

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D290/2007

CATCHWORDS

Major domestic building contract – scope of works – extrinsic evidence irrelevant where contract documents complete and unambiguous – variations – whether allowable despite non-compliance with s.37 and s.38 of *Domestic Building Contracts Act 1995* – claim and counterclaim – amounts offset and single order made for the balance

APPLICANTS	Peter Bodnarcuk, Katrina Bodnarcuk
RESPONDENT	Stephen Gibbs
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	25 – 27 March 2008
DATE OF ORDER	12 May 2008
CITATION	Bodnarcuk v Gibbs (Domestic Building) [2008] VCAT 854

ORDER

1. Order that the Respondent pay to the Applicants the sum of \$47,686.
2. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicants	Mr K. Oliver of Counsel
For the Respondent	In person

REASONS

Background

1. The Applicants (“the Owners”) are the owners of a dwelling (“the Existing House”) on a rural property at 40 Schaeffer Road Hurstbridge (“the Property”). By a major domestic building contract (“the Contract”) dated 23 September 2002, the Respondent (“the Builder”) who was at the time a registered builder agreed with the Owners to carry out an extension and alteration to the Existing House and construct a separate two bedroom dwelling (“the New House”) on the Property, adjacent to the Existing House, intended for occupation by Mrs Bodnarcuk’s mother, Mrs Ivanac.

The contract documents

2. The work was to be carried out pursuant to plans that are referred to in the Contract. These consist of four documents, one prepared by the Builder, another being an adaptation by the Builder of an earlier design prepared by a designer and the remaining two sheets being town planning drawings prepared by the designer. The four sheets of plans referred to (“the Plans”) were tendered as being the building drawings but only the first two sheets bear the endorsement of the building surveyor. The other two are two of the four drawings that were endorsed pursuant to the planning permit which allowed the development. It would seem from the designation “4 of 4” on the plan prepared by the Builder that two of the planning drawings were submitted to the building surveyor but only the two that I have referred to were endorsed. Nothing turns on this difference.
3. The two endorsed sheets, which were used as the construction drawings, were adapted and prepared by the Builder from the town planning drawings. He volunteered to do this to save the Owners money because the designer was unable, possibly through ill health, to prepare building drawings. They incorporated two major alterations that the Owners wanted. The original design had an external courtyard outside the front door of the New House and this was changed into a sun room. The second major change was to add a garage onto the New House. There is reference in the Contract to one page of specifications but I have not seen that and there is no evidence that any such document exists.

The scope of works

4. In order to ascertain the scope of works I am left with the Contract and the Plans. The contract price was \$199,200.00. As I suggested during submissions, this seems quite low given the scope of works undertaken by the Builder. Nevertheless that was the agreed price and the Owners were entitled to expect that all of the work would be done in a proper and workmanlike manner, using good and sufficient materials and in compliance with the implied warranties to be found in s8 of the *Domestic Building Contracts Act 1995*.

5. Evidence was led on behalf of the Owners that a number of other items of work were to be included. However they signed the Contract to do the work set out in the Plans and I am not prepared to look at other evidence beyond those documents except to resolve any ambiguity or uncertainty that I might find in them. Whatever might have been said in the pre-contractual discussions (and there is considerable conflict about that), the parties signed a Contract which referred to the Plans and that is what they agreed to. I find no ambiguity or uncertainty in the contract documents.

6. Some details as to what is and is not included is set out in the appendix to the Contract. Item 11.1 provides as follows:

“Where conveying, connecting or installation of services and facilities are not included in the contract price, the owner must pay for those services or facilities to be brought to the land and connected to the works and the builder must provide an estimate of that cost”.

There then follows a table of services and facilities stating that gas is not included in the contract price but that sewerage and stormwater are. Water and electricity are said to be included but the supply to the building is said to be not included. The telephone is also not included.

7. Item 11.2 provides:

“In relation to the services and facilities that are included in the contract price, the owner must pay for the fees which have been excluded from the contract price in the table below and the builder must provide an estimate of those fees”.

In the following table, connection to water supply and connection to electricity supply are specified and in each case the estimate of the excluded fees is said to be unknown. It would seem from other evidence that the electricity was brought from the Existing House and the water supply was from tanks which, it is conceded, were not within the scope of the Contract.

8. Items 18 and 19 of the Appendix provide for the insertion of fixtures and fittings that are shown in the plans of specifications but are not included in the Contract and items of materials to be supplied or items of work to be carried out by the Owners. In neither instance is anything inserted. Therefore, in the absence of an admission to the contrary I infer that all fixtures and fittings shown on the plans and specification are included in the contract price and no materials or items of work are to be carried out by the Owners.

9. Item 20 of the Appendix indicates that no second hand materials are to be supplied by the builder. As stated below, there were second hand materials provided by the Owners in regard to the extension and renovation of the Existing House where this was required to match existing finishes.

10. Item 21 of the Appendix provides the following as prime cost items:

Item	Amount
Tiles	\$960.00
Robes	\$2,000.00
All plumbing fittings i.e. sinks, troughs, toilet, spa taps	\$2,500.00

11. There was no evidence that these amounts were insufficient or not expended. The sums specified seem rather low but nothing turns on any of this.

Ground levels

12. A particular problem arose due to the levels of the land where the New House was to be constructed. The elevations in the Plans show very little fall between the front of the site for the New House and the rear, but the floor plan does include survey levels outside the New House reflecting the actual fall of the land. The west elevation shows the roof level of the New House to be in line with that of the Existing House. However because of the height of the site where the New House was to be constructed this was simply not possible because it is clear from the town planning drawings that no excavation was permitted.
13. It was therefore impossible to construct the New House as depicted in the elevations. The front needed to be constructed at ground level leaving the rear a considerable distance above ground level. If one looked only at the elevations and not at the survey levels on the ground floor plan, one would be quite misled as to the heights of the walls required to be built at and towards the rear of the New House. It is the Builder's evidence that he was so misled and he claims variations with respect to the additional brickwork and deck height that were required because of this. I will deal with the claims for variations later.

Progress of the work

14. The Builder had been introduced to the Owners through a mutual friend and the Builder and the Owners became quite friendly. This had the unfortunate consequence of them failing to follow the machinery set out in the Contract for regulating their relationship. Instead, they acted towards each other quite informally. Requests for extra work were never put in writing and the machinery with regard to variations was never followed. I am satisfied that considerable extra work was done by the Builder at the request of the Owners although in some instances, the scope of work was reduced.
15. The construction period specified in the contract was 239 days but there was no provision for any liquidated damages if the Builder should fail to achieve that. Indeed, it is clear that the areas in question were occupied; by

the Owners, in the case of the Existing House and by Mrs Ivanac, in the case of the New House, while construction was proceeding. Although the Builder did not specifically authorise this he was obviously aware of it and raised no objection. It was inconvenient to the Builder to have to work around the occupants of the two buildings but it was similarly inconvenient for them to be living in what was, albeit it to a limited extent, a building site. In the end, nothing turns on this.

16. During the course of the works there were numerous variations, requested or agreed to by the Owners. The relationship between the parties broke down from about November 2003 when the Builder presented the Owners at a meeting with a list, totalling about \$19,000.00, for extras that he claimed to have done. He was not asking for payment of this sum but rather wanted the Owners to make an offer with respect to this extra work. He also wanted them to stop them asking him to do extra work. This attitude again reflects the friendly and informal relationship which had existed until then between the parties.
17. Following the presentation of this list of extras the Owners obtained a report from Archicentre. This is a lengthy document criticising numerous aspects of the work. At a later meeting the Owners referred the Builder to various criticisms in the Archicentre report but did not reveal that they had such a report. They then showed the Builder the report whereupon he became quite upset.
18. Ultimately, the Builder left the site saying that he would do no more work until the planning permit was amended to reflect the scope of works that had been done. Correspondence then ensued but no further work was done and the Builder never returned.
19. The Owners then obtained a further report from Mr Rob Lees, a building consultant, and commenced these proceedings seeking damages of \$123,224.48 for allegedly defective and incomplete work.
20. The Builder then counterclaimed for the additional work he had done at the Owners' request.

The hearing

21. The matter came before me for hearing on 25 March. Mr Oliver of Counsel appeared for the Owners and the Builder represented himself.
22. On the first day of the hearing I went out to the Property with the parties and the Owners' expert, Mr Lees. We went carefully through each of the items that are the subject of the claim and the counterclaim. At the time of the inspection, this was only intended to be a view in order to assist me to understand the evidence that would be given later. However when the hearing resumed at the Tribunal's premises the following day it was agreed that what was said and seen at the view should be treated as evidence in the proceeding and I so treat it.

23. Evidence as to the factual matters was given by the Owners and Mrs Ivanac. The Builder cross examined Mr Bodnarcuk at some length but did not cross examine either Mrs Bodnarcuk or Mrs Ivanac. The Builder was extensively cross-examined by Mr Oliver.
24. I think that all the witnesses attempted to give an honest account of what they recalled and I do not have any reason to doubt the genuineness of any of the evidence given. However parties to any transaction will interpret things differently and the recollections of even an honest witness can often be selective. As to the expert evidence, apart from the Builder within his area of expertise, I only have that of Mr Lees and, in matters to do with defective and incomplete work I generally accept his evidence. As to some of the questions of finish and scope of work there are occasions when I accept the evidence of the Builder. I will now deal with each of the items in turn and then proceed to deal with the claims for credits and variations.

The defective and incomplete work alleged

25. Mr Lees has provided costings in his report allowing labour and materials plus 20% for margin and 10% for GST. He also adds to each item a proportion of the cost of “preliminaries”. This proportion averages over all items to 28.425%. He has detailed these preliminaries in his report. I accept both his costings and his apportionment of the preliminaries figure. Where I have made a partial allowance I have tried to calculate this from Mr Lees’ figures where possible, adding margin and GST and then adding 28.425% of the resultant figure for preliminaries. Calculated on this basis, the items I have allowed amount to \$64,181 for defective and incomplete work. Details of these are as follows.

The New House

26. Item 1 – Downpipe of kitchen window

According to Mr Lees, this dropped away from the guttering but at the time of inspection it had been replaced. The Builder agreed with Mr Lees that the relevant standard required the downpipe to be supported at no greater than 2 metre centres but said that, because it was less than 4 metres long, that meant it only needed to be supported in the middle. Whether that is a proper interpretation of the Standard (and I do not decide whether it is) the downpipe still had to be adequately secured to keep it in position and it was not. This defect is established. Allow \$34.

27. Item 2 – Brick sill of the Kitchen window.

The criticisms here were the lack of the usual gap below the window frame and the general uneven line of the brickwork. I do not find that there was not the appropriate gap at the time of construction but the criticism of the quality of the brickwork of the sill is established. That in itself warrants the relaying of the sill. Costing is included in Item 3.

28. **Item 3 – Standard of brickwork.**

Criticisms were made of the great variation in the thicknesses of the perpend joints and the mortar beds and the strength and colour variation of the mortar. I saw no indication of mortar having insufficient strength but I accept Mr Lees' evidence that the brickwork is very much sub-standard. In this regard, the Builder laid the bricks himself. He is not a bricklayer but a carpenter. The very poor quality of the brickwork may be contrasted with the excellent quality of the strip flooring in the New House which he also laid but which was within his area of expertise. I accept that substantial sections of the brickwork will need to be re-laid, to the extent suggested by Mr Lees. Allow \$32,107, noting that this figure includes a number of the other items as well.

29. **Item 4 – Eaves and fascia detail.**

A section of quad has fallen off and there are large gaps present in various places that need to be covered by moulding. This is established. Allow \$721, which also includes Item 12.

30. **Item 5 – Veranda floor tiling.**

Mr Lees criticises the variation in the widths of the grouting and the levels in the rows of tiles adjacent to the north bedroom wall. He also pointed out that the tiles had been laid unevenly. I accept his opinion that the tiles will need to be replaced. Allow \$1,916.

31. **Item 6 – Weatherboards.**

Mr Lees pointed to gaps in the junctions with the eaves linings and between the boards and said that these would need to be sealed and repainted. I accept his evidence. Allow \$3,611.

32. **Item 7 – Front veranda brickwork.**

Again, there were variations in perpend widths and areas of unsatisfactory brickwork. Costing is included in Item 3.

33. **Item 8 – Timber handrails.**

Mr Lees pointed out that the Builder had used structural grade treated pine for the handrails instead of smooth machined handrails. The Builder said the material that he had used is what is normally used in that area, where construction style tends to be rustic in keeping with the rural surroundings. I accept the Builder's argument in this regard and I find no defect.

34. **Item 9 – Flywire screens and sub floor vents.**

The area in question is bushfire prone and so the vents must be screened. The Builder said that he had screened the vents but it was apparent on inspection that a number of them did not have screens and at least in one instance, the screen has fallen over. It seems to me that screens will have to be properly fitted and flyscreens also will need to be installed to all

openable windows. I accept Mr Lees' evidence in this regard. Allow \$1,585.

35. **Item 10 – Brickwork to master bedroom window.**

Again, I accept Mr Lees' opinion that some areas of brickwork will need to be replaced. Costing is included in Item 3.

36. **Item 11 – Brickwork to south and east elevations of the garage.**

The same criticisms are made and in addition, it is said that the bricks in the south wall have not been blended. That is certainly the case on observation. I accept this item. Costing is included in Item 3.

37. **Item 12 – Eave linings.**

Timber quads are falling off around the eave lining. That was demonstrated on site. Costing is included in Item 4.

38. **Item 13 – Bathroom window.**

Cover strips have not been installed to the bathroom window. The Builder acknowledged this and said that he had not had them made before he left the site. Allow \$526.

39. **Item 14 – Hot water unit.**

The overflow relief pipe does not extend and discharge away from the unit as required by the relevant standard. That was pointed out. This is a very minor item but a new relief pipe will have to be installed. Allow \$158.

40. **Item 15 – Brickwork north and east elevations**

The complaint here is established. I repeat my comments in regard to earlier items. Costing is included in Item 3.

41. **Item 16 – Pergola.**

Metal stirrups have not been installed to the junctions of the rafters of the pergola and so the rafters are insecure and are twisting. I accept that the Builder did not use the metal connectors for aesthetic reasons which are entirely defensible. However, it is clear that the various pieces of timber needed to be joined in such a way that they did not separate thereafter and this has not been done. This item has been established. Allow \$1,034.

42. **Item 17 – Timber decking.**

There were a number of criticisms. Mr Lees says that incorrect nails have been used to fix the decking boards. He said that narrow shank ungalvanised gun driven nails should not have been used. One nail was removed during the inspection. The shank diameter was as Mr Lees referred to in his report and I am satisfied that it was not 'hot dip' galvanised but it certainly had some coating on it although what that was is impossible to say.

Mr Lees also said that it was “good practice” to install water proof flashings across the top of the joists of the deck to protect them from moisture but he did not say that this was a requirement so I am not satisfied that the work is defective on that account.

He said that the joists were ineffectively joined to the bearers and that the stumps, some up to 2 metres high, have not been braced.

He said that the stumps were noticeably “out of plumb” but really there was only one stump that fitted that description.

He pointed out that the bearers were centred at 1500 mm which exceeded the 1200 mm specified in the drawings. I notice that it was the Builder himself who specified this spacing on the drawings that he prepared. Mr Lees said as to this “... although the current layout would satisfy the structural requirements for areas it is not necessarily acceptable for deck areas that a design for greater loads than the internal areas”.

He recommended that a structural engineer assess the deck’s structure and that an allowance should be made to reinforce the structure by installing extra stumps. He said in his report the stumps over a height of 1500mm were to be replaced with larger timbers but on site he qualified that by saying that an engineer might approve the existing stumps.

It seems to me in regard to this item that some of the matters requiring the opinion of an engineer arise from the additional height of the deck and that bracing, which was not provided for in the Plans, should be treated as an extra. The dimensions of the stumps are according to the Contract and any larger stumps would be an extra. The extent to which the engineer’s visit is required by reason of exceeding the space and for the bearers would not be an extra since the spacing needs to be according to the Contract. The proposed rectifications are as follows:

- a Replace twisted and damaged timber. This is allowed.
- b Install nailing brackets at joints. This is allowed.
- c Remove and place out of plumb and undersized stumps. I will allow for the straightening of one stump. I am not satisfied as to the others.
- d Install cross bracing to stumps. This was not shown on the Plans and arises from the increased height of the deck. It would have been an extra so this will not be allowed.
- e Re-nail the decking boards with twisted shank galvanised decking nails and supply extra support to the outer edge. This is allowed.
- f Refix the hand rails. This is allowed, but not the replacement of the handrails. I am satisfied that the treated pine used is adequate.
- g Install flashings to the poly carbonate roofing. This is allowed.
- h Install aluminium cleats to the underside side of the stair treads as well as a threaded rod between the stringers. This is allowed.

Working from Mr Lees' figures I allow \$1,571 for materials, labour and margin. Adding 28.425%, being the average proportion of preliminaries attributed to each item, the total allowance becomes \$2,017.

43. **Item 18 – roof space. Hanging beams.**

Joist hangers have been installed on one side of a hanging beam and so extra joist hangers need to be installed. I accept this item. Allow \$1,831, which includes 19, 20 and 22. (Mr Lees' composite figure of \$2,577 included item 21 which I disallow.)

44. **Item 19 – Birds mouth joints.**

These have not been installed to the toe of the rafters. I accept Mr Lees' opinion that blocking needs to be installed together with nailing brackets. Costing is included in Item 18.

45. **Item 20 – Collar ties.**

I accept that additional collar ties need to be installed and must be bolted rather than nailed. Costing is included in Item 18.

46. **Item 21 – Tie downs to battens.**

In this regard Mr Lees said that further investigation would be required but it is not established that anything needs to be done because it is possible that the investigation will find no fault.

47. **Item 22 – Ridge prop.**

I accept that the ridge prop is undersized and needs to be replaced with one of larger dimensions. Costing is included in Item 18.

48. **Item 23 – Waterproofing of roof.**

Mr Lees says that the roof is not sealed at the junction of the roof and the gable end. That was based upon his observation but the Builder's evidence was that he had installed a blanket of insulation so I am not satisfied as to that part of this item. However I do accept that a licensed plumber needs to alter the layout of the sheets and fix up various gaps and insert the missing bolts. The roof is, as the Builder admitted, incomplete and it was also laid by him and not by a licensed plumber. The Builder said that he did it under the supervision of a licensed plumber but no compliance certificate has been given. Hence this item is accepted. Allow \$3,306 which includes the following two items.

49. **Item 24 – Ceiling plaster.**

There is no back blocking in the ceiling plaster. I accept that these back blocks need to be installed. Costing is included in Item 23.

50. **Item 25 – Roof sheeting.**

I refer to my comments in regard to item 24. A plumber needs to go over the roof and fix up any problems. I do not find that the roof needs to be

replaced. There is some evidence of some leaking into the bedroom ceiling in two places. Costing is included in Item 23.

51. **Item 26 – Storm water pipes.**

Storm water pipes beneath the floor are supported on nylon hanging straps instead of proper brackets. This is established. This item was not costed, presumably because the cost would be minimal and would be attended to with other items.

52. **Item 27 – Termite protection.**

There are no ant caps on the tops of the stumps but the Contract did not require them. All the Plans require is “Termite barrier physical or chemical in accordance with AS3660”. The Builder’s evidence is that the area was sprayed for termites which constitutes a chemical barrier and he produced supporting documentation. I am not satisfied as to this item.

53. **Item 28 – Bearer support.**

Mr Lees suggested that inadequate support has been provided to the end of the bearer below the bedroom lounge room wall where it is partially supported by the attached pier. I could not see this from the access door but Mr Lees provided a photograph. However the Builder said that the bearer in question was attached to the adjacent overlapping bearer so I am not satisfied as to this item.

54. **Item 29 –Damp proof course.**

The physical damp proof course has not been installed in the sub-floor brickwork. The Builder said that a chemical had been added to the mortar for the lower courses in order to provide a damp course but, according to Mr Lees’ evidence, at the time of construction this did not comply with the *Building Code of Australia* (BCA 3.3.4.4). This item is established. Allow \$6,993 which includes the following two items.

55. **Item 30 – Mortar dags.**

Mortar dags bridge the cavity between the timberwork and the brickwork. I accept that these, where present, will need to be removed. Costing is included in Item 29.

56. **Item 31 – Sub-floor ventilation.**

There is insufficient sub floor ventilation, particularly at the rear of the New House and along the south side. I accept that extra sub floor vents need to be installed. Costing is included in Item 29.

57. **Item 32 – Attached piers.**

There is no evidence that brick ties have been used to secure the brick piers to the sub-floor brickwork. The Builder said that he had provided such ties and in the absence of any other evidence I disallow this item.

58. **Item 33 – Unseasoned timber.**

Unseasoned hardwood has been specified on the design drawings and used as sub-floor framework. Mr Lees says that this style of timber is not recommended for use with polished timber floors. Nevertheless, the timber used appears to be in accordance with the contract documents and the polished timber floor seems to be in excellent condition. This item is not allowed.

59. **Item 34 – Backfilling.**

Extra backfilling is required around the strip footings to prevent water build up around the footings. I accept that it has to be done. Allow \$949.

60. **Item 35 - Kitchen cupboard doors.**

The overhead cupboard doors are slightly smaller than the carcasses and the white melamine can be seen below the bottom of the doors. This was pointed out on the inspection but I think that the problem really is that the carcass edge strip has been covered with melamine instead of a material matching the doors. This matter was discussed at the time of installation between Mrs Ivanac and the Builder and according to the Builder Mrs Ivanac was going to paint the edges of the carcasses. This would be an unsatisfactory solution as the Builder pointed out but there seems no reason why timber edging could not be affixed to the front of the carcasses to match the rest of the cabinetwork. I think replacing the doors is excessive. I will allow \$127.

61. **Item 36 – Bench top.**

The bench top is scratched. On inspection I saw only one faintly visible scratch which is said to have arisen as a result of the Builder having to sand back the last coat of lacquer which had to be done by hand because Mrs Ivanac had moved in. Compared to other marks on the bench top the scratch in question is trivial and almost invisible. It would be quite unreasonable to allow for the sanding and resealing of the bench top because it is so trifling that no-one would do it. It is a de minimis situation. I am not allowing this item.

62. **Item 37 – Kitchen window.**

The glass pane of the kitchen window is alleged to be scratched and not siliconed into position. I could not see the absence of silicone nor could I see the scratch at the appropriate distance recommended by the Guide to Standards and Tolerances. This item is disallowed.

63. **Item 38 – Drawers.**

The bottom drawer adjacent to the pot drawer is catching and requires adjustment. The fact that it is catching now does not mean that it was defectively constructed. It is adjustable, as most doors and drawers are, and like most doors and drawers will need periodic adjustment. I am not satisfied as to this item.

64. **Item 39 – Pipe penetration.**

There is a hole in the sink cupboard carcass that requires patching. This was cut in the rear of the cabinet to allow the hoses from the dishwasher. It requires some sort of collar to be put around it to cover the cut-out. This item was not separately costed. It is a small matter of providing a collar. I will allow \$84.

65. **Item 40 – Window leak.**

There is evidence that the overhead window above the sink cupboard has been leaking causing water damage to the plaster lining. This was shown to me and is proven. Allow \$334.

66. **Item 41 – Plastic caps.**

Plastic caps have not been installed to cover any of the fixing screws inside the cupboard. This was also demonstrated. This item was not separately costed. The price of the caps would be trifling but they will need to be purchased and fitted. I will allow \$127.

67. **Item 42 – Skirting kickboard.**

The skirting of the return bench has not been polished. That was also demonstrated. This item was not separately costed. I will allow \$84.

68. **Item 43 – Creaking floors.**

No one was able to make them creak at the inspection. I am not satisfied that the floors are creaking. Indeed, the strip flooring seems to be of excellent quality in contrast to other parts of the work.

69. **Item 44 – External sliding doors.**

The door handle to the sliding flywire door has been altered and the previous screw holes have not been repaired. This is proven but I think replacement of the door is excessive. I will allow \$169 to cover the screw holes.

70. **Item 45 – Dining/lounge ceiling.**

There is said to be obvious plaster patching to the central section of the lounge/dining room ceiling. Although not obvious to the casual observer, it is nonetheless a defect and requires repair. Allow \$509.

71. **Item 46 – Stained timberwork and painting.**

Timberwork throughout the house has a clear finish. Mr Lees says that throughout the house the timber has been inadequately sanded between coats of clear finish. He says that the grain of the timber is raised and requires re-sanding and further painting. This is a matter of finish and, particularly bearing in mind the contract price, I do not think that the finish presented by the Builder is unreasonable. I am not satisfied as to this item.

72. **Item 47 – Installation of architraves.**

The joints in many of architraves have not been pinned and glued allowing the joints to open. I accept Mr Lees' evidence that they need to be pinned. Allow \$585 which includes item 49.

73. **Item 48 – Floor tiling.**

Floor tiling to the bathroom, laundry and toilet has not been finished under the line of the door. When the door is closed there is a band of tiling approximately 25mm wide that can be seen outside the line of the door. Again, this is a matter of aesthetics. The tiling clearly had to be carried over the chipboard flooring for the laundry so as to join the tongue and groove flooring. I am not satisfied as to this item.

74. **Item 49 – Door adjustments.**

Bedroom door to the back bedroom is binding on the head and requires adjustment. This item is proven. Costing is allowed in Item 47.

75. **Item 50 – Water stains.**

There were said to be three water stains in the ceiling paintwork in the front bedroom. I accept that the first two are water stains, that is, the stain in front of the window and the one above the bed, but the one in front of the wardrobe seems to be an irregularity in the paintwork. However, whether it is an irregularity or a stain, it still needs to be rectified and I accept the ceiling will need to be repainted. This item is not separately costed but was included with Item 46 which is a very substantial painting item that I have not allowed. These three marks only require a touch up and since the allowance to repaint the living room ceiling is a generous one I think it should be included in that.

76. **Item 51 – Floor and wall tiling.**

The caulking of the junction between the bench top and the tiles in the laundry is cracking and uneven and the timber trim at the end of the tiling has fallen off. The cuts around the door jambs of the laundry door are also uneven leaving wide grout joints and there are various other criticisms made. All of this item is established. Mr Lees' figure for this includes Item 46 which I have not allowed. That latter item is more substantial and would account for most of the composite figure. For this single item I will allow \$903.

77. **Item 52 – Bath.**

I accept that the bath has not been siliconed around the rim. Mr Lees also said that there is insufficient support to the base of the bath but with the bath in place I cannot see how he was able to form that opinion. The Builder said that it has been supported on mortar. I am satisfied that the bath needs to be siliconed but I am not satisfied that it has been insufficiently supported. To put a silicone bead around the bath is a simple matter. I will allow \$84.

78. **Item 53 – Vanity unit.**

There was a long vanity unit shown in the plans but a shorter vanity unit has been provided because an extra door was put into the room to connect it with the bedroom. In addition, Mrs Ivanac and Mrs Bodnarcuk purchased a particular basin to match the spa bath they had bought. The basin was designed to be set into the side of a narrow vanity unit. When the Builder pointed out to Mrs Ivanac that to install the basin the vanity unit could only be 300mm wide, she said that she wanted the vanity unit to be wider. So a 450 vanity unit top was provided by the Builder. Because of the design of the basin the front of the vanity unit had to be scribed on a very difficult angle to try and fit the curved contour of the basin. Although I am satisfied that the Builder did his best the result is quite inadequate from an aesthetic point of view. Despite having sympathy for the Builder I find that he should not have undertaken this task and should have directed the Owners to obtain another basin instead. The vanity top will have to be replaced to suit another basin that the Owners will have to provide at their own cost. Allow \$865.

79. **Item 54 – Garage ceiling.**

This also has not been back blocked and that will have to be done. Allow \$814.

80. **Item 55 – Finish to the garage floor.**

The finish to the garage floor is said by Mr Lees to be “particularly rough”. The evidence in regard to this was, on the Builder’s side, that he suggested this rough trowelled finish because of Mrs Ivanac’s advanced age and the danger of her slipping on the floor, particularly bearing in mind the muddy nature of the surrounding area. Mrs Ivanac said that the Builder did not ask her what sort of finish she wanted to the garage floor, that he gave her this explanation, that she told him that she wanted to paint it like in her old house. I note that it has been painted. I am not satisfied that this is defective workmanship. The Builder’s position is quite defensible. Indeed, the decision to provide a rough surface was probably wise in the circumstances.

81. **Item 56 — Pergolas.**

I accept Mr Lees’ opinion that the twisted timbers need to be replaced and that nailing brackets need to be installed to the junctions. However, I do not accept that polycarbonate roofing should be installed “as per design drawings” because I am satisfied that it was part of a variation that this would be omitted. In view of the amended design that was agreed upon it is now not practicable to cover the relevant area. Of Mr Lees’ figure I will allow \$1,199 which also covers so much of the next 3 items as I have allowed.

82. **Item 57 – Timber lining to the carport.**

The timber linings to the carport have not been sealed. That is certainly so but I am not satisfied that it was part of the contract work. The evidence is that the pine lining the Builder has installed cost considerably more than the fibrocement sheeting that one normally sees in such applications and no extra has been claimed by the Builder for this. I am also satisfied that no painting was included in the work for the extension. Indeed, such painting as was done there was undertaken by the Owners. No part of the figure I have allowed is with respect to this item.

83. **Item 58 – Roof gutters and stormwater pipes.**

In regard to this item I am satisfied that the fall on the roof gutters needs to be adjusted but I am not satisfied as to the rest of it. The stormwater disposal beyond the downpipes and the stormwater tanks were not part of the Contract. This is allowed for with Item 56.

84. **Item 59 – Fixing bolts.**

I agree that these need to be trimmed. This is allowed for with Item 56.

Existing House extension.

85. **Item 60 –Weatherboards.**

Mr Lees says that the gap between the bottom weatherboard and the top of the plinth needs to be covered by an appropriate flashing. The Builder maintained that there would be no problem with this because the water simply runs under the house. Mr Lees said that the problem is that it would run inside the weatherboards whereas it is supposed to run outside. I accept this item. This was costed by Mr Lees together with items 61- 65. Working from Mr Lees' figures I allow for so much of Items 60 - 65 as I have allowed, \$934.

86. **Item 61 – Cracking to brickwork.**

This was where the new roof was installed. I accept this item. The allowance is included with Item 60.

87. **Item 62 – Brickwork.**

Mr Lees says that the mortar joints to the brickwork vary in width with perpend joints up to 30mm. Bricks have not been cleaned around windows and doors. The problem here was the bricks from the demolished wall of the Existing House had to be re-used in order to provide a match with the rest of the house. The Builder said that he had only one brick left at the end. It would not have been possible to equalise the perpend joints by using cut bricks because there were simply no spare bricks available. Unlike the New House, the appearance of this wall is not particularly unsatisfactory and it is generally in keeping with rustic appearance of the rest of the Existing House. I accept the claim relating to the cleaning of the bricks but not the rest of this claim. The allowance is included with Item 60.

88. **Item 63 – Downpipes.**

Downpipe junctions have not been sealed. This was established. The allowance is included with Item 60.

89. **Item 64 – Eave linings.**

It is suggested that eave linings have not been sealed and are noticeably out of level along the south side of the extension. I am not satisfied as to this item.

90. **Item 65 – Overhead glazing.** The flashing to the glazed section of the roof is inadequate considering the pitch of the roof. I agree that this needs to be rectified. The allowance is included with Item 60.

91. **Item 66 – Door to bedroom 3.**

The door has been installed out of wind by more than 8mm. This was demonstrated. This was costed by Mr Lees together with Items 67- 72. Of these I have allowed only Items 66, 68 and 69 which are the small items. Working from Mr Lees' figures I assess those three items at \$321.

92. **Item 67 – Scotia mouldings.**

The scribed joints at scotia junctions are open and require filling and painting. However the painting was not part of the Contract and the small degree of filling required would I think be part of painting preparation.

93. **Item 68 – Bolts to the beam.**

The filling of the bolts to the beam above the bed is inadequate and requires re-application. This was demonstrated. The allowance is included with Item 66.

94. **Item 69 – Lining boards.**

The 45° junction to the lining boards in the bedroom 3/rumpus room wall have not been joined in a straight line. I agree that this needs to be covered with a beading. It is more incomplete than defective work. The allowance is included with Item 66.

95. **Item 70 – Scotia joints.**

It is suggested that the scribed joints to the scotia are sub-standard. I am not satisfied they are inadequate.

96. **Item 71 – Wardrobe doors.**

In his report Mr Lees said that installation of the doors was incomplete as they had not yet been installed and that a bottom track was required. This was not demonstrated on my inspection and I am not satisfied as to this item.

97. **Item 72 – Second hand lining boards.**

Second hand lining boards have been used in the back of the wardrobe in bedroom two and in the laundry. In addition to the ones I was shown

during the inspection photographs were produced as to the lining boards in the laundry. The problem here was that, like the bricks, the previous materials were to be re-used in order to provide a match. This has resulted in joints in the laundry that are not entirely satisfactory but are I think reasonable in the circumstances. As to the backs of the wardrobes, this was agreed to by the owners. This item is not established.

The claim for credits

98. I now turn to the Owners' claims for credits for items said to have been within the scope of the Contract but not done. There are four:
- (a) **Internal and external painting.** I am not satisfied that painting was included in the scope of works for the extension so this item is disallowed.
 - (b) **Credit for veranda to extension.** The Owners claim that there was to be a veranda constructed to the west of the extended bedroom two and the new bedroom three. No such veranda is shown on the Plans nor is it mentioned in the Contract. The Builder denies any such agreement and an inspection of the site would show that any such veranda would have required substantial excavation if any fall were to be obtained on the roof over it. I am not satisfied that the Builder was required to provide such a veranda.
 - (c) **Sunroom.** The Contract documents required the Builder to construct a brick veneer sunroom in front of the entry. Instead the parties agreed to a variation whereby a front porch would be constructed instead. This relieved the Builder from having to construct a brick veneer wall for the sun room, install two windows and also provide strip footings to support the brickwork. Mr Lees has costed out the savings of the provision of the windows and doors and external cladding and internal linings, at \$2,043.00 but this was on the assumption the external cladding was to be weatherboard. When it was pointed out to him in the witness box that the Plans required a brick veneer wall he said that that would amount to approximately \$2,000.00 extra. If I delete the external cladding of \$330.00 he had allowed for the weatherboards and replace it with \$2,000.00 for the brick veneer external cladding, the figure becomes \$3,713.00 plus 10% overhead and profit of \$371.00 plus GST of \$408.00. This amounts to a credit of \$4,492.00 which will be allowed.
 - (d) **The Septic tank.** The Owners paid \$4,697.00 for the supply and installation of the septic tank. Although no septic tank is mentioned or depicted in the Plans, "Sewerage" was included in the scope of works in the Contract. Since the property is not sewered this can only mean a septic tank. This cost is a credit to be allowed to the Owners.

There is therefore a total of \$9,189.00 to be allowed to the Owners as credits.

Variations

99. I now turn to the Builder's claims for a substantial number of variations. He had originally suggested modest amounts for these at the meeting in November 2003 referred to above. He described these at the hearing as "mate's rates". He now seeks larger figures. Anything that I allow should be a fair and reasonable sum and the most reliable source for that is, I think, Mr Lees, who is an expert in costing building work. On the basis of Mr Lees' figures I assess the claims that I find should be allowed at a total of \$25,684.00, as follows:

(a) **Ceiling heights increased to 2.7 metres.**

The Plans required the ceilings to be this height so this claim is disallowed.

(b) **Extra decking.**

This was an extra area beyond that shown on the Plans that the Owners requested. The Builder originally claimed \$1,389.00 but in his counterclaim, claimed \$7,300.00. Mr Lees says that a reasonable amount would be \$3,600.00 which I will allow.

(c) **Sheeting around the spa.**

The Builder originally claimed \$230.00 and now claims \$830.00. Mr Lees says a fair and reasonable price would be \$500.00 and I accept this assessment.

(d) **Door to bedroom.**

The Builder claims \$380.00 and Mr Lees says \$300-\$350.00 would be reasonable. I will allow \$325.00.

(e) **Front side light.**

The Builder claims \$400.00. Mr Lees has allowed \$191.00 which I will allow.

(f) **Cavity slider.**

The Builder claims \$350.00. Mr Lees said a reasonable figure would be between \$300.00 and \$350.00. I will allow \$325.00.

(g) **Extra tap set.**

The Builder has claimed \$320.00 which Mr Lees says is reasonable.

(h) **Gas pipe.**

This was for the piping of the gas to the internal gas fire to the house. This was not included in the Contract price so this is a proper extra and Mr Lees has not provided any estimate to dispute the Builder's claim of \$597.00 so that figure will be allowed.

(i) **Overhead cupboard.**

The Builder claims \$630.00. Mr Lees has said \$500.00 which I will allow.

(j) **Bathroom cupboard doors.**

Mr Lees said the figure of \$366.00 was not unreasonable. The question is whether it should be included with the next item.

(k) **Upgrade to vanity.**

As stated above, the plans required a longer vanity but a standard builder's range vanity could have been supplied. What has been built is a custom-made vanity which is worth considerably more. The deficiency in the bench top caused by the Builder's attempts to scribe around the basin is certainly there but this is already taken into account as a defect. I therefore propose to allow the claim for the upgrade of \$2,575.00 but accept Mr Lees view that the previous item should be included in that.

(l) **Fire surround and build in gas fire.**

The Builder claims \$800.00 for the fire surround and \$1,200.00 to build in the gas fire. Mr Lees says that the two should be included and allowed between \$750.00 and \$800.00 for them. Looking at the Plans it is clear that some sort of surround was contemplated for the "Jetmaster" heater which the gas fire replaced. Hence I accept Mr Lees' evidence that I should only make one allowance, which will be \$800.00. The Builder said that installation of the two items was different and that the "Jetmaster" heater would have had to have been flued through the roof whereas the gas heater was vented through the external wall. I cannot see that this makes any difference in terms of additional cost to the Builder. Indeed, it is one less roof penetration.

(m) **External steps and hand rail.**

Mr Lees does not dispute the amount of \$350.00 claimed by the Builder.

(n) **Extra power points \$450.00.**

Mr Lees says that this figure would amount to between 8 and 10 power points and I am not satisfied that any more than about 3 additional power points was provided. I will therefore allow \$150.00.

(o) **Extra power for hot plate.**

The Builder claims \$390 for this. Mr Lees say it should have been allowed for. The plans indicate the presence of the stove but

nothing else. The contract provided that electricity was included in the contract price. I am not satisfied as to this item.

(p) **Tinted glass.**

This related to the extension. The Plans provided for glass, which would have been plain glass. At the Owners' request, tinted glass has been provided. The Builder has claimed \$280.00. Mr Lees says that \$250.00 would be appropriate and I accept his figure.

(q) **Pergola at the front.**

This has certainly been done. The Builder claims \$900.00. Mr Lees says \$750.00 would be appropriate and I accept his figure.

(r) **Pergola at the back.**

This has also been done. Again, the Builder claims \$900.00 and Mr Lees has allowed \$750.00. Again, I accept Mr Lees figure.

(s) **Timber shelf.**

It is not dispute that this was installed. The Builder claims \$350.00. Mr Lees says \$250.00 would be appropriate and I accept his figure.

(t) **French doors.**

French doors were installed between the rumpus room and the carport instead of a single door as per the Plans. The Owners argue that in assessing the amount of this claim it ought to be taken into account that less bricks were used in the walls. However that wall was constructed from bricks taken from the demolished part of the house and so I think there would have been no saving. The Builder claims \$1,200.00. Mr Lees says \$1,000.00 would be appropriate. I will allow Mr Lees' figure.

(u) **Change existing wardrobes.**

It is not disputed that these were changed. The Builder claims \$520.00. Mr Lees says \$300.00 would be appropriate. I will allow Mr Lees' figure.

(v) **Shelves in cupboards.**

The Builder claims \$800.00. Mr Lees says \$256.00 would be appropriate which, coincidentally, was the amount originally claimed for this item by the Builder. I will allow Mr Lees' figure of \$256.00.

(w) **Four extra drawers.**

The Builder claims \$280.00. Mr Lees says \$160.00 is appropriate. I will allow Mr Lees' figure.

(x) **Slate flooring.**

The Builder claims \$1,700.00 which Mr Lees says would be an appropriate figure if it was indeed a variation. The Owners dispute that it was to be a variation and say that the Builder verbally agreed to do that before the contract was signed in order to get the job. There is nothing to that effect in the Contract and no floor coverings are specified in the Plans. In the absence of an admission by the Builder that he had agreed to do this for nothing it is a variation and I will allow the figure of \$1,700.00.

(y) **Extra floor deck height.**

The Builder claims \$2,976.00 for this. As previously indicated, the Plans are quite misleading. The elevations depicted in the Plans do not show this increased height that the Builder had to build to but the survey levels are written in the Plans. The Builder was required by the Contract to construct what is in the Plans and they show a house of those dimensions built on the levels specified. Since he only did what the Contract required him to do I do not accept that this is an extra.

(z) **Hand rail to deck.**

The Builder claims \$2,380.00 and Mr Lees says that \$2,000.00 would be appropriate. This would not have been required had the decking been of a height above ground level that the elevations in the drawings showed. Although the Builder did agree to build the New House with the levels indicated, the Plans do not require any railing and so a railing is a variation. I will therefore allow Mr Lees' figure of \$2,000.00.

(aa) **Big steps.**

The Builder claims \$750.00 for constructing steps down from the deck onto the walkway linking the New House to the Existing House. Again, if the deck had been closer to actual ground level these would not have been required. Although the Builder agreed to construct the deck to those levels, no steps are shown in the Plans and so these are an extra. I will allow Mr Lees' figure of \$600.00.

(bb) **Change supporting beams.**

The Builder claims \$1,320.00 for this. Mr Lees said that the appropriate figure was between \$900.00 and \$1,200.00. I will allow \$1,050.00.

(cc) **Hot water.**

The hot water service is not shown in the Plans and was not included in the Contract. I will allow the amount of the claim of \$960.00.

(dd) **Upsize bedroom window.**

The Builder claims \$300.00 for that. Mr Lees says appropriate figure is between \$250.00 and \$300.00. I will allow \$275.00.

(ee) **Finish plans.**

The Builder was given only three town planning drawings by the Owners and went away and finished the plans himself. He has claimed \$2,500.00 for doing this and says that it took him three days. Mr Lees says that an appropriate allowance would be \$960.00. However, there was no agreement that he would charge anything for finishing the plans and I cannot find from the circumstances that an agreement to pay a reasonable price ought to be implied. I am not satisfied that this is a variation.

(ff) **Upgrade kitchen.**

There is no doubt that the kitchen has been substantially upgraded from what is shown in the Plans. The Builder claims \$5,000.00 and Mr Lees thinks that is a reasonable figure.

(gg) **Excavate for water tanks.** This was not part of the Contract works. The Builder has claimed \$500.00 and Mr Lees says that \$250.00 would be reasonable. I will allow Mr Lees' figure.

Defence to the claim for variations

100. In regard to each of the claims for variation, the Owners rely upon sections 37 and 38 of the *Domestic Building Contracts Act 1995*. Section 37 applies to variations that a builder wishes to make to plans and specifications. Section 38 applies to variations to plans and specifications by the building owner. In neither case has the procedure set out in these sections been followed.
101. Where a variation is made at the instigation of a builder, s.37(3) provides that the builder is not entitled to recover any money in respect of the variation where he has not complied with the requirements of the section, unless the Tribunal is satisfied that there are exceptional circumstances or that the builder would suffer a significant or exceptional hardship by the operation of the section and that it would not be unfair to the building owner for the builder to recover the money.
102. In regard to s.38, this section only applies when a building owner who wishes to vary the plans and specifications, gives the builder a notice under sub-section (1). No such notices were given.
103. The sections are there to protect owners from unexpected claims for variations. Where it is a builder's variation he must follow the required procedure. If he does not he will have to bring himself within one of the exceptions. Where it is an owner's variation, in order to gain the protection of the Act the owner should likewise follow the procedure.

104. The variations in this case were agreed to quite informally and appear to have been at the request of the Owners. In regard to the two that might have been builder's variations namely, the handrail to the decking and the steps to the decking, claims have been made against the Builder with respect to the work that is the subject of the variation. It would seem inequitable to allow claims against the Builder for rectification of work that he is not permitted by reason of the operation of the section to claim for.
105. It is impossible on the evidence to disentangle which of the other variations were at the instigation of the Builder and which were at the instigation of the Owners. There were discussions between them as a result of which an agreement was reached and, except where I have stated to the contrary above, that is not disputed. I do not think any of them was strictly a "builder's variation", in the sense that it was something insisted on or required by the Builder. Although one or more of them might have arisen due to suggestions that he made they were all ultimately variations that the Owners wanted.
106. I think it is also significant that both sides contemplated an offset between the credit for the sunroom and the variations. There could obviously only be an offset in favour of the Builder if the variations were to be paid for.
107. I think in the circumstances of this case and bearing in mind the casual relationship between the parties, arising as it did from the very friendly relationship that they had, that it would be most unfair to the Builder not to allow him to recover a reasonable price for the variations that the Owners wanted. It would certainly not be unfair to the Owners to allow it. I am satisfied that they knew they were variations and that they would be at an extra cost, albeit they were never told how much the cost would be. For these reasons I am satisfied that the Builder ought to be able to recover for these variations.

Conclusion

108. There is a claim and counterclaim but in this case I think it is appropriate to offset the figures and make only one order on the claim that takes into account the Builder's success on the matters sought in the counterclaim. That will be that the Builder pay to the Owners \$47,686, calculated as follows:

Cost of rectifying and completing defective and incomplete work:	\$64,181
Add credits:	<u>\$ 9,189</u> 73,370
Less variations	<u>25,684</u>
Balance due to Owners	<u>\$47,686</u>

SENIOR MEMBER R. WALKER