at no.43[5]	$7645.00
Total Claimed	$102,554.50

QUESTIONS FOR DETERMINATION

15. The following questions are the issues for determination in this proceeding:

    a. Did the builder repudiate the contract?

    b. If so, did the owners elect to affirm the contract on or about 14 April 2015?

    c. Did the owners lawfully terminate the contract on or about 11 August 2015 or did they repudiate the contract?

    d. What are the consequences of these findings?

    e. If the owners' claims of repudiation are successful, what is the reasonable cost to complete the work?

    f. What amounts should be allowed to the owners for defective work, if any?

    g. Are the owners entitled to a refund of variations already paid ("the disputed variations")?

    h. What amounts is the builder entitled to for other variations?

16. For the reasons set out below, I have determined that the answers to these questions are:

    a. Yes, the builder did repudiate the contract.

    b. No, the owners did not elect to affirm the contract.

    c. The owners lawfully terminated the contract by accepting the builder's repudiation and did not themselves repudiate the contract.

    d. The builder is liable to the owners for their loss and damage arising from its wrongful repudiation of the contract.

    e. The reasonable cost to complete the work, as jointly determined by the experts, is $687,196.

[5] As a variation to the building contract, the builder performed some works at no.43, which are part of the variation claims considered at Part H below

f. The reasonable cost to rectify defects is $107,898.75

g. No, the owners are not entitled to a refund of the monies already paid for the disputed variations.

h. The builder is entitled to $94,513.50 for works carried out in addition to the contract works.

17. I pause here to note that I did not reach these conclusions lightly. As discussed in further detail below, the relationship between the parties had broken down from early in 2015 and there was mistrust and antagonism on both sides. Some of the grounds relied on by the owners to justify their actions in terminating the contract were not proven or not significant. The builder had not abandoned the site. However, there were two crucial factors, being the demands for payment that were not due under the contract and the suspension of the works, that lead me to the conclusion that the builder had evinced an intention to no longer be bound by the terms of the building contract, or to fulfil it only in a manner substantially inconsistent with its obligations.

THE HEARING

18. The owners were represented by Mr A. Broadfoot QC with Mr H. Forrester and the builder by Mr K. Oliver, of counsel. I commend all counsel on their efficient running of the hearing; they clearly outlined the issues at the commencement and limited the evidence and submissions to those issues. Nevertheless, the hearing occupied seven days, including a view of the property, followed by obtaining of transcript, extensive written submissions and then a further appearance by the parties to speak to the written submissions. Between the closing of the evidence and the final submissions, a summons to produce documents was also issued.

19. Mrs Barbour gave evidence for the owners, and Mr Bishara, a director of the builder, gave evidence on its behalf. Each of them had engaged an expert building consultant, namely Mr Robert Lorich for the owner and Mr Ian Johnson for the builder. They attended the view and gave their evidence before the Tribunal concurrently. They are to be commended for the practical and collaborative manner in which they gave their evidence (which is discussed further below). The building surveyor, Mr Michael Flanagan, also gave evidence on behalf of the owners. In reaching my decision, I have had regard to the 4 folders of evidence and the helpful submissions (of more than 160 pages) received.

THE WITNESSES

20. I accept the evidence of Michael Flanagan as contained in his witness statement and given during the hearing in respect of the tasks performed by him and his company, Metro Building Surveying ("MBS").

21. As for Mrs Barbour and Mr Bishara, I did not find either of their evidence to be particularly persuasive. Accordingly, I have based my decision on contemporaneous documents where available, rather than the parties' recollections.

Mrs Barbour

22. I found Mrs Barbour to be an unreliable witness because she gave answers that were evasive or exaggerated. For example, in her witness statement, she suggested that she was naive and inexperienced, and relied heavily on the guidance of Mr Bishara. The reality was she had already undertaken one building project (prior to the present development) and was planning to do more developments in the future. She denied having considered subdividing the land and building for many years before she met Mr Bishara, but had obtained a land survey in 2005 and had the single dwelling covenant on the property modified in 2010 to allow the subdivision. In contrast to her witness statement, in her oral evidence she described herself as an "investor" and said that she had undertaken a "feasibility study" for this project and had discussed with Council various options for developing the land[6].

23. She repeatedly denied in cross examination that the current subdivision was going to be the first of many projects. However, she stated in an email to a friend called Gita that she was "looking forward to work together with you and produce many successful projects ahead". When it was suggested to her that was inconsistent with her earlier statement that she had decided this was to be the first of many property developments, she denied that the email to Gita was in relation to construction projects. She said instead she was referring to mining and research, mining investment. That is inconsistent with the email itself, in which she says to Gita:

> "I had a discussion with William Bishara (our builder) when I was in Melbourne, and he is happy for you to be my assistant to oversee, and report about the project to me, since I am not in Melbourne.… I would like you to inspect the site once a week. You could set up a two-hour meeting with William… Please get yourself a set of safety gear (helmet, boots, EGC) and be sure to use them when visiting the site… I would like you to give me a written report on three things, … Since I did not do these kinds of projects before, these are only my thoughts and suggestions. Please give me your ideas and advice. It is a learning process for both of us; I am looking forward to work together with you, and produce many successful projects ahead."

Mr Bishara

24. I found Mr Bishara's evidence to be inconsistent and contradictory. On some issues, his evidence in his witness statement and the answers given in

[6] T206

cross examination differed to the instructions he admitted having given to his solicitors, which were contained in their letter to the owners of 4 November 2015. His evidence in this hearing also differed from the evidence he gave to the Victorian Building Authority ("VBA") on certain issues.

25. On some matters I accept that his recollection was poor because of the passage of time, such as whether he had delivered an invoice for the retaining wall between no.41 and no.43. However on other matters, I found his evidence to be not credible, such as in relation to the temporary front door. He was adamant that he had fixed a temporary front door to the property, when there was no physical evidence that that had been done. When challenged about the door, he said that the owners must have removed it. The he said that he had changed the door frame to remove the markings that would have been made by the temporary front door. This version is not credible, as discussed further below.

26. I now turn to consider each of the issues for determination in detail.

A: DID THE BUILDER REPUDIATE THE CONTRACT?

27. The owners contend that there are two grounds upon which it can be said that the builder repudiated the contract. First, they say that as at 11 August 2015, the builder had committed a multitude of breaches of contract, which either individually or in combination, constitute a repudiation of the contract, even though each breach taken in isolation may not have amounted to a repudiation.

28. Second, if the owners' termination was unlawful, then as at 31 August 2015 the builder was in substantial breach of the contract and its solicitors' letter of that date, purporting to terminate the contract, amounted to a repudiation.

29. On the other hand, the builder submits that the evidence does not disclose any express or wholesale renunciation by the builder of its obligations under the building contract, and accordingly the owners must establish that the builder evinced an intention to carry out its obligations only if and when it suited it to do so rather than in accordance with its obligations under the contract. It says there is no such evidence.

30. Further, the builder submits that I must take into account the owners' conduct, by which they were complicit in or acquiesced to any departures from the contract. I should also consider that contracts are often adjusted in a way that the parties find acceptable and convenient, or commercially necessary, without any formal variation of the contract.

Legal principles as to repudiation

31. It has long been established that a party repudiates a contract when that party evinces an intention to no longer be bound by it, or to fulfil it only in

a manner substantially inconsistent with his or her obligations and not in any other way[7].

32. The test is whether the conduct of one party is such as to convey to a reasonable person, in the situation of the other party, renunciation either of the contract as a whole or of a fundamental obligation under it[8].

33. Repudiation of a contract is a serious matter and is not to be lightly found or inferred. If there was never any clear renunciation of the contract, or if genuine attempts to perform it, or to cure any breach, were being made, there may be no repudiation[9].

34. I will now consider each of the breaches which the owners allege.

Was the Builder entitled to claim the Frame Progress Claim?

35. The builder invoiced the owners for the frame stage payment on 11 December 2014 in the amount of $235,125. It was conceded by the builder that as at that date, the frame stage had not been completed and the work had not been approved by the building surveyor. It had not even been inspected. The owners paid part of the claim on 29 December 2014. The owners contend that the frame stage had still not been approved by MBS as at August 2015 when the contract was terminated.

36. The owners submit that in circumstances where the frame stage was not completed:

    a. the builder had no entitlement to claim the frame stage progress payment in December 2014 or thereafter to retain the payments which had been made by their bank; alternatively

    b. the builder was only entitled to retain such portion of the amount as related to valid variation claims that were then due and payable and unpaid. On any view, this was much less that the amount paid.

37. By 14 April 2015 the owners became aware that the frame had not been approved, and on that date the owners' solicitor demanded the payment be refunded, on the basis that since the frame works had not been approved, the builder had no entitlement to claim or retain the progress payment.

38. In response, the builder submits that it rendered the frame stage invoice on 12 December 2014 at the request of Mrs Barbour, even though the frame had not been completed. It says that:

    a. at the request of the owners, the terms of payment set out in the contract were varied such that the parties agreed that the progress

[7] *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17 at 33, 40
[8] *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115 t [44]
[9] *Shevill v Builders Licensing Board (*1982) 149 CLR 620 and *Cheshire & Fifoot* at p.1108

payments for the frame and lock-up stages were payable if they were approved by the owners' bank; alternatively

b. the owners, by agreeing to pay the frame stage and lock-up stage payments if the bank approved them, are estopped from denying that the claims were payable.

39. It contends that in any event, it is not repudiatory conduct to submit a claim for a progress payment prior to the completion of the relevant stage, and the frame was ultimately approved by the building surveyor, Michael Flanagan of MBS, on 22 April 2015, well prior to the owners' purported termination of the contract.

The events surrounding the frame stage inspection process and claim

40. It is necessary to set out in some detail a chronology of events in relation to the frame stage inspection process and payment claim.

41. On 20 and 25 August 2014 MBS carried out the foundation and footing inspection and approved (without condition) the pre-slab and pads and the steel for slab and basement retaining wall.

42. On 22 October 2014 MBS inspected and approved the strip footings (living area), subject to the builder providing amended structural drawings and a certificate of compliance from the relevant engineer for changes made to the footings in that area.

The frame stage progress claim

43. On 11 December 2014 the builder issued the frame stage tax invoice. It says it did this at the request of the owners. Mr Bishara's evidence was that "Mrs Barbour asked me to continue to work on the project during the Christmas holidays and to send them an invoice for the frame stage progress payment so that I could continue with the work over Christmas"[10]. On 29 December 2014 the owners' bank paid $141,075 of the claim of $235,125.

44. On 3 February 2015 the builder issued a tax invoice for the lock-up stage payment and the unpaid balance of the frame stage invoice, totalling $329,175. On 9 February 2015, the owners' bank paid a further $282,150.

The first frame inspection and Building Direction

45. On 18 December 2014 MBS made its first inspection of the frame but did not approve this work as it was incomplete. A Building Direction was issued to the builder (the owners were not provided with a copy), which stated relevantly as follows:

[10] Witness statement paragraph 54

"**Inspection Item:** Inspection of framework
Inspection Date: 18/12/2014
Report: An inspection of the above property revealed that the building work is not in compliance with the provisions of the Act, Regulations, BCA and/or Australian Standards as are relevant to the approved Building Permit documents. The following works are required to be carried out and notification given to this office to arrange a reinspection of the prescribed mandatory notification stage…

Special instructions and/or directions: NOT APPROVED
1) Frame incomplete at time of inspection.
2) … [roof truss items listed]…

A re-inspection is required on the completion of the above."

The second frame inspection and Building Direction

46. On 11 February 2015 MBS carried out a further frame stage inspection. The stage was not approved, and MBS issued a Building Direction to the builder (again, the owners were not provided with a copy), which stated relevantly as follows:

> "**Inspection Item:** Inspection of preliminary framework
> **Inspection Date:** 11/02/2015
> **Report:** An inspection of the above property revealed that the building work is not in compliance with the provisions of the Act, Regulations, BCA and/or Australian Standards as are relevant to the approved Building Permit documents. The following works are required to be carried out and notification given to this office to arrange a reinspection of the prescribed mandatory notification stage…
>
> **Special instructions and/or directions:**
> NOT APPROVED
> **General -**
> … [7 items listed]
> **Ground floor -**
> … [7 items listed]
> **First floor -**
> … [10 items listed]
> **Roof framing -**
> … [3 items listed]
>
> A re-inspection is required on the completion of the above."

47. The builder then provided MBS with amended engineering drawings which included a Certificate of Compliance-Design dated 18 February 2015 and amended structural drawings in relation to the footings and retaining wall. These were approved by MBS on 12 March 2015 and an Amended Building Permit was issued.

The third frame inspection and Building Direction

48. On 16 March 2015 MBS carried out a further frame inspection. This was not approved as the items identified in the Building Direction of 11 February had not been completed. MBS issued a further Building Direction dated 16 March 2015. For unexplained reasons, MBS produced two different versions of this Direction. One version was sent to the owners, but a different version was sent to the builder. Both contain the same preamble, including:

> "**Inspection Item:** Inspection of framework
> **Inspection date:** 16/03/2015
> **Report:** An inspection of the above property revealed that the building work is not in compliance with the provisions of the Act, Regulations, BCA and/or Australian Standards as are relevant to the approved Building Permit documents. The following works are required to be carried out and notification given to this office to arrange a reinspection of the prescribed mandatory notification stage…"

49. The version of the Direction received by the builder then listed four items under the heading "General", two items under the heading "ground floor" and one item under the heading "first floor". All items except one were for the builder to provide documents, including computations, certification, amended architectural drawings, truss layout, engineer's certification. The one item of work that was required was to "provide double floor joists within the hall area outside the gym area to cater for point loads above".

50. The version of the Direction received by the owners was much longer. It listed the same four items under the heading "General", but 13 items under the heading "ground floor", 12 items under the heading "first floor" and five items under the heading "roof framing". The items of work required appear to be duplicates of the items required in the Building Direction issued on 11 February 2015.

51. Mr Flanagan gave evidence that he was not personally aware of the contents of the Direction at that time, because the inspections had been carried out and the Direction had been prepared by Mr Giardina of his office. He conceded that from his file it appeared that the builder had only been sent the shorter version but could not explain why. It was suggested to him that the shorter version was correct, and the longer version was a draft. Mr Flanagan disagreed with that proposition and said he thought that the longer version was correct, and the shorter version was a draft in progress. He based that conclusion on the fact that he attended the inspection of the property on 1 April 2015 with Mr Giardina, and said he would not have done so if there had not been a significant number of items outstanding.

52. Although I have reservations about Mr Flanagan's assumption that the longer version was the correct version of the Direction as at 16 March 2015,

I do not need to make a finding as to what was the correct status of the works as at that date, as it is clear that by 1 April 2015 the building surveyor was satisfied that there was only one item of frame work to be completed ("either install WB-wall bracing or provide engineers certification confirming otherwise" – see paragraph 56 below). It is immaterial whether the items were notified to the builder in both February and March. What is relevant is that between the February Direction and 1 April 2015 (the fourth inspection and Direction) the builder had carried out significant works on the frame, but that the frame stage was still not approved.

The Notice of Suspension

53. On 23 March 2015 the builder issued a Notice of Suspension, relying on the ground that:

> "You, the Owner(s) have failed to make a Progress Payment that is due within 14 days after it became due. The Progress Payment you have failed to make is Progress Claim Certificate for: Frame Stage".

54. Attached to the Notice of Suspension was a document headed "Summary of Claims" which set out the progress claims made and paid, together with four variations and one reimbursement which had been claimed but not paid. The Notice was handed to the owners on site during an inspection being carried out by their building consultant Mr Seville.

The fourth frame inspection and Building Direction

55. On 1 April 2015 Mr Flanagan inspected the framework. He said that he noted that of the ten rectification items MBS had previously specified, one remained outstanding. That was the need for the installation of wall bracing within the fireplace, laundry and powder room areas as per the endorsed plans. He also identified other items requiring attention, which were not related to the frame. He issued a Building Direction dated 1 April 2015 which required the builder, in summary, to:

> **General -**
> 1) Provide amended Architectural drawings reflecting al las built changes i.e. additional/omitted windows, window sizes, dining room setbacks, garage wall heights etc;
> 2) Provide Engineers/truss manufacturer certification confirming the end bearing of all posi floor joists within the garage/study (above GB5) area;
> **Ground floor -**
> 1) Provide Engineers certification/design details confirming the connection of the timber whaler plate dyna bolted to the brickwork supporting GFJ2 floor joists within the entry area…
> 2) Provide Engineers certification confirming the end notching of GB7/8 bearers within the subfloor area
> 3) Provide Engineers certification/design details for the new load-bearing wall constructed within the store room area. The wall is now supporting the

ends of all GJ1's and GFJ2's…
4) Engineer to provide comments on the tie down of timber bearers to subfloor area within the family room
5) Engineer to comment on lack of tie downs to store room concrete walls supporting floor joists to family area
First floor -
1) Provide Engineers certification/design details confirming the connection of the timber whaler plate Dyna bolted to the brickwork supporting RR1 rafters within the alfresco area
…
3) Install all WB-wall bracing within the fireplace, laundry and powder room area as per plan. Alternatively, provide engineers certification confirming otherwise."

56. Mr Flanagan said that on or about 14 April 2015, MBS received a Certificate of Compliance from the builder's engineer, which certified that 9 of the 10 items in the Building Direction of 1 April had been attended to.

57. Also on 14 April 2015, the owners' solicitor sent the builder a letter demanding that the payment be refunded as the frame works still had not been approved and the builder accordingly had no entitlement to the money. Mr Bishara's evidence was that after he received that letter, he spoke to the owners' then solicitor, Mr Turnbull, and told him that the frame was nearly approved. A file note prepared by Mr Turnbull of this conversation was tendered, which records Mr Bishara's words as:

> "He said he didn't claim the frame or the lock-up stage. He put in request for payment for frame stage, the Inspector of the bank inspected, then the bank made payment because there was a frame there. He said there's a complete frame but it's not compliant. I told him that if it is not compliant it is not finished and therefore not complete. He said he is happy to go to court about this."

For the reasons set out at paragraph 121 below, I accepted Mr Turnbull's file note into evidence and I accept that it is a true record of the conversation.

The fifth Building Direction

58. On 15 April 2015 MBS issued a further Building Direction for the following outstanding items:

> "**Inspection Item:** Inspection of re-framework
> **Inspection date:** 01/04/2015
> **Report:** An inspection of the above property revealed that the building work is not in compliance with the provisions of the Act, Regulations, BCA and/or Australian Standards as are relevant to the approved Building Permit documents. The following works are required to be carried out and notification given to this office to

arrange a reinspection of the prescribed mandatory notification stage…"

Special Instructions and/or Directions:

General -
1) Provide Engineers/truss manufacturers certification confirming the end bearing of all posi floor joists above the load-bearing wall within the garage area and study area (end notching of floor joists above GB5)

The following items are not directly related to the framing of the dwelling, although these matters were observed on site and require attention:

- Provide amended Architectural drawings reflecting all as built changes i.e. additional/omitted windows, window sizes, dining room setbacks, garage wall heights etc.
- …[items referring to blockwork issues]"

59. Later that day, the builder sent MBS a copy of truss computations and engineers comments re the brick ties.

The first MBS Inspection Report "Approved - subject to" – 16 April

60. MBS then issued a document called "Inspection Report/Direction", sent to the builder by email on 16 April 2015, which stated:

"**Inspection Report – Approved Subject To…**

Inspection Item: Inspection of Structural Framework (re-framework)
Inspection Date: 1/04/2015
Report: An inspection of the above property revealed that the building work is generally in compliance with the provisions of the Act, Regulations, BCA and/or Australian Standards as are relevant to the approved Building Permit documents.

Special Instructions and/or Directions:
The following items are not directly related to the Structural framing of the dwelling, although these matters were observed on site and require attention …

- … [items referring to blockwork issues] …
- Remove, replace or install all windows as per Approved Architectural drawings. Alternatively, provide amended Architectural drawings reflecting all as built window changes i.e. additional windows, omitted windows or change in size/location.
- Provide amended Architectural drawings for all as constructed design changes i.e. Garage wall heights, etc.
- Upon receipt of the above two items an assessment will be undertaken by this office for compliance with Building Regulations."

61. Later that day, the builder sent MBS a number of emails attaching a copy of truss computations, referring to the choked end bearing of the posi floor joists, providing clarification and including an email from Rooftruss advising that the computations were structurally accurate.

The second MBS Inspection Report "Approved - subject to" - 17 April

62. On 17 April 2015 MBS sent the builder an "Inspection Report/Direction", which largely mirrored the document sent the previous day and was again headed "Inspection Report – Approved Subject To…". The only apparent difference was the addition of amended Architectural drawings being required for *dining room setbacks*.

63. On 19 April the builder emailed MBS and said that the dining room setback was exactly as per the approved drawings.

The third MBS Inspection Report "Approved - subject to" - 22 April

64. On 22 April 2015 MBS sent the builder an "Inspection Report/Direction", which mirrored the first MBS Inspection Report sent on 16 April and was again headed "Inspection Report – Approved Subject To…".

65. The builder relies on this document as being the approval required to entitle it to claim the frame stage is completed in accordance with the definition in the contract and it is therefore entitled to be paid for that stage. The owners submit that this document is a conditional approval and does not satisfy the definition in the contract.

Michael Flanagan's evidence

66. Mr Flanagan was not directly asked about the meaning of the three Inspection Reports issued 16, 17 and 22 April. However, I am assisted by his answers to questions about a similarly worded approval for the footings. Following the footing inspection, MBS had issued a Report with the same heading "Approved - subject to". Mr Flanagan explained the meaning of these words as follows:

> "An inspection was carried out on site where it was found that excavations had been carried out. The excavations, reinforcement, et cetera, and whatever else was looked at at the time was found to be satisfactory from a structural point of view. There were changes noted on site. The building inspector was happy with what he saw on site but required the submission of amended structural drawings and certificates of compliance to verify the changes. "Approved subject to" was often used. It's not a practice employed by my office any longer. It was approved where construction or an aspect or a component of the building on site was found to be satisfactory and, generally, the "subject to" items tend to be either administrative or a

> document type of scenario where there is not the need to revisit site to carry out a further inspection."[11]

67. When asked what would happen if the builder did not provide the amended structural drawings as requested, Mr Flanagan replied:

> "The "subject to" issue – and in this instance the amended structural drawings – remains a live issue which is monitored through the construction phase. Eventually, if these documents aren't forthcoming then they are raised at final inspection stage and the "subject to" item needs to be satisfied before we will issue any final inspection or certificate of occupancy."[12]

68. Having considered Mr Flanagan's evidence about the meaning of the phrase, it seems he was either unable or unwilling to say whether or not it meant a stage had been approved. This is unfortunate. The system of building regulation in Victoria requires a building surveyor to inspect and approve certain stages of every project[13]. Victorian contracts usually define the completion of certain stages based on their approval by a building surveyor[14]. When a building surveyor's assessment is open to multiple interpretations, situations such as the present one arise. MBS appears to have acknowledged this difficulty, as it no longer uses the phrase "Approved – subject to".

69. Mr Flanagan was not directly asked about the meaning of the three Inspection Reports issued 16, 17 and 22 April. Counsel for the builder submitted during the hearing that the document should speak for itself and the question of whether a frame has been passed or not will depend on the interpretation of the document on its face. The owners submit that the builder should have asked the question of Mr Flanagan if it wants to say that the works were approved. I accept that the document must be interpreted based on the plain meaning of the words used and that Mr Flanagan's subjective interpretation is not decisive. Accordingly, the failure to ask him questions directly on that point is not fatal.

Discussion and conclusion on the frame stage approval

70. For the following reasons, I am satisfied that approval for the frame stage had not been given as at 22 April 2015.

71. First, the document issued by MBS is expressed to be given under Part 4 section 37 of the *Building Act* 1993 ("the *Building Act*"). Part 4 relates to inspection of building work and in 2015, it contained the following requirements:

[11] T392/20-393/5
[12] T393/8-15
[13] Including s 33, s 34 *Building Act*; reg.901 *Building Regulations 2006;* reg.167 *Building Regulations 2018*
[14] S 40(1) DBCA, unless modified by agreement

- Section 33: Requires a person who is in charge of the carrying out of building work for which a permit has been issued to notify the relevant building surveyor (RBS) after completion of each mandatory notification stage of that work.

- Section 34: Requires the RBS to cause the building work to be inspected upon being notified that a mandatory notification stage had been completed.

- Section 37: Allows the RBS, after inspecting building work, to direct the person who is in charge of carrying out the building work to carry out work so that the building work complies fully or substantially with the building permit issued, the *Building Act* or the *Building Regulations* (emphasis added).

72. The document issued by MBS was headed as a direction to the builder given under section 37, and because there were still a number of matters listed which the builder had to complete before the works fully or substantially complied with the building permit issued, I am not satisfied that the direction had been complied with.

73. Second, counsel for the builder urged that the phrase "subject to" should be interpreted as a conditional approval. I do not accept that Part 4 of the *Building Act* allows for either conditional or unconditional approvals. Further, there is nothing in the definition of "frame stage" in section 40(1) of the *Domestic Building Contracts Act* 1995 ("DBCA") and in clause 1 of the building contract which allows for such a distinction. The works either comply with the building permit, the *Building Act* and the *Building Regulations*, or they do not.

74. Third, such an interpretation would make a nonsense of the supervisory nature of the role of the building surveyor, who is required to provide a 'checking mechanism' for owners by inspecting at each mandatory notification stage and approving that the works have been carried out in accordance with the building permit, the *Building Act* and the *Building Regulations*. A 'conditional' approval would be binding on an owner (in terms of requiring them to make payment for that stage) when ultimately, those conditions may never be able to be met. I appreciate that the surveyor may attempt to require the conditions to be met before issuing a final certificate, but if they cannot be, it is the owners who will be penalised by having paid the contract price and then receiving no final certificate.

75. Fourth, there may be a concern that this conclusion will have ramifications for the building industry, as it may be thought practically impossible to meet the "administrative" or "document type of scenario" referred to by Mr Flanagan until later in a job, and works may have to be put on hold as a consequence. However, in my view, these concerns are addressed by the

amendments to Part 4 of the *Building Act*, made since this project, which inserted Division 2 and sections 37A-K. These now require a building surveyor to set out in writing the required items to "fix", provide a time frame for them to be done, and give a builder appeal rights. If a surveyor were to say that the "administrative" issues could wait until the end of the job, and that there were no other outstanding works for the frame stage, then the approval would be unambiguous and the works could continue.

76. Further, and if I am wrong about the above reasoning, the phrase "Approved – Subject to" may be interpreted according to the principles of interpretation set out in Pearce and Geddes, *Principles of Statutory Interpretation in Australia*[15]. Although the Inspection Report issued by the building surveyor is not a statute, it was a mandatory record prescribed by regulation 902 of the *Building Regulations* 2006[16] and thus these principles are useful. Pearce and Geddes refer to the Victorian Full Supreme Court's analysis of statutes using the words "subject to" thus:

> "As to the introductory words ['subject to'], the section should first be construed without them, and then, if there is anything in the other provisions of the Act inconsistent with the interpretation so arrived at, these other provisions must yield"[17].

77. Applying that analysis, I would first construe the heading of the Inspection Report without the words "subject to", which would lead to the works having been "Approved". However, the balance of the Report, as well as the balance of the words in the heading, are inconsistent with that interpretation first arrived at, and so the initial interpretation must yield.

Is claiming the frame stage progress claim necessarily repudiatory conduct?

78. The builder then submitted that even if it is found that its view as to the meaning of the Inspection Report was erroneous, this does not of itself amount to repudiatory conduct, as, where there is an ambiguity, "In the last resort, if the parties cannot agree, the true construction will have to be determined by the court. A party should not readily be found to have refused to perform the agreement by contentious observations in the course of discussions or arguments"[18]. It says it was open for the owners to seek a declaration as to whether the frame had been approved before terminating the contract. I do not accept that the owners had this obligation, for the following reasons.

79. It was the builder who had suspended the works and was insisting on payment for a stage which was disputed. Where the surveyor's directions

[15] 7th ed, LexisNexis at [12.4]
[16] Which has since been replaced by s.37F of the *Building Act* and reg.175 of the *Building Regulations* 2018, which are even more prescriptive
[17] *Re Bland Bros and the Council of the Borough of Inglewood (No.2)* [1920] VLR 522 at 533
[18] *Sweet & Maxwell v Universal News Services Ltd* [1964] 2 QB 699 at p. 734 and cases referred to in the builder's closing submission at paragraph 50

are ambiguous, as in this case, a prudent builder would not have taken such steps, with their significant ramifications, without first being sure that its interpretation of the Inspection Report was correct.

80. Further, it would have been impossible for the owners to seek a determination on the meaning of the ambiguous Inspection Report at the dates the repudiatory conduct first occurred, because the payment claim was made and the Notice of Suspension was issued months before the contentious "approval" was given. Accordingly, there was nothing for the owners to seek a determination about at the dates the repudiatory conduct first occurred. Then, following the issuing of the ambiguous Inspection Report, the owners consistently told the builder that they did not accept that the frame stage had been approved (for example, by not paying the progress claim). It was a matter for the builder then to seek clarification on the meaning of the Report.

Did the owners instruct the builder to depart from the contractual requirement for a frame approval?

81. As mentioned above, the builder also contended that the owners had requested it to issue the frame stage progress claim even though the stage was incomplete, because they were going overseas and wanted the building work to continue over the Christmas period. It says that this was a variation to the contractual requirement that the stage as defined in the contract must have been completed before the builder was entitled to be paid.

82. The owners deny there was any such variation. Mrs Barbour denied that she had asked the builder to send the frame invoice early, or to work over the Christmas period; instead she said that the contract required completion within 365 days and it made no difference to her when he worked. If the contract ran over time, she would be entitled to liquidated damages.

83. I accept her evidence as being the more plausible version of events. It is supported by the contemporaneous documents, in that the progress claim was sent before the email relied on by Mr Bishara as evidence of the owners' advice that they were going overseas. Further, there is no mention in the written communications of a need to work over Christmas. For example, I would have expected a note in the builder's email of 12 December 2014 to the effect that he was sending the frame stage invoice early, as agreed or as discussed. Instead he simply said, "Please find attached frame stage invoice." The first mention of Christmas was in Mrs Barbour's reply to the effect that she could not sign the form for the bank until 28 December because she was overseas.

84. In respect of the signed authority provided by Mrs Barbour to her bank, the builder submits that this is evidence of an agreed variation to the progress payment schedule in the contract. It referred to Mrs Barbour's evidence that she relied on the bank to inspect the work and she was prepared to pay

the claim if the bank was happy to pay it. Further, that this evidence indicates that the parties had varied the building contract such that they agreed that the progress payment for the frame stage and lock-up stages were payable if they were approved by the owners' bank.

85. I do not accept that the contract was varied as alleged. I accept that the owners relied on the bank to assess whether a payment was due, but it does not follow that this constituted a variation to the contract. There was no evidence of any conscious turning of minds by the owners or the builder to redefining the meaning of frame stage, or to deleting the requirement for MBS's approval. Nor was there any consideration for such a variation.

86. The builder also submits that further evidence of a variation can be found in the fact that the bank adopted a different method of assessing this stage than what was contractually agreed. The bank approved 35% of the total building contract price rather than the 45% specified in the contract (being the total of the deposit 5%, plumbing and slab in ground stage 15% and frame stage 25%).

87. I do not accept that this unilateral action by the bank relieved either the owners or the builder from their obligations under the building contract. Had the stage been correctly completed, then it would have been open to the builder to insist that the owners pay the full amount of the claim (being 45% of the contract price), even though their bank only approved 35%.

88. Third, the builder says that further evidence of an agreed variation was Mrs Barbour's representation to him that she would pay the balance of the frame stage at lock-up stage, which he agreed to. In my view, the fact that the owners relied on the bank to assess the stage of the work, the bank made an assessment using its own criterion and not that set out in the contract, and the builder accepted that assessment, does not lead to a conclusion that the parties had agreed to vary the definition of 'frame stage' in the contract, or that the owners are now estopped from denying the completion of the stage. Further, even if there was a representation by Mrs Barbour that the balance of the frame stage would be paid at lock-up stage, the difficulty for the builder is that the works did not reach lock-up stage while the contract was on foot (for the reasons set out below).

89. Fourth, and perhaps most significantly, I am bound by the decision of the Court of Appeal in *Imerva Corporation Ltd v Kuna*[19] in relation to section 40 of the DBCA. This section relevantly provides that:

> (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….

[19] [2017] VSCA 168 at [96]

> (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.

90. The *Domestic Building Contracts Regulations* 2007 and 2017[20] specify a particular form which must be used if the payment regime is to vary from that specified in the Table. The form contains a warning which must be signed by both parties. The type of contracts listed in column 1 of the Table referred to at section 40(2) includes a contract to build all stages of a home, such as in the present case.

91. In *Imerva,* Tate JA held as follows at [98]:

> "…non-compliance [with section 40(4) of the DBCA] means that, pursuant to s 40(2), [the builder] was not entitled to demand, recover, or retain more than the percentage of the contract price specified in the prescribed payments regime … [The builder] remains entitled to the sequence of payments specified in the prescribed payments regime under s 40(2) of the Act, insofar as the stages of construction identified under the Act were completed… [T]he progress payments revert to the statutory regime as expressed schematically in the Contract in Method 1."

92. In the present case, the parties had already agreed to vary the progress payment schedule from that set out in the Table and had done so in writing using the prescribed forms. This agreement is contained at page 42 of the contract. Pursuant to the decision in *Imerva Corporation Ltd v Kuna*, any subsequent oral or implied variation of the agreed progress payment schedule is not enforceable, as it was not made on the prescribed form and with the signed warning. Accordingly, the builder is only entitled to the progress payments as agreed at page 42-43 of the contract, namely that the owners must pay 25% of the contract price upon the completion of frame stage (as defined in the building contract) and 25% of the contract price upon completion of the lock-up stage (as defined in the building contract).

Conclusion on the Frame Progress Claim

93. Having found that:

    a. the works were not approved at frame stage, for the reasons that, first, they had not been approved by the building surveyor, and second, they were not completed in accordance with the building permit;

    b. the owners had no obligation to query or review the builder's actions before alleging the builder had repudiated the contract by claiming the frame stage progress claim; and

    c. there was no variation (or no enforceable variation) to the payment schedule set out in the contract,

[20] reg.13 *DBC Regulations* 2017 and reg.12 *DBC Regulations* 2007

I find that the builder was not entitled to claim the payment of the frame stage in December 2014, nor to maintain that claim throughout 2015. As a result, I am satisfied that its conduct in so doing was repudiatory.

Was the builder entitled to claim the Lock-Up Progress Claim?

94. The next act of repudiation relied on by the owners was the builder's claim for the lock-up stage payment, before that stage had been completed. As set out above, the builder invoiced the owners on 3 February 2015 for the amount of $329,175, which included the amount stipulated in the contract for the lock-up stage ($235,115) plus the balance of the frame stage invoice that was unpaid. The owners part paid this invoice on 9 February 2015.

95. By that date they had paid the builder in respect of the frame stage and lock-up claims a total of $423,225. This sum was $188,100 more than the full amount of the frame stage claim, to which the builder was not entitled (as I have found above).

96. The owners allege that the lock-up stage had not been completed for the following reasons:

    a. the dwelling was not locked up because there were no external doors on the garage or upstairs balcony entry, and arguably no door on the front entry; and

    b. because the frame stage had not been completed, there was no entitlement to the lock-up stage, in accordance with the decision of the Court of Appeal in *Cardona v Brown*[21].

97. In light of my finding above that the works had not reached the completion of frame stage, and following the *Cardona v Brown*, I am satisfied that the builder was not entitled to the progress payment for the lock-up stage.

98. As a result, I am not required to make any findings as to whether the works had physically been locked up or not. However, if I am wrong about whether the frame stage had been reached, I would nevertheless find that the works had not reached the completion of lock up stage as defined in the contract at clause 1: "when the home's external wall cladding and roof covering is fixed, the flooring is laid and external doors and windows are fixed (even if those doors or windows are only temporary)". The same definition is found in s.40 of the DBCA.

99. In *Cardona v Brown*, the issue was whether a garage, which formed part of the house, was required to have an external door fixed to it. Tate JA (Bongiorno and Osborn JJA agreeing) held at [82] – [85]:

[21] [2012] VSCA 174; (2012) 35 VR 538

> "82. The failure of the builders to install either the roller doors specified in the plans, or temporary doors, left the home in a state where its external doors were not fixed. The dwelling did not satisfy the definition of 'lock-up stage'...
>
> 85. Moreover, it is unlikely that the expression 'lock-up stage', as chosen by Parliament under s 40, and as adopted by the parties to the contract, is no more than a label; the very expression conveys the achievement of some degree of security. Indeed, the reference in the definition of 'lock-up stage' to 'temporary doors or windows' suggests that there may be a need for interim works to be done for the purpose of ensuring that the home is completely enclosed. This suggests that some minor temporary construction may indeed be required beyond the specifications in the plans..."

100. The evidence in the present case indicated the following about the state of the works when the lock-up stage was claimed:

101. The owners' building consultant, Mr Seville of Darbecca, inspected the property on 27 February 2015 and prepared a report, with photographs, which were tendered without objection. There was no front door present at the inspection and no evidence that a temporary front door had been installed prior to that date, such as markings on the doorframe for hinges or other fixings. The garage opening had not been covered at all.

102. Mr Bishara said that he had installed a temporary front door, but that the owners had removed it. I find this is not credible, especially when there is no physical evidence a temporary door was ever installed, and no receipts to show one had been purchased.

103. Mr Bishara gave evidence to explain the lack of markings on the doorframe by saying he had asked his carpenter to remove the doorframe which had markings from the temporary door and to reinstall a new frame between 3 February and 27 February. I find this improbable.

104. It is also inconsistent with answers he gave to the VBA, when questioned about this project as part of an inquiry conducted by them. His record of interview with the VBA was put to Mr Bishara in cross examination. In that record, when the VBA suggested to him that the lock-up stage had not been reached, Mr Bishara made no mention of having installed a temporary front door; instead he blamed the owners for not having chosen the door design. If there had been a temporary door at any stage, it is more likely than not that he would have mentioned that to the VBA investigator. I note that Mr Bishara said that the record of interview must have been wrong, but I also note that he signed it and initialled every page.

105. In the present hearing, Mr Bishara then said that he had installed a temporary fence in front of the garage opening and front entry, and said that was sufficient to constitute locking up the property. This fence was shown

in footage taken on 25 March 2015 during the Darbecca attempted inspection (further details of which are set out below), and was a series of wire fence panels, located at a distance of between half to one metre from the building itself.

106. Similar photographs were contained in an inspection report prepared by Mr Grahame of the VBA at the owners' request on 11 June 2015, showing the temporary fence still in place but no front door, upstairs door or garage door. The owners' photographs show a similar situation.

107. In my view, the use of a temporary fence located some distance from an uncovered garage opening and the front entry, together with a completely uncovered upstairs balcony door opening, does not equate to a 'fixed' external door as defined in the contract. Accordingly, regardless of the issue of the frame stage approval, the works had not reached lock-up stage as at the date the progress claim was issued or at any time thereafter.

Was the builder entitled to suspend the works?

108. On 23 March 2015 the builder issued a Notice of Suspension, relying on the ground that:

> "You, the Owner(s) have failed to make a Progress Payment that is due within 14 days after it became due. The Progress Payment you have failed to make is Progress Claim Certificate for: Frame Stage".

109. The owners submit that there was no entitlement to suspend the works, since the frame stage progress payment was not due.

110. Mr Bishara said that he served the Notice "due to the monies outstanding", as he was frustrated by the owners' reluctance to pay for variations which they had requested and to pay for the balance of the progress payments. Attached to the Notice of Suspension was a document headed "Summary of Claims" which set out the progress claims made and paid, together with four variations and one reimbursement which had been claimed but not paid.

111. Mr Bishara also said that he served the Notice to try to get the owners to meet with him and to provide instructions about items such as the kitchen cabinetry, the front door and the bathroom appliances.

112. The Notice of Suspension was expressed to be for a failure to pay the frame stage. As I have found above, the builder was not entitled to be paid the frame stage and accordingly on that ground alone the Notice of Suspension was invalid and constitutes a repudiation of the contract. The comments in *Cardona v Brown* at [87] are apt and I respectfully adopt them:

> "[The builder's] suspension of the works, in response to the owners' refusal to pay for lock-up stage, was thus in breach of the contract. The owners

were correct to accept the suspension of the works, in the circumstances, as a repudiation of the contract and were entitled at common law to bring the contract to an end."

113. Second, I do not accept Mr Bishara's evidence that the owners should have understood that the Notice of Suspension was really a response to their failure to provide instructions about the works and to pay for the variations. If the builder had really been unable to carry out any further work because the owners had not responded to his emails requesting details about the kitchen cabinetry, the front door, the bathroom appliances, then the Notice should have been phrased accordingly, and not as a demand for monies.

114. Further, as discussed below in respect of the builder's variation claims, I have accepted that the builder is entitled to payment of $94,513.50 for variations. Even if I were to accept Mr Bishara's evidence that he had suspended the works pending payment of these variations, the amount in question was not due as at 23 March 2015, because the owners had already overpaid the builder for the frame stage and lock-up stage.

Was the builder entitled to refuse the owners and their experts access to site to inspect the works?

115. Mrs Barbour said that by mid February 2015 she was concerned that the builder was charging in advance for progress payments, when she observed that the roof of the garage was incomplete. She engaged a building consultant, Mr Seville, of Darbecca Pty Ltd, who inspected the works on 27 February 2015 and prepared a report. A copy was sent to the builder.

116. Mr Bishara's evidence was that during the inspection, Mr Seville damaged the property, by slashing insulation and spraying pink paint on the flooring and walls. He had not asked for permission to do this. Mr Seville did not give evidence to explain his actions, but during the view of the site in the hearing, Mr Johnson (the expert for the builder) pointed out the areas of damage. It appeared to me that the pink paint had been used to mark defects and the installation had been slashed in a few locations in order to inspect the construction behind it. I do not think it appropriate for a building consultant to do this without the builder's permission, however I do not think there was anything destructive or malicious in Mr Seville's actions.

117. Following that inspection, the builder wrote to the owners on 6 March 2015 and said:

> "as we have advised you many time before, the building site is a very dangerous site. Please no person or owners or public or visitors are allowed to enter the building site… without a written permission from [the builder]. No entry to the site without our supervision".

118. The owners submit that email, purporting to limit access to the site, is a breach of clause 7 of the contract. I do not agree with that submission. Clause 7 is based on section 19 of the DBCA, which provides that a builder must give an owner reasonable access to site. It is not unreasonable for a builder to require notice in advance of an inspection. Mr Bishara seems to have misunderstood the need for written permission or a permit, as referenced in his email and in the video of the meeting with Mr Mladichek discussed below, but I am not persuaded that makes the demand in his email for notice to be unreasonable.

119. On 25 March 2015, a meeting was arranged on site between Mr Bishara, the carpenter Jerry, Mr Flanagan and Mr Giardina from MBS, the owners and their building consultant Mr Seville. I was shown a video of the meeting on site. It is fair to say that Mr Bishara refused to allow access to Mr Seville, but Mr Seville provoked Mr Bishara's reaction, by walking forward towards him, walking backwards towards him, and by trying to go around him to get through the temporary fence. During this time Mr Bishara was on the phone to the police. Given the damage caused to the property by Mr Seville previously (which I accept was inappropriate), and his antagonistic approach (saying "that's assault" when he walked in to Mr Bishara), and the confrontationist attitude of the owners (who were filming the altercation and regularly shouting out "you're on video"), I do not find that refusal to be unreasonable.

120. On 9 May 2015 the owners attended the site with a different building consultant, Mr Mladicheck, without notice. The video taken by the owners indicates that meeting was initially cordial, with discussion between Mr Mladicheck and Mr Bishara about site safety and the need for a permit for access. Mr Barbour then became agitated and told Mr Bishara he could "go to hell". Mr Bishara's response was that "it is not your house" and "as long as you owe me $95,000, it is not your house". Again, given the lack of notice and the confrontational attitude of the owners, I do not find the denial of access on that occasion to be unreasonable.

121. Had those been the only occasions relied on by the owners, I would have concluded that the builder was not in breach of the contract by refusing to grant them access to the property. However, Mr Bishara gave evidence that at no time after refusing access to Mr Seville did the owners make a further request for another building consultant to inspect the site. That evidence is contradicted by the file note of a phone call made by the then solicitor for the owners (Mr Turnbull of Boutique Lawyers) to the builder on 16 April 2015, in which Mr Turnbull requested permission for a building consultant, Mr Love, to attend the property. The file note records that Mr Bishara replied "he said no more access for the building expert and said they've already been out… I asked if he would give access to the building expert repeatedly and he replied each time that the building expert has already been given access". Mr Turnbull was not called to give evidence, but I

accept his file note as being a true record of the conversation as Mr Turnbull is a solicitor, the note is contemporaneous, at the time it was made it was not apparent that access would be relied on as a ground for terminating the contract, and there was no reason for Mr Turnbull to make an inaccurate recording. In his evidence, Mr Bishara agreed that a conversation had taken place but his recollection about its contents was vague.

122. I find that that the request on 16 April 2015 was reasonably made and was unreasonably rejected. I find the refusal to grant the owners and their consultants access to inspect to be evidence of the builder evincing an intention to not be bound by the terms of the contract.

Did the builder make improper demands for money and/or refuse to build in accordance with the approved drawings?

123. The owners nominate these as distinct grounds of repudiation; I have considered them as part of the other grounds above (improper demands for progress payments) and below (the nature and extent of defective work).

124. In summary, I found that the builder did make improper demands for payment of the progress claims and that this was a ground of repudiation. On the other hand, as discussed further below, I do not accept that the builder refused to build in accordance with the approved drawings. I found that the builder made an error about the design for a roof over the balcony and the height of the garage wall, but had conceded the errors and had agreed to rectify.

Does the nature and extent of defective work amount to a repudiation or serious breach of the contract?

125. The owners submit that there are significant defects in the building work carried out by the builder, and this, together with its failure to follow the building permit approved drawings (for example the missing roof over the balcony and the height of the garage wall), demonstrated that the builder had not carried out the work in a proper and workmanlike manner nor with reasonable care and skill. They cite this as a further example of the builder's repudiatory conduct; alternatively, that it meant the builder was in substantial breach of the contract when it sent the letter of 31 August 2015, and so was not entitled to terminate the contract.

126. They rely on the decision of Dixon J in *Stojanovski v Australian Dream Homes*[22] where he concluded that a failure to build in a proper and workmanlike manner was a substantial breach of the contract, even though the works had not been completed, and this entitled the owners to determine the contract by following the two step process provided for in the contract (being a default notice followed by a notice of termination if the default is

[22] [2015] VSC 404

not remedied). I do not find this authority relevant in this case, as we are not dealing with the two-step process here. Instead of needing to decide whether the breaches were 'substantial' as at August 2015, and whether this provided grounds for a default notice to be served, I must assess whether or not the builder had evinced an intention to no longer be bound by the contract.

127. In my view, when assessing whether a party intended to be bound or not by the contract, it is the actions (or inaction) taken by them that are relevant, not the fact that there is defective or non-compliant work per se. In the present case, the nature of these items (details of which are set out at Part F below) were that they were works in progress, rather than being irremediable failures. Neither expert suggested that any of the defective items could not be rectified. As for the non-compliance with the approved drawings, the builder conceded it had made an error by omitting the roof over the balcony and misreading the height of the garage wall. These errors were able to be rectified, and in fact the builder said it had purchased the bricks to rebuild the garage wall by early March. Had there been no other instances of repudiation, the existence of defective and non-compliant work on its own would not be sufficient to constitute grounds on which the contract could be terminated in the present case.

128. I note here the builder's submission that as at the date of the termination, the owners were only in possession of two reports about the state of the works: Mr Seville's from February and Mr Grahame's from July. It is submitted that because the builder had completed the items in the first and planned to address the latter, the owners had no grounds for believing the builder had failed to remedy defective work.

129. The difficulty for the builder with this submission is that a party may rely on any acts amounting to repudiation, even though they were not relied on at the time of termination: *Shepherd v Felt Textiles of Australia Ltd*[23]. The owners now submit that the nature and extent of the defective and incomplete, work as identified by Mr Lorich, and the builder's failure to return to work to address these items, is an act of repudiation. The fact that Mr Lorich only identified these items after termination does not prevent the owners from now relying on them.

Did the builder fail to return to work?

130. While the existence of defects and non-compliant works does not constitute a repudiation of the contract in the present case, the builder's response to these issues is a separate question which is relevant when assessing its intention to complete the contract. The owners submit that following the Notice of Suspension, the builder "continued not to work", and its

[23] (1931) 45 CLR 359 at 377-8

behaviour was not consistent with an intention to perform the contract either at all, or substantially in compliance with the builder's obligations.

131. On 14 April 2015 the owners' solicitors wrote to the builder and demanded that it withdraw the Notice of Suspension and continue with the works. They say that the builder failed to do so and that no visible progress was made on the site following that letter. Instead, when the owners attended the property with the building inspector on 9 May 2015 they were told to leave, and Mr Bishara said to them "it is not your house", "as long as you owe me $95,000, it is not your house" and he could delay the building works for a number of years.

132. Further, after receiving the Notice of Suspension, the owners lodged a complaint with the VBA on 1 April. Mr Grahame of the VBA inspected on 11 June. During the inspection, Mr Bishara told Mr Grahame that the building work had ceased because the builder had issued the owners with a Suspension Notice. This is recorded in Mr Grahame's inspection report dated 7 July 2015. I note Mr Bishara's denial that he had said that to Mr Grahame, but I prefer the written evidence to Mr Bishara's recollection.

133. Mr Bishara then went on an overseas holiday for a month from 8 July 2015. The owners say that as at the date of termination on 11 August 2015, the builder had not communicated with the owners in writing or by phone to say that:

    a. the suspension was lifted;

    b. the frame stage or lock-up stage had been completed; or

    c. that he intended to continue building the property.

134. Mr Bishara gave evidence that he had either rectified or intended to rectify the defective and non-compliant works. He said that he accepted the items in Mr Seville's report, had commenced rectifying them immediately and had completed them by the time of the frame inspection in April. He said he was not aware of the missing balcony roof because the drawings were not clear, but had he been told earlier he would have fixed it. Further, he said that he had intended to carry out the items identified by the VBA inspector, and tendered in evidence an email to the VBA dated 8 July 2015 in which he said that he was leaving for his holiday but would attend to the items when he returned.

135. As for completing the works, as set out above, he said that notwithstanding the Notice of Suspension, he continued to work at the site, and the owners observed him doing so. He attended to the items required for frame approval and arranged for plumbing and electrical work to be carried. This included digging trenches, and Mr Bishara said that he saw the owners watching the excavator on site for 20 minutes one day, and so they should

have known the works were not really suspended. Then he said he was told in an email from the VBA to not do anything until the inspection to be conducted by Mr Grahame in June. However, Mr Bishara did not produce the alleged email.

136. On 26 June 2015 MBS issued a Building Direction in relation to the location of the retaining wall. Mr Bishara said that he requested time to deal with the Direction as he would be overseas and took steps to obtain the required amended architectural drawing on 7 September.

137. Mr Bishara also said that he was unable to proceed with many items because the owners had refused to meet him or to give him confirmation on inclusions such as the kitchen, stairs, appliances, doors.

138. The builder's submission is that notwithstanding the Notice of Suspension, the works were not actually suspended, which the owners knew or ought to have known. I do not accept this contention, for the following reasons.

139. The works being carried out in April and May were largely administrative (providing engineering documents to the surveyor, arranging other contractors). There is no evidence that owners were copied in to these communications. Seeing an excavator working on site for 20 minutes is not sufficient to have alerted the owners that the Notice of Suspension was not being enforced.

140. Further, I do not accept Mr Bishara's evidence that notwithstanding the Notice of Suspension, the builder was actively progressing the building works (as opposed to simply dealing with the matters raised by MBS and the building consultants), as it is inconsistent with contemporaneous records.

141. Mrs Barbour's evidence was that at that time she also received an email from the air-conditioning subcontractor stating that he had been advised by the builder that he had closed the building site and the subcontractor would not be able to complete the rough-in scheduled. Counsel for the respondent objected to the email being tendered as being hearsay. During the hearing I ruled that I would give the email such weight as I thought appropriate, after it had been put to Mr Bishara. It was not put to him. Nevertheless, and although the author of the email was not called, I will allow the contents as a business record, as I am permitted to do pursuant to sections 97 and 98 of the *Victorian Civil and Administrative Tribunal Act* 1998.

142. Further, the builder's contention is inconsistent with the statement made by Mr Bishara to Mr Grahame of the VBA.

143. Further, Mr Bishara's own evidence was that he was unable to proceed with much of the internal works as he was waiting on instructions from the owners. By mid-March (prior to issuing the Notice of Suspension) he had

told the owners there would need to be a variation as a result of the amended drawings provided by their architect on 5 March. He said he had asked to meet the owners on many occasions to discuss the vanity, kitchen cabinetry and other items. They failed to provide instructions and failed to meet him (for example at the staircase manufacturer) and as a result he cancelled the subcontract for the kitchen which he had already entered into.

144. The examples given by Mr Bishara of his requests for information all predate the Notice of Suspension. When asked in cross examination about the progress of the works after the Notice, Mr Bishara said that he:

> "can't do much inside because the owner didn't give me dimension to get which kitchen, which front door. There's no response about all the email I sent for any item. I send about five email requesting meeting, requesting item essential for me to start work on site and she say you will get another inspection. I get email. I receive email saying you get another inspection in March, which is from VBA, and don't do anything until inspection. I waiting and when I get Mr (indistinct) here and I waiting for a report. I get a report back at the same day I go oversea. When I come back there's no access for me"[24]

145. There was no evidence of any attempt by Mr Bishara to obtain further instructions from the owners about the cabinetry, vanity, or other internal items after the builder served the Notice of Suspension. Even if I accept that the owners had failed to provide instructions prior to 23 March, they could not have known that that was the reason the works were unable to continue after that date, in circumstances where the Notice did not say so and no further request for instructions was made following the Notice being served.

146. For the reasons set out above, I am satisfied that the builder failed to withdraw the Notice of Suspension and failed to advise the owners that it was working and intended to continue after Mr Bishara's return from holidays. Further, I do not agree with the builder that the owners should have known that the despite the Notice the builder was continuing and intended to continue to work after the holidays. Instead, what Mr Bishara had told the owners was that the house was not theirs until they paid him $95,000 and that he could delay the works for a number of years. I accept the submission that the builder failed to return to work.

Did the builder's letter of 31 August 2015 amount to a repudiation?

147. As an alternative contention, the owners submit that the letter from the builder's solicitors dated 31 August 2015 (purporting to terminate the contract based on the owners' repudiation) was itself repudiatory conduct. They submit that either the builder was in "substantial breach" of the contract at that date and therefore was not entitled to purport to terminate it,

[24] T669/670

or alternatively this letter is a further ground of the builder evincing an intention to not be bound by the building contract. As I have found that the contract had been validly terminated by this date (by the owners' solicitor's letter of 11 August), I do not need to consider whether this letter had the contended effect.

Conclusion on the builder's repudiation

148. As set out above, the builder submits that it demonstrated "serious and consistent" effort on its part to meet its obligations and there was "no suggestion that it sought to be relieved of its obligations altogether"[25]. Based on my findings of fact set out above, I do not accept this contention.

149. The builder submits that "a significant aspect of this case which is relevant to the issue of termination is the incomplete stage at which the design had reached at the time of contract". It is suggested that the incompleteness of the design and the speed with which the drawings were prepared resulted in inadequate consideration being given to the layout of the land and the need for retaining walls. That may be correct, however the layout of the land and the location of the retaining walls is not a factor relied on by the owners as evidence of the builder's repudiation.

150. Further, the builder submits that in determining whether a breach is repudiatory, the conduct of the party not in breach is also relevant, for example, whether breach might have been avoided or remedied if the other party had protested at the time. It says that the relevance in this case is the owner's awareness of, and failure to complain about, the fact that the external doors were not fixed at the time the lock-up payment was claimed. As a result of my findings that the claiming of the lock-up payment before it was due was not the only breach of the contract by the builder, I reject the submission that the owners' failure to complain about the missing doors should be taken to mean the builder's conduct as a whole was not repudiatory.

151. Whilst I accept that the builder may have had genuine difficulties in obtaining instructions from the owners, or certainty on amounts to be paid for variations, I am satisfied that an objective observer would conclude from the builder's actions, taken in combination, that it was not willing to complete the contract according to its tenor, in circumstances where it had:

    a. demanded two progress payments to which it was not entitled;

    b. issued a Notice of Suspension relying on one of those progress payments being outstanding;

    c. not withdrawn the Suspension;

[25] Builder's closing submission paragraphs 24-29 and the cases cited therein

d. performed only minimal works on site;

e. responded to the owners' solicitor's letter of 14 April 2015 by saying he would see them in court;

f. denied access for a properly arranged inspection;

g. maintained its claim for $95,000 at a meeting with the owners' inspecto;, and

h. advised the VBA that the works were suspended.

152. Lastly, I accept the builder's submission that it is not repudiatory conduct to submit a claim for a progress payment prior to the completion of the relevant stage. However, where the builder then suspends works on the grounds it has not been paid for that progress payment submitted prior to the completion of the relevant stage, that conduct is repudiatory.

B: DID THE OWNERS ELECT TO CONTINUE THE CONTRACT?

153. On 14 April 2015 the owners' then solicitors wrote to the builder and stated as follows:

> "… Pursuant to the Surveyor's Notice the Frame stage is not in compliance with the provisions of the Act, regulations, BCA and/or Australian Standards as are relevant to the approved Building Permit documents and therefore the Frame Stage is not complete. Further, as Frame stage is incomplete Lockup stage is also not complete….
>
> Our clients demand that you refund all monies paid for the Frame and Lockup stages in the sum of $423,225 within 7 days… Should you fail to pay the said monies… we are instructed to immediately issue proceedings in the [VCAT]…
>
> This letter in no way forms any repudiation of Contract on the part of our clients but merely requires you to comply with your obligations pursuant to the Act and the Building Contract. We note that as a result of you failing to allow our clients access to the property we have not been able to obtain an expert's report… Unless you allow our client's expert access to the property… we shall proceed to file an application with VCAT to obtain access…"

154. The builder submits that this letter is an unequivocal election by the owners to affirm the building contract, and that therefore they were not entitled, as at August 2015, to terminate.

155. In response, the owners say that such a contention lacks merit. Election requires a party faced with the ability to exercise inconsistent rights, to choose one or the other. In not terminating at this stage, the owners in no way disentitled themselves from doing so at a later stage, in circumstances where the builder did not refund the money is to which he was not entitled,

did not return to work or withdraw the notice of suspension and engaged in continuing and additional repudiate trick conduct.

156. The applicable test to be applied in respect of an election, is set out in *Sargent v ASL Developments Ltd*[26], as follows:

> "The doctrine of election between two inconsistent legal rights is well-established but certain of its features are not without their obscurities. The doctrine only applies if the rights are inconsistent the one with the other and it is this concurrent existence of inconsistent sets of rights which explains the doctrine…
>
> For the doctrine to operate there must be both an element of knowledge on the part of the elector and words or conduct sufficient to amount to the making of an election between the two inconsistent rights which he possesses…"

157. Mason J affirmed his decision in *Sargent* in *Turner v Labafox International Pty Ltd*27:

> "…a binding election to affirm a contract may be made by a person who then has knowledge of the facts giving rise to a right of rescission, though unaware of the existence of the right of rescission, and that unequivocal conduct affirming the contract will in such circumstances preclude the exercise of the right of rescission."

158. The test may be summarised as follows[28]:

> "A promisor's repudiation of obligation continues to operate as such – and remains available as a basis for an election to terminate the contract – until it has been withdrawn, or the promisee elects to continue with the contract. Accordingly, if a promisor repudiates the contract, but the promisee elects against termination, the promisee is entitled to terminate the contract if the promisor nevertheless continues to repudiate.
>
> The position is the same if the promisor repudiates the contract on a subsequent occasion, following the promisee's election to continue performance. The promise obtains a fresh right to terminate unless what is put forward is an effective exercise of a right to terminate enjoyed by the promisor against the promise."

159. Applying the test to the present case, I am not satisfied that the letter of 14 April 2015 amounted to an election by the owners to continue the contract. There is no indication in the letter that the owners have chosen not to exercise their rights to terminate the contract but instead to keep it on foot. Rather, the demands in the letter address specific issues such as repayment of a progress claim and access.

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[26] (1974) 131 CLR 634 per Stephen J (with whom McTiernan ACJ agreed) at 641-2
[27] (1974) 131 CLR 660 at 670
[28] *Carter's Breach of Contract*, LexisNexis Butterworths 2011 at [11-61]

160. If I am wrong about that, and the letter did amount to an election, I nevertheless accept that the owners were entitled to subsequently terminate the contract. The builder's repudiatory conduct was ongoing, in that despite demand he did not refund the overpayments or withdraw the notice of suspension or complete the frame satisfactorily or fitted external door is to enable the lock-up claim to be justified. Moreover, the builder engaged in further repudiatory conduct such as sending the further invoice for $47,025 (being the balance outstanding for frame stage) and by excluding access to the site on 9 May 2015.

C: DID THE OWNERS REPUDIATE THE CONTRACT?

161. Given my findings above that the builder repudiated the contract, I conclude that the owners did not repudiate the contract by their letter of 11 August 2015.

D: THE CONSEQUENCES OF THESE FINDINGS

162. As a result of these findings, I now turn to the assessment of the owners' loss and damage. I agree with the analysis submitted by the owners (as set out above), that the starting point is the agreed cost to complete the dwelling (which is considered at Part E below), less the amount that would have been payable to the builder under the contract, plus an amount to rectify defective work (discussed at Part F below). I will then consider the other claims, being the owners' claims for a refund of disputed variations already paid (at Part G below), and the builder's claims for variations for extra work carried out (at Part H below).

E: COMPLETION COSTS

163. During the hearing, the experts, Mr Lorich and Mr Johnson, agreed on a figure which they said represented the reasonable costs to complete the dwelling in accordance with the contract specifications and approved drawings. The amount they agreed on was $687,196, including GST. Their original estimates had been approximately $725,000 (Mr Lorich) and $664,000 (Mr Johnson), and accordingly I accept this compromise position. I also commend them and the parties for having saved a great deal of hearing time and cost, as this compromise figure was worked out and agreed while the hearing was in progress.

The lift storage claim

164. The owners also claim for storage costs for a lift they had purchased. They say that had the project been completed on time, the lift would have been installed well prior to completion. As a result, the owners would not have incurred the storage costs for the lift, from the period June 2015 to date. The amount is $25,025. They also seek a further six months of storage costs at $715 per month, being an estimate of the time will be required to restart and continue the building works before the lift can be installed.

165. The builder's position is that the cost of the lift was excluded from the contract price, at the owner's request. Although the builder assisted them by paying a deposit for the lift in December 2014, which the owners repaid to the builder (albeit after a delay), the issue here is that the builder should not be responsible for the storage of an item which was not part of the building contract. Further, the builder submits that the owners have failed to mitigate the loss.

166. In my view, the storage costs claimed were not reasonably foreseeable in terms of the test set out in *Hadley v Baxendale*[29]. The purchase of the lift was not part of the builder's obligations under the building contract. There was no evidence that the builder was aware that storage costs would be charged to the owners. Alternatively, if such costs were reasonably foreseeable, then the owners have failed to mitigate the loss by making alternate arrangements either to store the lift, to cancel the contract with the supplier, to sell it, or to complete the construction of the house. As I said earlier, the house has been sitting incomplete for three years. The builder is not liable for that failure to mitigate: *Australian Dream Homes Pty Ltd v Stojanovski (No 2)*[30].

F: THE DEFECTS

167. The method of costing the defective work used by Mr Lorich and Mr Johnson was similar. Both allowed a margin of 35% and GST of 10%, which combined equals a mark-up of 48.5%. Both allowed similar labour rates. The differences between their costings arose where they had allowed different scopes of work. They attended the view on site and then gave their evidence concurrently during the hearing.

168. Each provided a written report with detailed pricing calculations included. In this decision I will not set out those calculations in detail, unless there is a discrepancy between the experts. Similarly, where an item is agreed to be a defect, I accept that it is defective due to the workmanship of the builder (or lack thereof) and that it is a breach of the warranties given by the builder under section 8 of the *Domestic Building Contracts Act* 1995, unless otherwise stated. In providing their costings for each of the items below, the experts included the mark-up of 48.5% on top of the raw figures for each item. Accordingly, each of the totals below includes 48.5% for margin and GST.

(1) Missing damp course, weep holes $2839

169. Both Mr Lorich and Mr Johnson agreed that there is no damp course or flashing on the entry wall and weep holes are missing. Following this view, both agreed on the required scope of work (Mr Lorich having revised his opinion while on site), which is to rectify the brickwork panel to the right-

[29] (1854) 9 Ex 341
[30] [2016] VCAT 2194

hand side of the front door and to insert weep holes on the left-hand side panel. Mr Lorich had originally allowed to completely rebuild the left-hand side panel. During the hearing, he revised his costing for this item to $2839, made up as follows:

Item	*Allowance*	*Amount*
Demolition and props	6 hours at $60/hour,	$360.00
Changes to brickwork	16 hours at $85/hour,	$1,360.00
Re-render	4m² at $48/m²	$192.00
Subtotal		***$1,912.00***
Margin and GST	48.5%	$927.32
Total		**$2,839.32**

170. Mr Johnson had allowed 8 hours for a bricklayer and labourer rather than the 16 hours allowed by Mr Lorich. Mr Lorich agreed with Mr Johnson that 8 hours would be reasonable if other brickwork items were being attended to on-site, as there would be no separate time required for setting up and finishing the job.

171. Having concluded that there will be further brickwork items to be rectified (see defects numbered 18 and 21 below) I will allow 8 hours for this item, together with the other costs set out in the table above, making a total cost of $2,159.

(2) Missing control joints and movement gaps $1,782

172. The experts agree that further control joints are required and that existing joints (particularly around the north wall windows and door) require a movement gap. Mr Johnson had estimated $3,486 for this work, while Mr Lorich had allowed $1,782. The differences between them were explained as follows:

    a. Mr Johnson's estimate included an allowance for new mouldings in case they cannot be reused. Mr Lorich agreed that this was reasonable.

    b. Mr Johnson allowed $800 for scaffold, while Mr Lorich has an allowance for scaffold generally at items 15, 43 and 44.

    c. Mr Johnson allowed for localised render repairs, while Mr Lorich has included the render component at item 43, where he allowed for a complete render recoat of the building.

173. The cost of scaffolding is complicated by the different methods of calculation. Mr Lorich has allowed for scaffold in three places (items 15, 43 and 44) totalling $20,000, but says that would also cover this and similar items. Mr Johnson has allowed $3,800 for items 2 and 44, but conceded that a further allowance is required for item 43 and may be required for item 15 if allowed. Mr Lorich calculated his amounts on a lineal metre

basis while Mr Johnson's was on a square metre basis. Each agree that the others' method is acceptable. On that basis, I will allow an overall sum for scaffolding at item 43 which will include all items requiring scaffolding. Details of the calculation are set out at item 43.

174. Having allowed an amount for scaffold at item 43, I will allow Mr Johnson's figure less $800, making a total of $2,686.

(3) Bricks used as subfloor bearer supports $1,114

175. The owners withdrew this claim during the hearing on the basis that a certificate of compliance in relation to this item has been provided by the project engineer.

(4) Gas pipe exposed $980

176. Both experts agree that the gas pipe must be covered. Mr Lorich has allowed to cover the pipe and also to attach it to the wall of the house. His opinion is that this is a prudent measure so that it does not get damaged. Mr Johnson allows for a cover only, on the basis that the pipe is likely to be buried underground once landscaping is completed and so is not in danger of being damaged.

177. I will allow Mr Johnson's estimate of $468 as it is obvious from the site that extensive landscaping will be required particularly along the western side of the house where this pipe is located. Landscaping was not part of the builder's scope of works.

(5) Window packers incorrectly done $535

178. Both experts agreed that this item is a defect for which the builder is responsible. The difference between their costings was minimal ($535 and $416) and the parties sensibly agreed that I should allow an amount halfway between them, in order to save time and costs during the hearing. Accordingly, I will allow $475.50.

(6) No silicone to plumbing hot cold pipes through frame $535

179. The claim is that the hot and cold pipes have been roughed-in through the timber framework but no silicone has been provided. Mr Lorich's view is that this work should be completed as part of the lock-up stage works, because it cannot be completed after the wall plaster is in place. Mr Johnson agrees that silicone is required but says this would normally be part of the completion of the house rather than being classified as a defect. They agree that a reasonable amount for this item is $535.

180. I will allow this item as a defect, as I accept Mr Lorich's opinion that it is unlikely that a plumber would be called back to apply the silicone after the rough-in is completed and before the plaster board is applied. Further, I

note the experts have not included this as a completion cost (so there is no duplication of amount).

(7) Wall blocks not fully nailed or fitted $594

181. Both experts agreed that there are a number of wall blocks which require attention. Mr Lorich revised his estimate from 6 hours to 5 hours of labour being required, making his costing $504.90. Mr Johnson had not provided an estimate in his report but thought that a reasonable costing would be about $250. The parties then agreed that I should allow an amount halfway in between the two figures, in the interests of efficiency. I will therefore allow $375 for this item.

(8) Sarking missing and gaps $505

182. The experts agreed that there are areas of sarking missing and damaged and their costings were very similar. They agreed that I should allow an amount halfway in between their two estimates. I will therefore allow $464.

(9) Floor in ensuite out of level $624

183. Both agreed that the floor in the ensuite is out of level. Mr Lorich allowed $624, being four hours of labour and six bags of Ardit levelling compound. Mr Johnson allowed a rate of $30 per square metre, being that prescribed by Cordell's Guide[31], totalling $446. Mr Lorich said that I should calculate the cost on an hourly basis, rather than an area basis, because the job requires several attendances at different times. The Ardit leveller must be applied in several coats, allowing 24 hours between layers to set. I accept Mr Lorich's opinion that an hourly rate is appropriate and will allow his figure of $624.

(10) Heat/air conditioning voids not fitted $683

184. The claim is that the heating and air conditioning voids have not been framed up in the timber framework. Both experts agree that this has not been done, but disagree on whether this constitutes a defect or incomplete work. They agree that a reasonable cost would be $683.

185. Mr Johnson's view is that these voids do not form part of the mandatory frame inspection undertaken by the building surveyor, and so this work is not required at this stage. However, in circumstances where a builder has made a claim that the frame is complete, this work should have been undertaken. Accordingly, I will allow $683 as an item of defective work. The experts do not seem to have included this as a completion cost (so there is no duplication of amount).

(11) Credit for change of first floor $3,524

186. The claim for this item is based on a change in the builder's scope of works from the contracted scope. The original engineering design for this area was

[31] Which is a recognised cost estimator used in the building industry

for a suspended concrete slab. The subsequent engineering design for a timber frame and floor was approved when the revised building permit was issued on 12 March 2015. Mr Lorich's view is that the owners are entitled to a credit for the difference in cost between a concrete slab and the timber frame and floor that has been installed. He estimates this to be $3524. Mr Johnson says that the cost of both structures would have been about the same once the piers and footings for the timber frame are factored in.

187. No evidence was led as to the circumstances surrounding this variation, including whether it was requested or approved by the owners, or whether there was any discussion with the builder at that time about the cost of the variation. I accept that the constructed flooring would have been readily apparent to the owners on site, but even if they requested and/or accepted the variation, there is no proof of what discussions occurred relating to the cost. No written variation has been produced to the Tribunal. With no evidence of any agreement between the parties produced to me, the onus is on the builder pursuant to sections 37 and 38 of the DBCA to satisfy me that there are exceptional circumstances, or that the builder would suffer a significant or exceptional hardship, and that it would not be unfair to the owners for the builder to retain any cost saving. In the absence of any evidence about the variation, I am not satisfied of these matters.

188. The experts and I explored the costings for this item at length during the hearing. I prefer Mr Lorich's opinion. I find that there was a cost saving to the builder of $3,524. As the builder ought not benefit from the cost saving to it as a result of this unapproved change, I will allow the credit to the owners of $3,524.

(12) Roof over first-floor balcony not per plan $2,836

189. Both Mr Lorich and Mr Johnson agree that the roof shown on the plans over the first-floor balcony has not been constructed, that this is defective work, and that the reasonable cost to rectify is $2,836. I will allow this amount.

(13) Garage wall not per plan $9,245

190. Both experts agree that this item is a defect. Mr Lorich has provided an estimate of $9,245 to raise the wall, fit the moulding and render. Mr Johnson estimates $7,833 for the same works. Both experts agreed in their evidence that each other's costings are reasonable. Accordingly, I will allow a figure halfway between the two, namely $8,539.

(14) Windows missing study and storerooms – supply and install or credit to O $3,742

191. The issue is that the builder has not installed windows in the study and storerooms, which are shown on the original plans. Mr Johnson said this was a design error. His evidence is that had the drawings properly shown

the area of excavation, it would have been apparent that these windows could not be installed. Mr Lorich agreed that the design was at fault, in that the wall appears to have been constructed partly as a retaining wall, and windows are not appropriate in a retaining wall. He also noted that the builder had incurred extra costs in constructing the wall as a retaining wall, which it has not passed on to the owners.

192. I accept that the error is a design error and not a defect caused by the builder. The owners agreed to delete those windows because the windows would be underground. The owners are not entitled to a credit, in circumstances where their expert accepts that the builder would have incurred greater cost by building the external wall of the house as a retaining wall and then obtaining amended plans at its cost to reflect the change in the as-built structure.

(15) Incorrect window sizing (20) – replace all windows $40,986

193. The owners claim is that twenty of the installed windows do not comply with the window schedule provided on the approved drawings, and so an allowance should be made for them all to be removed and replaced. Much of the hearing was devoted to the question of these windows and submissions about the credibility of each witness were made based on the evidence they gave on this issue.

The builder's contention

194. The builder's contention is that the architectural drawings provided by the owners to the builder at the time of signing the contract did not contain a detailed window schedule, just a heading "Window Schedule" and some general notes on drawing WDA01. None of the drawings contained measurements of the windows other than in the General Notes on drawing WDA01, which stated "Full height Windows not to have chair rails. Window head is to be set at 2100 mm above finished floor level or as otherwise noted".

195. Mr Bishara said that when calculating the contract price, he costed the windows based on standard window sizes (based on the house at Surrey Hills) and allowed $23,000. After signing the contract, he received further architectural drawings, dated 25 June 2014. These became the stamped, approved building permit drawings ("the approved drawings"). These approved drawings contained a detailed window schedule with different window sizes to the ones Mr Bishara had allowed for in the contract.

196. Mr Bishara then obtained a quote from DB Windows (a Chinese supplier) for the windows shown in the approved drawings for $25,366. He said that he showed this quotation to Mrs Barbour who said that she did not want them because they were made in China. Mrs Barbour denied this. Mr Bishara contends that his version is supported by him then obtaining two quotations from Australian suppliers: one from Bradnam's Windows and

Doors dated 18 August 2014 for the windows shown in the approved drawings ($41,215) and one from Dowell Windows dated 12 August 2014 for the standard windows Mr Bishara had costed originally ($25,366).

197. Mr Bishara said that he spoke to Mrs Barbour and discussed the windows at length. Mr Bishara told her that if she wanted the custom-made window sizes shown in the window schedule in the approved drawings there would be a variation of around $15,000 and that Mrs Barbour said that she preferred the standard windows. She denied these discussions.

198. Under cross examination, Mr Bishara explained that he would have issued a variation if the owners had decided to proceed with the custom sized windows set out in the window schedule in the approved drawings. As far as he was concerned, the contract that he signed was for standard windows and any changes required by the approved drawings would require a variation.

199. Mr Bishara relied on the fact that the owners did not raise any concerns about the window sizes until March 2015, three months after they were installed, despite having been on site nearly every day, having taken numerous photographs, and having readily observed the actual sizes of the installed windows. The parties then had a meeting with the owners' bank manager on 12 or 13 March 2015. During that meeting, the owners complained particularly about the three windows / doors on the north wall of the living room. Mr Bishara offered to replace them, but if he did so, he would charge the owners an extra $10,000 for earthworks, rather than covering that cost himself as he had intended to do. He said the owners had not responded to that offer before terminating the contract.

200. It was suggested by the owners that Mr Bishara had deliberately installed the standard Dowell Windows in order to save money compared with the DB Windows. The builder submits that this is not credible because:

    a. the savings were minimal, even after adding flashings and reveals to the quoted price; and

    b. the different sizes were obvious.

201. Instead, he said the only credible explanation for not installing the DB Windows was that Mrs Barbour did not want them. The builder also relies on the fact that the owners, in 2017, instructed a new builder to retain the building surveyor to review the 'as built' drawings to "ensure that they will meet compliance", which it says indicates that the owners have no intention of altering the window sizes. It says that is consistent with its version of events, that the owners initially agreed to have the windows installed in accordance with the 'as built' sizes.

The owners' contention

202. Mrs Barbour denied ever having been shown any quotes for windows. She denied having had any discussions with Mr Bishara relating to the choice of window supplier. She denied having agreed to vary the window sizes from those set out in the window schedule.

203. The owners submit that the builder's version of events is not credible, as it failed to issue a variation following the alleged agreement reached with the owners in 2014, and then failed to refer to any agreement when the parties met with the owners' bank manager on 12 or 13 March. During the meeting, they discussed many issues, including the defects identified by Mr Seville in his February report, additional problems identified by the owners' architect in March, and the builder's claims for allegedly outstanding payments and requests for instructions. The minutes of the meeting record that Mr Bishara said if the owners required the three living room windows to be changed, he would charge them an extra $10,000 for earthworks, rather than covering that cost himself as he had intended to do. The owners submit that if there had been an agreement to use the standard sized windows, Mr Bishara would have said that during the meeting at the bank, and in a subsequent email, but did not.

204. Further, they contend that the installed windows do not meet the requirements of the Energy Rating Report, which forms part of the building permit documents, and so must be replaced in order to obtain an occupancy permit.

My findings on the windows

205. I do not allow for the replacement of the windows. I accept the builder's evidence as being the more likely version of events, for the following reasons:

    a. As there was no detailed window schedule at the time the contract price was calculated, and there was only a notation for full size windows to be set at 2100 mm, it is likely that Mr Bishara costed the windows at standard sizes when calculating the contract price.

    b. The approved drawings provided after the contract contained a window schedule with non-standard window sizes that had not been specified earlier.

    c. The builder would have been entitled to a variation for the custom-made windows and it is likely that he raised that issue with the owners, as he did with the extra excavation costs and the sleeper retaining wall at about that time.

    d. The builder obtained three quotations for the windows which supports his version of having discussed the various options with the owners.

e. The difference in price between the DB Windows and the Dowell windows is not large enough to have given the builder reason to substitute the installed windows without consent.

f. The fact that the windows installed in the living areas have a reduced height of 300 mm when compared with the approved drawings would have been obvious to the owners who were on site almost every day yet made no complaint until three months after they were installed, which was the time when they were in dispute with the builder.

g. The builder's offer made at the meeting with the owners' bank manager is consistent with Mr Bishara's contention, that there would have been an extra cost for the windows listed in the approved drawing window schedule, had the owners requested that variation. I accept his explanation that he did not specifically mention the agreement during the meeting because until that date he was not aware the owners were disputing the windows, and in any event Mrs Barbour knew there was an agreement.

h. Although the owners contend that the installed windows do not meet the requirements of the Energy Rating Report, there was no evidence that the building surveyor would require the windows to be replaced in order to meet those requirements. As an Energy Rating is calculated on the combination of a number of items, the fact that some windows may not reach that standard is not determinative of whether the overall building will comply. Instead, I note the advice from Dowell Windows dated 29 September 2014 that many of the windows would be well under the requirements, which may compensate for the casement windows which are allegedly over the required rating.

206. Second, if I am wrong about the evidence, I would not allow the replacement of the windows on the grounds that it is not a reasonable course to adopt in this case. In circumstances where there is no evidence of any defects in the installed windows (other than the minor maintenance item 16 below), the question as to whether they ought be replaced comes down to what the law will consider to be reasonable.

207. Senior Member Walker conveniently summarised the relevant authorities on this question in *Clarendon Homes Vic Pty Ltd v Zalega*[32], at [165]:

> "I think the following principles concerning the assessment of damages for the breach by a builder of a domestic building contract can be spelled out from the cases referred to:
>
> Where the work and materials are not in conformity with the contract, the prima facie measure of damages is the amount required to rectify the defects complained of and so give to the owner the equivalent of a

[32] [2010] VCAT 1202

building which is substantially in accordance with the contract *(Bellgrove v Eldridge[33]);*

a. The qualification, however, to which this rule is subject is that, not only must the work undertaken be necessary to produce conformity, but that also, it must be a reasonable course to adopt *(Bellgrove);*

b. Reasonableness is a question of fact *(Bellgrove)* and the onus of proving unreasonableness so as to displace the prima facie measure is upon the builder. It is the builder who is seeking to displace the prima facie position *(Tabcorp Holdings Ltd v Bowen Investments Pty Ltd[34] per Rares J.)*;

c. In considering whether it would be unreasonable to award the cost of rectification, the tribunal should consider all the circumstances of the case before it. The nature and significance of the breach should be looked at in terms of the bargain the parties had and the relative importance of the breach within the context of the contract as a whole. The decision in *Ruxley Electronics and Construction Ltd v Forsyth*[35] suggests that account can be taken of the following matters at least:

   i. Whether and to what extent the work, although not in conformity with the contract, is nonetheless serviceable;
   ii. Whether and to what extent the defect has affected the value of the work or the building as a whole;
   iii. The cost of rectification, the proportion that the breach bears to the cost of rectification and whether the cost of rectification would be wholly disproportionate to the real damage suffered by reason of it;
   iv. The likelihood that, if rectification cost is awarded, the sum so ordered will actually be spent on rectification. Obviously, a successful plaintiff can spend his damages as he sees fit but this may be a useful indicator of whether the amount sought is greater than the real loss suffered.

Quite obviously, this list is by no means exhaustive. Other matters might be relevant according to the facts of the particular case. For example, the innocent party might have elected to accept the non-conforming work, whether by taking the benefit of it or otherwise; the owner might have waived the breach or so acted after becoming aware of the breach as to create an estoppel or to make rectification impracticable. There might also be many circumstances in which it could be argued that an award of rectification cost would give the innocent party an uncovenanted profit *(Radford v De Froberville[36]*."

208. In the present case, I am satisfied that:

[33] [1954] HCA 36; (1954) 90 CLR 613
[34] (2009) 83 ALJR 390; [2009] HCA 8.
[35] [1994] 1 WLR 650
[36] [1977] 1 WLR 1262 per Oliver J

a. the windows, if not in conformity with the contract, are nonetheless serviceable;

b. that their size has not affected the value of the work or the building as a whole;

c. the cost of rectification would be wholly disproportionate to the real damage suffered by reason of the breach; and

d. in the absence of any evidence about the availability of an occupancy permit, the owners are "merely using a technical breach to secure an uncovenanted profit".

(16) Window 39 faulty – service and replace winders $683

209. Mr Lorich said that if the windows are not to be replaced, all winders should be serviced and repaired where necessary, upon completion of the dwelling. The cost to do this is $683. Mr Johnson located one window winder that was faulty. Mr Bishara said that it would have been attended to by the window supplier on completion of the works as part of its subcontract. No allowance appears to have been made in the agreed completion costs. In circumstances where the builder failed to compete the contract and there is no evidence that its subcontractor window supplier will return to complete its work, I am satisfied that the owners are likely to have to pay for all window mechanisms to be serviced and repaired on the completion of the works. I will allow the amount estimated by Mr Lorich.

(17) Alfresco whaler plate not per plan $3,712

210. The complaint is that the whaler plate on the north and west external walls to which the pergola is attached, has been constructed in timber rather than steel. Mr Lorich has classified this as a defect, and counsel for the applicants submitted that this item could be categorised as an unauthorised departure from the plans for which a credit is due. However, during their concurrent evidence, both experts agreed that the plans were either silent or not clear on the material required for the whaler plate. Accordingly, I do not allow this item.

(18) Brick wall should be blockwork $6,623

211. For unexplained reasons, the builder has constructed the basement level masonry walls to the east and south sides of the storeroom and gym from a mixture of concrete blocks and clay bricks. Both experts agree that this is not an acceptable building practice, due to the potential for different rates of expansion and contraction in the different materials, and the walls must be rebuilt. Mr Lorich originally estimated $6,623 and Mr Johnson $11,613. During their evidence Mr Lorich said that he had made a mistake and had underestimated his figure. He said that Mr Johnson's figure was reasonable, and I will therefore allow $11,613.

(19) No trimmers fitted to subfloor $713

212. Both experts agree that trimmers are required to be fitted to the subfloor. Mr Lorich said that on reflection his original figure of $713 is too high and that a reasonable timeframe for the work would be 2 hours. He adjusted his costing to $238. Mr Johnson's estimate for this work was $111 and the parties agreed that I should allow a figure halfway between them. I will therefore allow $174.50.

(20) Subfloor access door not closing and jamming $89

213. Both experts agreed that the subfloor access door requires adjustment. Mr Johnson says that this is completion work while Mr Lorich says that because the door has been installed it is a defect. I accept that both options are possible, but as this item has not been included in the agreed cost to complete I will allow it here as a defect.

(21) Basement walls not waterproof $20,463

214. Mr Lorich gave evidence and produced photographs to show that water is entering through the basement walls and pooling on the floor, particularly in the storeroom. Mr Bishara gave evidence that he had engaged a specialised waterproofing contractor to install a plastic waterproof membrane on the outside of the basement walls and produced a photograph showing plastic sheeting in place. He relied on an invoice from the builder's waterproofing subcontractor dated showing that he had supplied and installed Corflute membrane at a cost of $45/m².

215. I accept that the builder carried out the required waterproofing works, however I find that this has failed. Pursuant to section 8 of the DBCA, the builder provides a warranty for the work carried out by its subcontractors and accordingly is liable for this defect in the absence of any evidence that the cause was something outside its control (which was not suggested).

216. Mr Johnson's opinion was that if it is accepted that water is entering the basement, then he would accept the waterproofing was defective and that Mr Lorich's scope of work to rectify is reasonable. He disagreed with Mr Lorich on the cost of that scope of work, saying that it is possible to subcontract the tanking works to specialised subcontractors at $50/m². Mr Lorich said that in his experience, it is not uncommon for competent waterproofing subcontractors to charge $200/m², especially if they are required to provide a 15 year guarantee.

217. I accept the experience of both experts and accept that waterproofing costs may range from $50-$200/m² in the marketplace. However, this does not assist me in deciding in this matter. I note that the builder has been invoiced $45/m² to supply and install corflute, but do not accept that figure, since that work has failed. Despite the lack of evidence, I must make a finding on the reasonable amount to allow for the waterproofing, so will allow the

mid-point between the two expert's figures, which is $125/m^2$. The total amount allowed for this item is $15,739.75, calculated as follows:

Item	*Allowance*	*Amount*
Excavate (2 men)	32 hours at $60/hour	$1,920.00
Re-tank	$39m^2$ at $125/ m^2$	$4,875.00
Drainage	Allow	$1,500.00
Re-fill with scoria	L: 16 hours at $60/hour	$960.00
	M: $20m^3$ at $30/m^3$	$600.00
Misc (core board etc)		$1,000.00
Subtotal		***$10,855.00***
Margin and GST	48.5%	$4,884.75
Total		**$15,739.75**

(22) Electricity meter located on council land $2,495

218. The dispute between the parties in respect of this item turns on whether the builder is responsible for the location of the electricity meter. The experts agree that if it is to be relocated the cost is within a range of $2,495 (per Mr Lorich) to $2,836 (per Mr Johnson).

219. Mr Bishara's evidence was that the owners directed him to locate the electric meter in its present location. Their existing letterbox was on council land and when the original house was sold, they engaged him to build a second letterbox next to the original. They then instructed him to build the meter box next to the letterbox. Mrs Barbour denied that, but her evidence was contradictory. She said that she knew the letterboxes were on council land, but they looked good there and nobody had complained, and many neighbours in the street had done the same. She then said that she would not have told Mr Bishara to put the meter box on council land because she knew that would not be allowed. I prefer Mr Bishara's evidence on this point and accordingly, I do not allow this item.

(23) Temporary downpipes not installed $891

220. Both experts agree (and it was apparent during the site view) that temporary downpipes have not been installed. Mr Lorich allows 6 hours for labour and materials at a cost of $891. Mr Johnson allows 4 hours plus materials at a cost of $536.09. In circumstances where there is a difference of two hours between the experts, and no other evidence to assist my decision, I will allow an amount halfway between them, namely $713.50.

(24) Missing doors at lock-up stage $2,376

221. Mr Lorich's opinion is that for the building works to have achieved lock-up stage, a garage door, front door and upstairs balcony door should have been installed, even if only temporary doors or barricades were used. His costing to provide and install the ground level doors was revised during the hearing from his original estimate of $2,376 to $1,782.

222. Mr Johnson has estimated $816.75 to supply and hang a temporary front door and to block off access through the garage, being five hours of labour plus material.

223. In circumstances where the claim for lock-up stage payment has been made and paid, and where the contract between the parties has been terminated, I make no allowance to now retrofit a temporary front door, garage door and upstairs balcony door. These items are not defects; rather they would be completion costs if it were necessary to install them at this stage of the works. However, I do not accept that such works are a necessary part of completion or that it would be reasonable for a completing builder taking over the project at this stage to install them. Accordingly, I do not allow this item.

(25) NBN access

224. This claim was withdrawn during the hearing.

(26) Driveway incomplete

225. The parties agreed that this item is part of the completion cost and it has been agreed between the experts at $21,000. I do not allow it as a defect.

(27) Timber retaining wall leaning and no permit $3,088

226. As a variation to the building contract, the builder constructed a timber retaining wall between the owners' two properties, no.41 and no.43 and the builder has been paid for these works. The owners claim that the retaining wall was constructed defectively, in that it is leaning. Both experts agree it is out of plumb and leaning. Mr Lorich has estimated $3,088 as the cost to rectify, being two days labour in order to dig out the post to at least half the depth of the existing embankment, replace the post and fence, and obtain engineering certification. Mr Johnson provided an estimate of $2,227 for these works.

227. In circumstances where I have allowed the builder the cost of constructing this retaining wall, as a disputed variation (see Part G), I will allow the owners a reasonable amount to rectify the defective work. Mr Johnson did not give a breakdown of his estimate and accordingly I am unable to compare the two in detail. I will allow Mr Lorich's estimate of $3,088.

(28) Driveway at no.43 damaged $3,074

228. The existing driveway belonging to no.43 has been damaged during the construction of the house at no.41. It was conceded by the builder that the damage was caused by delivery vehicles. I accept that the builder is responsible to make good this damage. Mr Lorich has provided an estimate of $3,074 while Mr Johnson estimates $3,222. In the interests of efficiency, I will allow a figure halfway between the two, namely $3,148.

(29) As-built dimensions vary from plans $668

229. The complaint is that several rooms differ in size from the dimensions shown on the plans which were approved as part of the building permit. The owners contend that they will be required to provide amended plans showing the as-built structure and dimensions to the building surveyor, in order to obtain a final certificate. Mr Johnson agreed. Excluding margin and GST, Mr Lorich allows $450 for the preparation of amended plans while Mr Johnson allows $600. After factoring in margin and GST, their estimates are $668 and $891 respectively. In the absence of any further evidence as to what is a reasonable cost for preparation of amended plans, I will allow an amount halfway between the two estimates, namely $779.50.

(30) Excavation to study and store room not completed

230. Mr Lorich and Mr Johnson agreed that this item is contained within their costings to complete the works. I do not allow it as a defect.

(31) Subfloor ventilation incorrectly positioned and partially blocked $1,217

231. Both experts agreed that the subfloor ventilation requires rectification. Mr Lorich has provided an estimate of $1,217 on the assumption that these are the only works being carried out to brickwork and render. Mr Johnson said that the works will be carried out as part of the works required to rectify items 1 and 18. Mr Lorich conceded that if items 1 and 18 have been allowed as defective works then there will be no separate loss and damage for this item. I have allowed the owners compensation for items 1 and 18 and accordingly do not allow any further loss and damage for this item.

(32) Balcony waterproofing to be completed

232. Mr Lorich and Mr Johnson agreed that this item is contained within their costings to complete the works. I do not allow it as a defect.

(33) Timber under box gutter in garage $1,485

233. Both experts agree that the use of chipboard underneath the box gutter in the garage is not an acceptable building practice and it must be removed and replaced. Mr Lorich has estimated $1,485, and Mr Johnson $898.43. The difference between them is largely due to Mr Lorich's allowance of 6 hours for a plumber, compared with Mr Johnson's 3 hours. Again, in circumstances where both agree the others costing is reasonable, and in the absence of any other evidence, I will allow an amount midway between the two, namely $1,191.50.

(34) Sewer collapse $4,000

234. This claim was withdrawn during the hearing as the issue has been rectified by others.

(35) Subfloor wall structure

235. Both experts agree that this item has been included in item 18.

(36) Sill flashings missing to windows $683

236. Mr Lorich in his original report noted sill flashings are missing under all windows. Mr Johnson confirmed at the on-site view that flashings are missing under the windows he inspected. In order to install flashings now, it will be necessary to remove and re-install all windows. Mr Lorich originally allowed $683 for this item, on the assumption that twenty windows would be replaced as part of item 15 and would not form part of this claim. However, as I have disallowed the claim for the replacement of the windows at item 15, Mr Lorich's estimate to remove and re-install all windows with sill flashing is now $2,509, made up of 24 hours of labour plus margin and GST. Mr Johnson did not disagree. I will allow this amount.

(37) Curved bulkhead framework over kitchen needs battens $238

237. Both Mr Lorich and Mr Johnson agree that battens are required for the bulkhead framework over the kitchen. Their cost estimates are $15 apart, so I will allow the middle figure of $230.50.

(38) Window head trimmers not fully nailed $386

238. Both experts agree that the window head trimmers require further work. As I have not allowed to replace all windows, I accept these works are required. Mr Lorich provides an estimate of $386 and Mr Johnson $223. The difference between them is the number of hours of labour required (4 hours carpentry compared with 2 hours). In the absence of any further evidence or explanation I will allow 3 hours of carpentry, making a total of $304.50.

(39) Footpath damaged $1,960

239. This claim is for damage to the footpath, allegedly caused by the builder during the works. I heard no evidence in relation to the cause of the damage, other than speculation that as the damage occurred while the builder had possession of the site, it must have been by the builder or its sub-contractors. The builder has paid an asset protection fee to the Council to cover such damage (Mr Bishara's evidence) and accordingly I do not accept that this item is loss and damage that has been or may be suffered by the owners.

(40) Rear retaining wall steel constructed without a permit or inspection $1,900

240. This item was withdrawn during the hearing.

(41) Pergola foundation not inspected by RBS $1,900

241. The owners claim that if the pergola foundation was not inspected by the building surveyor then they are likely to be required to engage an engineer to excavate, inspect and provide certification prior to the occupancy permit being issued. Mr Lorich estimates this cost to be $1,900. However, he agreed during the hearing with counsel for the builder that if the surveyor had inspected the footing then no further engineering certification would be required. The builder submits that as there has been no building direction issued in respect of this item since the footings were inspected, it is unlikely that the surveyor would now require any further certification.

242. In the absence of any evidence confirming that this work is required, I find that the owners have failed to establish that they have suffered, or are likely to suffer, this item of loss and damage, and so this claim is dismissed.

(42) Foundation west boundary retaining wall $1,900

243. This claim is similar to the previous, in that the owners presume that an engineer certification will be required. In the absence of any supporting evidence, I find that the owners have failed to establish that this head of loss and damage has occurred or is likely to occur and the claim is dismissed.

(43) Render repairs including scaffold $43,970

244. Mr Lorich's opinion is that several areas of render will require repairs (including as a consequence of rectifying the defects listed at items 1, 2 and 13 above). Rather than localised repairs, he has allowed a scope of works which includes one top coat of render to be applied over the whole building ($2,600) plus two further membrane coats ($15,010). He said this scope is to give colour evenness and also is likely to be required by the render manufacturer's requirements. He has also allowed for scaffold.

245. Mr Johnson disputes that a complete coat of render plus two coats of membrane was required under the building contract, or by the manufacturer, or to rectify defective workmanship. He has allowed for localised render repairs of $7,500 plus margin and GST, totalling $11,137.50. During the hearing he said that this amount would be enough for one coloured top coat which would result in the finish now seen on the house (that is, without the two membrane coats). He conceded that a further amount should be allowed for scaffolding.

246. I was not taken to the provisions of the contract relating to render. Mr Johnson notes in his report that the specification for the render does not include a membrane final coat. I have read the specification attached to the contract and there does not appear to be any reference to a membrane coat; it provides for "external rendered and moulding as per plan" and "top floor external wall to 75mm foamboard cladding with rendered finish". Sheet 3 of 4 of the approved drawings includes a notation "walls and mouldings:

fine textured cement render, select integral paint, Dulux colour specifier, 'Tranquil Retreat'".

247. In the absence of any evidence to the contrary, I am not satisfied that the building contract required the builder to apply two coats of membrane on top of an integral coloured cement render. Accordingly, I will allow Mr Johnson's scope of work of $11,137.50.

(44) Remove foam cladding and reconstruct with brickwork $23,091

248. This item was added to the owners' claim during the hearing, in response to the builder's claim for a variation. For the reasons discussed below, I am satisfied that the top floor cladding specified in the contract (foam) was varied by the approved drawings to brickwork. I have allowed the builder $22,534 for the variation (at Part H below).

249. However, the builder has failed to use brick cladding in a section of the top floor, and the owners seek damages to put them in the position as if the builder had complied with the varied design.

250. The cost to remove the foam and replace it with brickwork according to Mr Lorich is $23,091. Mr Johnson's opinion is that it is $18,279. The main differences between them is the cost of scaffold ($6000 compared with $3000), and Mr Johnson allows for render to match existing, but with no membrane top coat. Both experts agree that the others' figures and methods are within an expected range.

251. I am satisfied that the estimate provided by Mr Johnson is reasonable, as I have included an amount for scaffold at item 45 and I have already decided that a membrane top coat is not required under the contract (at item 43).

(45) Scaffold

252. As discussed with the parties during the hearing, I will allow a general amount for the hire of scaffolding. The parties agreed that as multiple items require scaffolding, and to avoid the risk of duplicating these costs, I should allow an overall figure. I allow $14,850, which is made up of $10,000 hire costs plus 48.5% margin and GST. I have calculated that amount as the difference between the following:

    a. $13,000 (Mr Lorich's total for items 2, 43 and 44, and not including item 15 which I have not allowed); and

    b. $7,300 (Mr Johnson's total for items 2 and 44 plus half of Mr Lorich's figure for item 43. Mr Johnson had provided no amount for item 43, but had used a figure for item 44 which was half Mr Lorich's. I will adopt that calculation).

Summary of amounts allowed for defects

253. In summary, the amounts allowed for defects are as follows:

Item	Amount
1	$2159.00
2	$2686.00
4	$468.00
5	$475.50
6	$535.00
7	$375.00
8	$464.00
9	$624.00
10	$683.00
11	$3524.00
12	$2836.00
13	$8539.00
16	$683.00
18	$11,613.00
19	$174.50
20	$89.00
21	$15,739.75
23	$713.50
27	$3088.00
28	$3148.00
29	$779.50
33	$1191.50
36	$2509.00
37	$230.50
38	$304.50
43	$11,137.50
44	$18,279.00
45	$14,850.00
Total	**$107,898.75**

G: THE DISPUTED VARIATIONS

254. The owners dispute two variation claims made by the builder during the course of the project, and seek a refund of the amount they have paid for each, namely:

    a. the variation for the sleeper retaining wall of $8,810; and

    b. the excavation of $32,500.

255. The owners say that the builder failed to comply with the requirements of section 37(3) of the DBCA and so is prevented from retaining these payments. In respect of the sleeper retaining wall, it is section 38(3) which would be applicable, as I accept that the owners requested that variation. I will not set out these sections in full, but in summary they provide as follows:

Section 37 - variation by builder

a. If a builder wishes to vary the plans or specifications, it must give the building owner a notice which describes the variation, states why the builder wishes to make it, states what effect the variation will have, including any delays, and states the cost of the variation – s.37(1).

b. A builder must not give effect to any variation unless the owner gives it a signed consent attached to a copy of the notice required by ss.(1), or there is a building notice or building order in place – s.37(2).

Section 38 - variation by owner

c. An owner who wishes to vary the plans or specifications must give the builder a notice outlining the variation the owner wishes to make – s.38(1).

d. If the builder reasonably believes the variation will not require a variation to any permit and will not cause any delay and will not add more than 2% to the original contract price, the builder may carry out the variation – s.38(2).

e. In any other case, the builder must give the owner a notice that states the effect of the variation on the work, including any delays and the cost, or a notice that states that the builder refuses or is unable to carry out the variation – s.38(3).

f. A builder must not give effect to any variation asked for by a building owner unless the owner gives the builder a signed request, or ss.(2) applies – s.38(5).

Both sections 37 and 38

g. A builder is not entitled to recover any money in respect of a variation unless the builder has complied with s.37 or s.38, or the Tribunal is satisfied –

   i. that there are exceptional circumstances or that the builder would suffer a significant or exceptional hardship, and

   ii. that it would not be unfair to the building owner for the builder to recover the money – ss.37(3), 38(6).

Sleeper retaining wall

256. Mr Bishara's evidence was that the owners asked him to construct a sleeper retaining wall along the driveway between their two properties, no.41 and no.43, and to lay grass in the backyard of no.43. There is no dispute that this work did not form part of the original contractual scope. The builder carried out the work, including providing amended drawings and engineering to the building surveyor in response to its Building Direction dated 23 June 2015.

257. Mr Bishara then provided the owners with copies of the invoices and receipts in respect of the wall and had a discussion with them about the amount that they were willing to pay. The parties agreed on a figure of $8,810 and the builder issued a variation dated 5 November 2014 for that amount. The owners signed the variation and paid that amount.

258. The owners initially said that they had not requested the retaining wall be built, and that it was necessary because the builder had damaged the site. I do not accept that evidence. From my observations on site it is clear that a retaining wall would have been required to address the differing levels between the two blocks.

259. They now seek to recover the payment of $8,810, on the basis that the builder failed to comply with the requirements of section 37(3) of the DBCA. I do not accept that argument. The variation was requested by the owners and accordingly the applicable section of the Act is section 38. The builder has complied with the requirements of section 38(5) of the DBCA, and obtained a signed variation from the owners.

260. Alternatively, if the builder has failed to comply with section.38, I am satisfied in accordance with the provisions of subsection 38(6), that that there are exceptional circumstances or that the builder would suffer a significant or exceptional hardship, and that it would not be unfair to the owners for the builder to retain the money. These circumstances are that the works were clearly outside the original scope of works. They were requested by the owners and the owners have received the benefit of them. The owners discussed the price with the builder and agreed to pay $8,810 and signed a variation form to that effect. The works have been carried out, albeit defectively. I have allowed an amount to rectify the defects at item 27 above. Accordingly, I do not allow this claim.

Excavation costs

261. The builder issued a variation dated 30 July 2014 of $32,500 for "bulk excavation over than 100m³ [sic] and rock hammer". The owners signed their agreement to this variation at the time. However, by their points of

claim[37] they allege that this was an invalid variation and they seek an order that this amount is not part of the varied contract price. The builder seeks to enforce the variation. The builder also makes a further claim for additional excavation costs not yet the subject of a written variation, which is considered at Part H below.[38]

262. As with the previous item, it is not clear to me how the owners say that the builder has failed to comply with section 37 of the DBCA. I do not allow this claim for a refund on that basis. The owners also submit that the variation should never have been requested in the first place, because the works were allowed for in the original contract price, and they signed it on the builder's advice that he would cover the first $10,000 of the extra charge. Accordingly, I must determine whether or not this variation was valid.

The contract terms

263. The specifications forming part of the contract provide the following in respect of the cost of excavation: "Builder responsible for… bulk excavation up to 100 m³ extra excavation cost $45 per m³".

Mr Bishara's evidence

264. Mr Bishara's evidence was that these words were inserted into the contract specification following a series of discussions with Mrs Barbour. He said that when he first met Mrs Barbour in May 2014 she provided him with a plan of features, levels and re-establishment survey of her land. He noticed from these documents that there was a significant slope in the land of about 5 metres from the back to the front and he told her that there would be a large amount of excavation required, which could be about 1,000m³. Mr Bishara said that Mrs Barbour told him she was aware of this because she had previously planned to have a tennis court on the site and had been told then that the cost of levelling the land would be about $100,000.

265. He said that when he told Mrs Barbour that the likely cost of the house that her architect was designing would be about $1.1 million, she told him she only had approval from the bank for $940,000. He said that there were expensive items in the design, including the lift and the excavation costs. Mrs Barbour asked him if he could build the house for her budget of $940,000 if she paid for the lift and excavation out of her own funds. He said that he could do that.

266. Sometime later, as already mentioned above, Mr Bishara took Mrs Barbour to visit a house he was building in Surrey Hills. At the time of preparing the contract documents Mrs Barbour asked Mr Bishara what arrangement he had with the owners of the Surrey Hills house regarding excavation. He told

[37] Points of claim paragraph 14
[38] Points of defence and counterclaim paragraph 11 and 45

her that he had included 100 m³ in the contract price but that her house would require much more excavation than that. He said that Mrs Barbour asked him if he could include the first 100 m³ of excavation in the contract price like he had with Surrey Hills and he did so.

Mrs Barbour's evidence

267. In her evidence Mrs Barbour agreed that the contract specification was as set out above. She disagreed however on how that clause came to be included in the contract. She denied that she had met with Mr Bishara in May 2014, or that he had told her that there may be 1000 m³ of excavation required prior to the contract being signed. Her recollection of the conversation about the excavation was that prior to signing the contract she had said to him "We should calculate how much do we need to excavate the land, the site" by using the data in the land survey she had obtained several years prior. His response was to the effect that every site is different and he "wouldn't know how much it would need to be excavate"[39].

268. She denied that he had used the Surrey Hills site as a comparison of excavation costs, and said he would not have because that house was on a low block and so would not need excavation. She also denied that she and Mr Bishara had discussed her previous idea to build a tennis court on the site.

My findings on the excavation variation

269. I am unable to set aside the terms of a signed contract document (namely the signed variation) in the absence of circumstances such as fraud, mistake or undue influence. None of those circumstances are alleged. While section 53(2) of the DBCA empowers me to vary a term of a contract (ss.(2)(c)), and to order a refund of any monies paid (ss.(2)(f)), I would need to be satisfied that it is fair to do so (s.53(1)). For the following reasons, I am not satisfied that it would be fair to order a refund of the monies paid or to vary the terms of the signed variation.

270. Alternatively, if the builder has failed to comply with sections 37 or 38 of the DBCA, for the following reasons I am satisfied that there are exceptional circumstances or that the builder would suffer a significant or exceptional hardship, and that it would not be unfair to the building owner for the builder to retain the money, in accordance with subsections.37(3) or 38(6).

271. I do not find any inconsistency between the contract specification and the variation which was requested by the builder. The contract does not say that there would only be 100 m³ of excavation required. It simply says that the first 100 m³ have been allowed for in the contract price, but that any

[39] T183/10-19

further excavation would be at a cost of $45/m³. The builder's request that the owners agree to the variation is consistent with the terms of the contract.

272. In any event, I prefer Mr Bishara's evidence that the cost of the excavation was discussed with Mrs Barbour before the contract was signed and that the contractual arrangement to include only the first 100 m³ in the contract price was agreed. My findings on the evidence are as follows:

(a) Given the slope of the land, it is obvious to all observers that significant excavation would be required.

(b) Mr Bishara's evidence was that when he first met Mrs Barbour she provided him with a plan of features, levels and re-establishment of survey. I am satisfied that she would have been aware from those documents that significant excavation would be required.

(c) Mrs Barbour's evidence was contradictory. At one point she said that the first conversation she had with Mr Bishara about excavation was on 19 June 2014, after the contract was signed and when the final plans were received. At other times in her evidence she said that prior to signing the contract Mr Bishara had told her the excavation would be 100 m³.

(d) When asked why she had mentioned the excavation cost to Mr Bishara on 19 June 2014, Mrs Barbour denied it was because she knew that there would be a lot of excavation. Instead she said that she thought the allowance of 100 m³ may be wrong because it is "exactly 100. Why not 120, 140?"[40] I do not accept that was the reason she raised the excavation costs as it is not likely in the circumstances.

(e) Mrs Barbour's statement that she could not determine the amount of excavation because she thought the builder might site the house on top of the hill is not credible, in circumstances where one of the reasons for the parties hastening to sign the contract was to avoid height restrictions being brought in by the local Council. I do not accept that she did not turn her mind to the siting of the house prior to the contract being signed.

(f) Mrs Barbour conceded that she had had a conversation with Mr Bishara about a plan to build a tennis court. At first, she said she had planned to build a tennis court and she agreed that she had been told by a contractor that levelling the land for the tennis court would cost $100,000. Then she denied that that price was for the tennis court, and instead said it was the price to take off all the soil from the backyard, because the backyard was not wide enough for a tennis court on the low level. Then she said that she had not been given an estimate of

[40] T226-7

$100,000, but rather she had been told it would cost a lot of money, maybe more than $100,000, but not exactly $100,000.[41] Her concession that she had a conversation with Mr Bishara about the amount of excavation required for a tennis court, and her inconsistent evidence, supports Mr Bishara's evidence that they had discussed the amount of excavation required to construct the house.

(g) It was put to Mr Bishara in cross examination that his internal costings used in calculating the contract price show only 100 m³ of excavation required, and that is why he nominated that figure on the contract. I accept Mr Bishara's evidence that the spreadsheet was prepared at various times, and the reference to 100 m³ was inserted after he had discussed with Mrs Barbour her finance arrangements[42].

(h) It was also put to Mr Bishara that his evidence contradicted the evidence he gave in the VBA record of interview. He denied that. The VBA inquiry is not binding nor even strictly relevant to the present proceeding. Nevertheless, I have read the record of interview, since it was put to Mr Bishara in cross examination, and I am satisfied that his evidence in this proceeding is consistent with his evidence in that interview in respect of the excavation costs. He said to the VBA that he had explained to Mrs Barbour that "the excavation would be huge quantity over 1000m³ and she said she knows that because she was planning to have a tennis court in this block and the contractor has asked for a $100,000 for excavation".

(i) The difference in evidence is that the record of interview does not record any mention of the use of the Surrey Hills property as an example of a contract allowing 100 m³ plus variations. Instead Mr Bishara told the VBA he had told Mrs Barbour the 100 m³ was a "standard allowance" and he would give the owners a variation after the excavation was finished. I do not find that to be an inconsistency. Accordingly, I do not need to consider the builder's submission that I should draw an adverse inference from the failure to call the author of the record of interview.

273. For those reasons, I do not allow a refund of the amount paid.

H: THE BUILDER'S FURTHER VARIATION CLAIMS

274. The variations and other outstanding payments claimed by the builder, by its Closing Submission, are set out below. The mere fact that the builder has been found to have repudiated the contract does not disentitle it to these items if they are valid variations. If they are, they must be added to the contract price when calculating the amount of the owners' loss and damage.

[41] T229/1-230/12
[42] T570

a. Excavation - $32,500 already paid plus $18,323.75 outstanding

b. Electrical variation - extra electrical points - $1,920

c. Change roof to terracotta tiles - $4,375

d. Footing for retaining wall against boundary fence - $9,750

e. Constructing 90mm frame for media room - $2,000

f. Reimbursement of building permit fees - $4,979.50

g. Sleeper retaining wall between no.41 and no.43 - $8,810

h. Change to wall from foam to brickwork - $22,534

i. Work and labour carried out at no.43 - $7,645

Further excavation costs - $18,323.75

275. The builder claims a total amount of $50,823.75 for excavation costs. $32,500 of this has already been claimed and paid by the owners and is dealt with above under the heading "The Disputed Variations". The balance of the claim, being $18,323.75, is for additional excavation works allegedly carried out, and for which a written variation was sent to the owners dated 17 March 2015[43].

276. The owners deny this claim, on the basis that the builder has failed to comply with the requirements for variations set out in section 37 of the DBCA. I accept that the builder has not complied with the requirements of this section, in respect of the claim for additional excavation costs, in that it had not provided the specified information or obtained the owners' signed consent to the variation prior to carrying out the work.

277. Further, based on the evidence before me, I cannot be satisfied that the builder would suffer a significant or exceptional hardship, and that it would not be unfair to the owners for the builder to recover the money. The builder relies on the documents listed at paragraph 113 of Mr Bishara's witness statement to support the excavation claims. These documents are invoices for haulage and tipping of the excavated material. I have calculated that the total amount of these invoices is $20,871.82. I have not been provided with any other evidence of other costs incurred by the builder for the excavation. I accept that other machinery and subcontractors must have been engaged by the builder, but in the absence of any proof, I cannot be satisfied that the builder has incurred a further $18,323.75 on top of the $32,500 already received. As I am not satisfied of the matters in

[43] In its Closing Submission, the builder reduced the amount of the claim from $24,860 to $18,323.75 to account for double counting

subsection (3), I dismiss the builder's claim for the additional excavation costs.

Extra electrical points - $1,920

278. The builder claims $1,920 as a variation in respect of the electrical points. It contends that the amended architectural drawings and specifications provided by the owners' architect on 3, 5 and 6 March 2015 specified additional chandeliers, feature pendants, and increased number of GPO's and downlights compared with the contract drawings.

279. Mr Bishara said that he issued a variation to the owners for $1,920 which they signed at a meeting on 12 March 2015 but have not paid. The works were carried out as part of the rough-in by the builder's electrician. No evidence was led by Mrs Barbour in respect of this claim.

280. I am satisfied that these works fall within subsection 38(2) of the DBCA. In circumstances where the owners' architect made changes to the electrical layout after the contract was signed, the owners signed the variation provided by the builder, and the works have been carried out, I accept that the builder is entitled to payment for this variation.

Variation for roof tiles - $4,375

281. The builder's claim is that on 1 December 2014 the parties signed a written variation to change the roof tiles from concrete to terracotta. The cost of the variation was $3,500 and according to Mr Bishara did not include any builder's margin. Despite having signed the variation, and the tiles having been installed by January 2015, the owners did not pay it. A series of meetings and emails followed, culminating in a meeting on 12 March 2015, in which Mrs Barbour asked for proof of the cost of the change in the roof tiles. Mr Bishara confirmed to her that it was $3,500 and that his margin of 25% needed to be added to that figure. The builder then provided a statement from the roofing supplier confirming the amount, and sent a further variation form which included the builder's margin of 25%. By an email dated 13 March, Mrs Barbour confirmed that she would pay the amount sought, however the owners have not done so.

282. Mrs Barbour said in response to this claim that she had not paid for the variation for a number of reasons, including that the builder had promised her a skylight which had not been installed, that the roof over the balcony was missing, and that by March 2015 the builder had been overpaid more than $400,000.

283. The owners did not specify how the builder had failed to comply with either section 37 or section 38 of the DBCA in relation to this variation. Nevertheless, pursuant to section 38(2), as the amount of the variation is less than 2% of the contract price, it did not cause any delay and there was

no evidence of any variation to a permit being required, the builder may carry out the variation without following the procedures in subsection (3).

284. In circumstances where this variation was requested by the owners, a written variation had been signed by them, they had requested an amended variation to include the builder's margin, and they had agreed to pay it upon receipt of proof of the cost, which they received, I am satisfied that the builder is entitled to payment for this variation of $4,375.

Variation for footing to the retaining wall - $9,750

285. On 9 March 2015 the builder submitted a variation form to the owners for the foundations for the retaining wall which had been constructed in October 2014. The builder's evidence was that the building permit approved engineering and architectural drawings did not specify a side retaining wall in front of the garage. Mr Bishara had a conversation with Mrs Barbour in October 2014 in which he suggested that a retaining wall could be built and rendered to match the house, in order to address the cut of the land near the front of the garage. Mrs Barbour agreed, and the builder obtained an engineering design for this new retaining wall. Mr Bishara told the owners that the cost of the wall would be about $15,000 and Mrs Barbour agreed that he should proceed.

286. Mr Bishara said that the engineering design showed the wall in the wrong location. He and Mrs Barbour telephoned the engineer, who confirmed that the drawings were wrong and that the wall should be constructed in the correct location and that the engineer would provide amended drawings. Mrs Barbour agreed with that course of action and the wall was constructed. Footings for the wall were inspected by the building surveyor on 22 October 2014. The correct engineering drawings were ultimately provided to the building surveyor in September 2015.

287. The variations form submitted to the owners on 9 March 2015 was for the amount of $9,750. The owners did not pay this. On 13 March 2015, as part of the email relating to the roof tiles, the owners advised the builder that they would pay the variation for the retaining wall as soon as they received "detailed information". The builder responded by providing the amended engineering drawings and a certificate of compliance for the retaining wall.

288. Mr Bishara said that the amount claimed for the wall, which is 14 m long, is reasonable. It is made up of 1-day excavation, trucks and tipping fees, approximately 15 m^3 of concrete, steel comprising 70 starter bars, 2 layers of reinforcing steel, 2 carpenters for boxing 1 day, labour for concreting, hire of concrete pump and margin.

289. In response to this claim, Mrs Barbour said that it was her idea to build the retaining wall and to render it to match the house. She also said that she pointed out that the original location for the wall was incorrect and it should

be moved. She denied being present when the builder phoned the engineer. In any event, she agreed that she received the variation form on 9 March 2015.

290. She said that she did not pay it because she and Mr Barbour thought they needed to obtain an expert opinion to value the work. In her email of 13 March, when she said she was waiting for "the detailed information", she meant that her husband was going to contact "some concreter person to come to inspect"[44] but that they did not do so because they were busy with other issues. She conceded that they had not told the builder of their intentions.

291. The owners rely on section 37(3) of the DBCA as a bar to recovery. In my view, it is section 38(3) which would be applicable, since the owners requested this variation. However, as with the previous item, I do not agree that either of these subsections is relevant. The amount of the variation is less than 2% of the contract price, did not cause any delay and there was no evidence of any variation to a permit being required.

292. If I am wrong about that (if a variation to a permit was required), I am satisfied nevertheless that there are exceptional circumstances, or that the builder would suffer a significant or exceptional hardship and that it would not be unfair to the owners for the builder to recover the money, in accordance with subsections 37(3)(b) and 38(6)(b). I rely on the facts that the work was requested by the owners, it has been completed and I accept that the cost is reasonable for the work required.

293. I will allow the builder the sum of $9,750.

The media room stud walls - $2,000.

294. It was not disputed that the owners requested the builder to install a 90 mm stud wall frame in the store room. The owners intended to install soundproofing materials and use the room as a media room. Mr Bishara said that he carried out this work in about January 2015 and the area involved was about 60 m². The builder issued a variation dated 17 March 2015 for the amount of $2,000. This has not been paid.

295. Mrs Barbour said that the owners had agreed to pay for the variation but did not do so because the works were not completed. She said that the builder had finished only one of the three walls.

296. I was not provided with any expert opinion as to whether the works had been completed or not. Nor was I shown the allegedly incomplete walls on site. In the absence of any evidence from the owners to the contrary, I accept Mr Bishara's evidence that he has completed about 60 m² of work and that this is the three walls nominated in the written variation. I am

[44] T328-9

satisfied that these works fall within section 38(2) of the DBCA. I will allow this claim.

The building permit fees - $4,979.50

297. It was a term of the contract that the owners were responsible to pay the cost of obtaining the building permit. The amount charged by MBS to issue the building permit was $4,979.50. Mr Bishara's evidence was that on 14 July 2014 he received an email from MBS informing him that the building permit was ready for issue but that the Part B payment had not been made. Mr Bishara said that at that time, he asked the owners to make the payment to MBS, but Mrs Barbour said to him that it was the builder's responsibility under the contract. He accepted her advice without checking the contract and paid MBS a total of $4,979.50, for both Part A and Part B of its retainer.

298. Mr Bishara then said that he checked the building contract in March 2015 and realised that the owners were responsible for paying the building surveyor's fee. He advised them of that by letter on 23 March and Mrs Barbour replied saying that she had already reimbursed the building surveyor's fee via a payment to his personal account. Mr Bishara said that payment was never received.

299. The owners' response to this claim is that the parties had verbally agreed that the builder would pay MBS, notwithstanding what was written in the contract. I do not accept Mrs Barbour's evidence on this issue, as it is inconsistent with her written communication with the builder. In March 2015, when Mr Bishara asked to be reimbursed for the MBS fees, Mrs Barbour responded by saying she had already paid the builder. She did not say that she was not required to, by reason of the verbal agreement.

300. I am satisfied that the written term of the contract was not varied by a verbal agreement, and that the owners are liable to pay for the building surveyor's fees. Accordingly the builder is entitled to be reimbursed $4,979.50.

Sleeper retaining wall between no.41 and no.43 - $8,810

301. In the builder's closing submissions, it claims this item as a variation. However, the owners had already agreed to and paid for this work, albeit that they now dispute the payment that they made. I have considered this item above, as part of the disputed variations, and determined that the builder is entitled to retain the payment of $8,810.

Change to wall from foam to brickwork - $22,534

302. The builder alleges that it is entitled to payment for a variation in the construction of the top floor external wall. The contract specifications provide for "top floor external wall to 75 mm foam board cladding with rendered finish". Mr Bishara said that the approved drawings, which he

received after signing the contract, show a solid brick wall with a rendered finish, instead of foam cladding. Mr Bishara then spoke to Mrs Barbour and told her there would be an additional cost for the change from foam to brickwork. He said that she agreed to pay the difference as she did not like foam cladding. The builder alleges that the additional cost for building in brick was $22,534. This amount includes a credit of $4,350 for the foam which was not installed.

303. Mrs Barbour denied having discussed the cladding with the builder. The owners submit that the change was not the subject of a written variation, it was not pleaded, it was never invoiced, it was never mentioned in any correspondence from the builder, it did not form part of the instructions provided to the builder's expert, and it was first raised at trial in Mr Bishara's witness statement. Further, the builder has produced no invoices to substantiate its calculations.

304. I agree with the builder that there was a change in the specified cladding from the original contract to the approved drawings. I am satisfied that the variation was made at the request of the owners, or their architect. It was obvious on site that the builder has constructed much of the upper floor from bricks. I accept Mr Bishara's evidence as set out in his witness statement that the cost to the builder for this change was the amount claimed. I note that Mr Bishara's evidence was challenged on the basis that he had not provided any receipts or invoices to substantiate the costs. Despite this, I accept the detailed figures provided by Mr Bishara. I also note that the experts in this case have costed the replacement of a section of the upper floor only and their costings are far greater than the builders.

305. I accept that the builder has failed to comply with section 38 of the DBCA in respect of this variation, but for the reasons set out above I am satisfied that there are exceptional circumstances, or that the builder would suffer a significant or exceptional hardship and that it would not be unfair to the owners for the builder to recover the money. I allow this variation.

306. I note here that during the hearing it became apparent that in fact the builder has not replaced all the top floor external wall with brickwork. An area on the south and west elevations is still constructed from rendered foam board. I have dealt with this omission as a defect (item 44 above).

Work and labour carried out at no.43 - $7,645

307. Mr Bishara said that on or about 21 September 2014, the owners sent him an email asking him to fix some damage at their existing house, no.43, in order to prepare it for sale. He said that Mrs Barbour told him they would pay for the works after settlement of the sale. The builder carried out the works, at a cost of $7,645 and is entitled to be paid for these works.

308. The owners agree that they asked the builder to carry out some works, but dispute that the value of the works was $7,645. They dispute that they received an invoice from the builder for these works. Further, they say that as the value of the works was over $5,000, the builder should have entered into a major domestic building contract with them, which it did not do, and as a consequence of section 31(2) of the DBCA, the contract is of no effect.

309. While I accept that section 31(2) has the alleged effect, this does not prevent a builder from recovering for works actually done on a restitutionary or quantum meruit basis: *Dover Beach Pty Ltd & Anor v. Geftine Pty Ltd*[45] Accordingly I must assess what is the value of the works carried out by the builder at no.43.

310. Mr Bishara's evidence was that he left an invoice for the works at about the time of the settlement of the sale, in the owners' letterbox as he had been instructed to do. He then sent them a further copy in March 2015. Regardless of whether an invoice was sent or received or not, I accept that the owners asked the builder to carry out works and have received the benefit of those works. I also accept that Mrs Barbour told Mr Bishara she would pay for the works when they sold no.43.

311. According to Mr Bishara, the damage at no.43 consisted of a hole in the laundry wall, the door on the piano room being out of square and cracks in three walls. He said he arranged for some tradesmen to rectify the doors, repair the cracks on the walls and paint the walls and to repair the hole in the laundry wall.

312. Mrs Barbour's evidence was that she thought the works required to prepare the house for sale would have taken only 10 minutes. I do not accept her recollection. She conceded that the tenants in the property had caused extensive damage and that she had made a claim to this Tribunal against those tenants for that damage for approximately $10,000 earlier in 2014. That is inconsistent with a scope of works of 10 minutes. I prefer the evidence of Mr Bishara and will allow the builder $7,645 for this claim.

Summary of amounts allowed for variations

313. In summary, the amounts allowed for variations are as follows:

Item	Amount
Sleeper retaining wall already paid	$8,810.00
Excavation already paid	$32,500.00
Electrical points	$1,920.00
Roof tiles	$4,375.00
New retaining wall	$9,750.00
Media room stud walls	$2,000.00

[45] [2008] VSCA 248 at [70]

Building surveyor fee	$4,979.50
Top level cladding	$22,534.00
Works at no.43	$7,645.00
Total	**$94,513.50**

CONCLUSION AND RECONCILIATION OF AMOUNTS DUE

314. As a result of the above findings, I find that the builder is liable to the owners in the amount of $371,406.25, calculated as follows:

Cost to complete	$687,196.00
Less balance of original contract[46]	($329,175.00)
Plus rectification of defects	$107,898.75
Less variations allowed to the builder	($94,513.50)
Balance due to owners	**$371,406.25**

INTEREST

315. In their closing submissions, the owners seek an order for interest and have set out a number of interest calculations. I will allow interest in the nature of damages pursuant to section 53(2)(b)(ii) of the DBCA on any sums they have already expended, in accordance with the decisions of Senior Member Walker of this Tribunal in *Quinlan v Sinclair*[47], as follows:

> "10. … There is no guidance in the Act as to the circumstances in which such damages should be awarded, apart from s.53(1) which indicates that it must be "fair" to do so.
>
> 11. It cannot be "fair" to make any order that is not in accordance with the evidence and established legal principles. The tribunal cannot make an award of damages in the nature of interest simply because the section confers the power. Before awarding damages in the nature of interest the Tribunal should satisfy itself that it is appropriate as a matter of law to do so in order to compensate the other party, wholly or partly, for loss and damage suffered as a result of the offending party's breach of the contract. Damages in the nature of interest are damages suffered because the successful party has been deprived of the use of the money but whether an

[46] Per Owners' closing submission at paragraph 232 – "the amount that would have been payable to the builder" – which does not appear to include the amounts of the disputed variations.
[47] [2006] VCAT 1063

> award of such damages is "fair" must be determined in each case."

316. In *Khan v Kimitsis trading as Quest Building*[48] he held as follows:

> "Interest is awarded to compensate the aggrieved party for having been deprived of the amount awarded from the date that it should have been paid until the date of judgement."

317. I will direct the parties to file written calculations on the amount of interest sought on that basis.

ORDERS

1. The respondent must pay to the applicants the sum of $371,406.25.

2. Interest, costs, and reimbursement of fees reserved with liberty to apply. I direct the principal registrar to list any such application before Senior Member Kirton for one hour.

3. The parties must file and serve any affidavit/s they wish to rely on in any application/s for costs and their calculations in respect of interest at least seven days before the hearing of the application/s.

SENIOR MEMBER S. KIRTON

[48] [2009] VCAT 912