VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO.D624/2009

CATCHWORDS

Repudiation – whether builder entitled to balance of contract price – cost of rectification and completion - liquidated damages – whether loss of rental in contemplation of parties when contract entered into

APPLICANT	Boutique Homes Pty Ltd (ACN 130 382 188)
FIRST RESPONDENT	George Tzimourtas,
SECOND RESPONDENT	Desy Tzimourtas
WHERE HELD	Melbourne
BEFORE	Deputy President C Aird
HEARING TYPE	Hearing
DATE OF HEARING	8 & 9 April, 21 & 22 July and 3 September 2010
DATE OF ORDER	25 October 2010
CITATION	Boutique Homes Pty Ltd v Tzimourtas (Domestic Building) [2010] VCAT 1793

ORDER

1. Order the respondents to pay the applicant $25,174.95.
2. Costs and interest reserved with liberty to apply. I direct the principal registrar to list any application for costs for hearing before Deputy President Aird for half a day.

DEPUTY PRESIDENT C AIRD

APPEARANCES:

For Applicant	Mr D Deller of Counsel
For Respondent	Mr J Forrest of Counsel

REASONS

1. All too often parties to a building contract fall into dispute because of communication difficulties during the construction process. Although their respective claims may not be high, parties sometimes become so embroiled in the dispute they lose all sense of proportionality, as has seemingly happened here. The applicant builder claims $42,190.57 which it says is the final payment due under the contract, alternatively $37,351.27 on a quantum meruit. The owners claim $41,610: $16,860.40 for completion and rectification costs, liquidated damages of $3,500 and loss of rent of $21,250.

2 The hearing was initially listed for two days. Ultimately it proceeded over five days. The hearing commenced, as scheduled, in April 2010, and was adjourned part-heard to late July for a further two days – this being the next convenient date for the tribunal, the parties and counsel. Because of the long delays, the parties wanted an opportunity to review the transcript before preparing final submissions. Written submissions were filed by both parties, and these were supplemented by oral submissions at the final hearing day on 3 September 2010.

3 The builder was represented by Mr Deller of Counsel, and the owners by Mr Forrest of Counsel, both of whom prepared comprehensive written submissions which have been of considerable assistance.

4 As this matter was initially listed for a two day hearing, tribunal books were not ordered. Unfortunately, although documents referred to in witness statements were exhibited to those witness statements, it was difficult to find each exhibit as they do not have exhibit sheets, nor dividers. The documents exhibited to Dr Tzimourtas' witness statement are not paginated which made locating the relevant pages difficult. Subsequently, when the hearing resumed in July 2010, the builder provided the tribunal and the owners with a copy of Dr Tzimourtas' witness statement with handwritten numbers on each page of the statement and the exhibits.

Background

5 On 28 February 2008 the owners entered into a standard HIA contract for the construction of a new home on land they own in Brighton East. The contract price was $338,877.

6 The builder named in the contract was Boutique Homes Melbourne Pty Ltd. After Boutique Homes Melbourne Pty Ltd merged with the Alcock Brown-Neaves Group in 2008, the owners were sent a Deed of Assignment under cover of a letter dated 11 September 2008 advising them of the change, and requesting them to sign and return the Deed of Assignment. A further copy was sent to the owners under cover of a letter of 9 December 2008 after Dr Tzimourtas told Sharon Wong, project co-ordinator for the builder, in a telephone conversation in early December 2008 that he would sign it. Although the owners failed to sign and return the Deed of Assignment to

the applicant, they did not raise any concerns about the assignment, nor did they object to the applicant completing their home. I find that their contract was assigned to the applicant, and it is entitled to bring this application as the builder.

7 All seems to have proceeded relatively smoothly until around 22 October 2008 when the builder rendered its fixing stage progress claim. The owners disputed that the works had reached fixing stage, and refused to pay the claim. The builder suspended the works on 11 December 2008 until the claim was paid on 18 December 2008. However, it seems that little if any work was then carried out for some months. The owners became increasingly frustrated, and lost all trust in the builder to finish the house and comply with its contractual obligations or their express requests.

8 Each party alleges the other repudiated the contract, which repudiation each says they accepted thereby terminating the contract. The builder alleges the owners repudiated when they changed the locks and took possession. The owners claim the builder repudiated by demanding final payment before the works were completed, and requiring all monies to be paid before it would install the hot water service and the appliances.

Were the works complete when the builder demanded the final payment?

9 Clause 36 of the contract provides that when the builder considers the works are complete it must give the owner a Notice of Completion and the Final Claim. Further, that the builder must not demand payment of the final claim until an occupancy permit has been issued, where required. The parties are to meet on site within 7 days of the owner receiving the Notice of Completion and Final Claim to carry out an inspection as contemplated by clause 37. The builder is then required to give the owner written notice when the items have been completed with the final claim to be paid by the owners within 7 days of receipt of such notice.

10 On 7 May 2009 the builder rendered a Tax Invoice for $37,979 described as *our progress claim for the PRACTICAL COMPLETION stage of your new home…due and payable in 7 days as per Schedule 1 Clause 30 of our Building Agreement* and *Please check the Final Account before paying as variations raised during construction will not be included in the contract amount.* I note that the Schedule 3 – Method 1 of the contract does not contemplate a progress claim when the works reach practical completion. The nominated progress claim stages, not including the deposit, are: base stage, frame stage (excluding garage), lock-up stage, fixing stage (excl built in shelves, baths, garage & Alfresco roofs if applicable), and completion (sic).

11 This Tax Invoice has a footer identifying it as *Page 1 of 2*. Page 2 of 2 is a letter dated 7 May 2009 headed *Progress Claim – Completion stage.* The first sentence of this letter states *Please find enclosed our progress claim for the Completion Stage of your new home….* It seems that the Statement

of Final Account dated 7 May 2009 for $42,190.57 was attached to this letter.

12 Essentially, the current dispute between the parties arises because of their different expectations about the timing of the installation of the appliances and the hot water service. The owners contend the builder's persistent refusal to install them prior to final payment being made is clear evidence of the builder evincing an intention not to be bound by the terms of the contract.

13 Sharon Wong, project co-ordinator for the builder, confirmed it was the builder's practice not to install appliances and hot water services until after settlement. Exhibited to her witness statement filed on 1 April 2010 is the builder's commencement letter dated 4 June 2008. Although not specifically referred to in the letter it was apparently accompanied by an information document headed 'What to expect during construction of your new home'.

14 Of particular relevance here is the information in the two last boxes. First confirming that the owners will receive the Certificate of Occupancy and all compliance certificates at settlement. Secondly, that the settlement will usually occur within 7 days of the handover inspection, at the builder's offices at which time *the keys and all certificates will be handed over to you on this day in exchange for the final payment.*

15 On 15 April 2009 the builder wrote to the owners advising:

> The completion of your home is fast approaching and so it is time to make the necessary preparations for the handover inspection and settlement to take place.
>
> The handover inspection has been arranged as follows [for 1 May 2009]
>
> …
>
> The items noted and agreed will then be completed within 7 working days (subject to the items listed).
>
> …

16 Ms Wong states at paragraph 45 of her witness statement:

> On 15 April 2009 I sent a letter to the Respondents regarding final inspection of the Property and settlement. In that letter I explained that it is the Applicant's policy that kitchen appliances and hot water service not be installed in a new home until there is a date for settlement and in some cases they will be installed within three days of settlement or an agreed timeframe…I did not receive any letter in reply from the Respondents objecting to any of the matters raised in my letter.

17 I note these matters are not referred to in the letter of 15 April 2009 but are set out in what I understand is an attachment to that letter, although not expressly referred to. The attachment appears to be a pro-forma

information sheet. The builder relies on the following statement as in some way excusing it from its contractual obligations:

> **Appliances**
> It is Boutique Homes policy that the **kitchen appliances** and **hot water service** not be installed in your new home until we have set a date for settlement. In some cases, they will be installed within 3 days of settlement or an agreed time frame. This is due to the common theft of these products from building sites.

18 Dr Tzimourtas met Mr Huysmans on-site on 1 May 2009 when Mr Huysmans prepared a list of items requiring attention – this handwritten list is headed 'FINAL INSPECTION'. Dr Tzimourtas emailed the signed list to Ms Wong on 2 May 2009 advising:

> We have had the final inspection with John Huysmans at 2 pm on 1/5/09 and I have included the signed list of defects that needs to be rectified as per your instructions within 7 days.

19 The listed items do not include the appliances. However, the list appears consistent with the advice in Ms Wong's letter dated 15 April 2009 – items requiring attention have been identified. I am not persuaded that the 15 April letter is the requisite Notice of Completion required under clause 36 of the contract.

20 One of the items noted on the 1 May list is *contract refers underground power*. There is a note on drawing 12 of the contract drawings which provides:

> If local authority requires overhead power to be converted to underground supply with pit it is the client's responsibility to arrange including all associated fees.

21 Inexplicably, the owners were not advised of the requirement for underground power until the inspection on 1 May when it was included on the list of items requiring attention. Thereafter ensued a flurry of emails between the parties, but ultimately the owners arranged and paid for the installation of the underground pit which, on their evidence, was installed on or about 25 May 2009.

22 On 26 May 2009 Ms Wong emailed Dr Tzimourtas:

> Further to our telephone conversation on Friday, can you confirm if you are able to meet with John Huysmans on site tomorrow at 2:00pm for a sign off and then proceed with the settlement of your home.
>
> I understand that you are arranging for underground electricity pit to be installed, however, please note that this is not included as part of the standard building contract, and should not prevent you from signing off on site with your supervisor. Upon receiving notification of underground electricity pit being completed, we will arrange for our electricians to return to site to connect the wires and ensure that you have power connected to your new home.

> Can you also advise when you would like your appliances to be installed. Our standard process is to have these installed after settlement to avoid theft and vandalism to your home especially if you require additional works to be done by your external contractors to the house prior to moving in. We will require at least 3 days notice for delivery of appliances.

23 On 10 June 2006, Elise Loukides, administration manager for the builder, wrote to the owners referring to clause 37.2 of the contract. She advised that all defects were complete, the building had reached completion and that payment of the Final Claim was due within 7 days.

24 On 12 June 2009 the owners wrote a lengthy letter of nearly three pages to Ms Loukides setting out their concerns about the lack of progress with the project, and the builder's lack of responsiveness to concerns they had raised during construction. In particular they made it quite clear they expected all works to be completed, and what they referred to as a valid Certificate of Occupancy being provided to them, when final payment was made. A conditional Occupancy Permit had been issued by the Responsible Building Surveyor on 15 May 2009 confirming the building was suitable for occupation subject to:

> **Permit conditions**
>
> All cooking appliances, hot water appliances and if applicable the rain water tank to be operational prior to occupation. All services to be connected prior to occupation.

25 Surprisingly, although the hot water service was not installed by the builder, the builder produced a compliance certificate for the supply and installation of the hot water service dated 1 April 2009. Ms Wong confirmed in response to a question from me that it was the builder's usual practice to have suppliers provide compliance certificates in anticipation of appliances being installed after settlement. This is another example of the builder's lack of regard and understanding of its contractual [and statutory] obligations.

26 The last paragraph on the second page of the owners' letter of 12 June is pertinent:

> Just in case I am wrong and all of these things have in actuality all been completed and we are "unaware" of this I am willing to give Boutique Homes the benefit of the doubt and also their last chance to honour their agreement with us. If as you state the house is ready for Handover and I mean "complete" with all appliances and utilities connected and correct, we are willing to meet you at the property on **Wednesday the 17th of June at 3 p.m.** where you will need to conduct with us the final inspection and to provide the following:
>
> 1. The keys to our new home,
> 2. A receipt for final payment,
> 3. Compliance certificates for:

- Plumbing works
- Electrical works

4. A new original Occupancy Certificate
5. Information pack on the care and maintenance of our new house.

27 Although the owners had made it quite clear they required the appliances to be installed prior to settlement, the builder persisted with its seemingly intransigent approach. On 17 June 2009, at 11:47am, Ms Wong sent Dr Tzimourtas a further email confirming the appointment on site for 3 p.m. that day and confirming that settlement occurs in the office with appliances to be installed after settlement on at least three days' notice.

28 Dr Tzimourtas responded at 1:15pm by email reiterating his requirements that the house be completed as specified in the owners' letter of 12 June and:

> …If the house is not ready for handover as specified in my letter to Elise then there is little point to any final inspection as it will not be final, if what you are stating is that the house is not ready and that list of defects is not completed.
>
> Please confirm that the house is complete and ready for handover as specified in my letter.

29 Inexplicably, although Dr Tzimourtas states in his witness statement that Ms Wong told him that Mark Crewther, the building manager, had left a telephone message on his phone on 17 June to discuss the matter further, the builder's representatives appear to have been decidedly reluctant to discuss the owners' concerns with them, preferring instead to correspond by email. Although the contract clearly provides the builder must not claim the final payment until the process set out in clauses 36 and 37 has been completed, the builder sought to arbitrarily alter the terms of the contract by simply advising the owners about its policies. If the builder does not consider it prudent to install the appliances and the hot water service prior to settlement, clause 36 should be amended, or a special condition included in the contract, prior to the contract being signed by the parties. It is basic contract law that one party cannot unilaterally alter the terms of the contract: both parties must agree. Here, the owners were insisting the builder comply with its contractual obligations and complete the works including the installation of all appliances and hot water service before settlement and the builder simply refused to comply.

Termination

30 Dr Tzimourtas and Mr Huysmans both gave evidence that they attended the property on 17 June as arranged. However, Dr Tzimourtas refused to carry out a further inspection when told that the appliances and hot water service had not been installed. Despite his assurances in the letter of 13 June 2009 that he would bring a bank cheque with him to the inspection, Dr Tzimourtas failed to do so. Under cross examination he said at first that he

had taken a bank cheque with him, then conceded it was a personal cheque but when asked to produce a cheque butt said that he had not kept it. I find this difficult to accept. Not only is Dr Tzimourtas, on his own evidence, an experienced investor, he is a practising medical practitioner and it seems very unlikely that he would not keep a cheque butt.

31 However, although perhaps impacting on Dr Tzimourtas' credibility as a witness, nothing turns on this because the builder failed to complete the house in accordance with its contractual obligations.

32 On 22 June 2009 the owners changed the locks and took possession of the property. They also sent the following letter to the builder addressed to Ms Loukides:

> Pursuant to my letter dated 12/6/09 we are informing Boutique Homes that it has been deemed to have abandoned the above property on the grounds of their inability to deliver to us the property as stated on the 17th of June 2009.
>
> Following this take this as being notified that from this date onwards Boutique Homes, its agents, contractors and anyone assigned by Boutique Homes will not be permitted entry to the property, without the express written authority from the owners.
>
> Please note that any transgression to this directive will be deemed as illegal trespassing.

33 Surprisingly, this does not seem to have elicited any response from the builder, until the builders' lawyers wrote to the owners on 23 July 2009 – a month later, demanding payment of $38,288 and enclosing a Notice of Breach of Contract under clause 42.2 of the contract. Although $38,288 is the amount of the Completion Stage payment noted in Schedule 3-Method 1 of the Contract, the basis of the claim for this amount is otherwise unclear. It is not an amount that appears on either of the claims/invoices sent to the owners by the builder. I reject the submission by counsel for the builder that this letter can properly be described as a final payment claim. The Notice of Termination is dated 11 August 2009. Inexplicably, although the contract has been assigned to the applicant builder in this proceeding, Boutique Homes Pty Ltd, the covering letters and both Notices referred to Boutique Homes Melbourne Pty Ltd as the builder.

34 Then, on 3 August 2009 Dr Tzimourtas wrote to Ms Loukides again, this time seeking damages of $75,928.87 for loss of income for the period 9 March to 3 August 2009 of $31,500 and interest costs for the same period of $44,428.87. No calculations or supporting material were provided.

35 Clause 38 of the contract provides that where the owner takes possession before paying the final claim and without the builder's written consent, the owner commits a substantial breach of the contract and the builder can elect to either:

- treat the owner's action as a repudiation and accept that repudiation;
- give the owner a notice to remedy the breach under clause 42; or
- accept the owner's actions as a variation of the building works such that it is not required to complete any outstanding works.

36 As I understand it, the builder contends that the invitation to the owners to attend the inspection on 1 May 2009 can be construed as a Notice of Completion required under clause 36. I reject this. The letter dated 15 April 2009 is quite clear – in it the builder advises the owners that *completion of your new home is fast approaching* and invites them to a handover inspection. Clause 36 requires the Notice of Completion to be sent to the owners when the builder considers the works are complete, not when they are nearly complete. Although clause 36 seems to contemplate the Notice of Completion and the Final Claim being sent together, the Completion Stage Claim and the statement of final account were sent to the owners on 7 May 2009. Whilst clause 36 does not prohibit the sending of the final claim before the Occupancy Permit has issued, it prohibits the builder from demanding payment until the Occupancy Permit has issued.

37 Counsel for the builder helpfully referred me to the recent High Court decision in *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Limited* [2007] HCA 61 where the majority said, when considering when renunciation (repudiation) occurs, at [44]:

> …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.

38 There can be no clearer evidence of an intention not to be bound by the terms of the contract, or renunciation of a fundamental obligation under the contract, than the conduct of the builder in first failing to comply with clauses 36 and 37 of the contract, and then refusing to comply with its obligations to complete the works before final payment. I find the builder repudiated the contract, which repudiation the owners elected to accept when they took possession of the property on 22 June 2009, at which time they were not in breach of their contractual obligations because the final claim was not due and payable.

The builder's claim

39 However, this does not mean that the builder's claim for payment of the balance of the contract price fails. Although the contract was not terminated in accordance with the provisions of clauses 43 and 44 of the contract, I note that clause 44 provides that where the owner terminates the contract under clause 43 then:

> 44.0 If the Owner brings this Contract to an end under Clause 43, then the Owner's obligations to make further payments to the Builder are suspended for a reasonable time to enable the

Owner to find out the reasonable cost of completing the Building Works and fixing any defects.

44.1 The Owner is entitled to deduct that reasonable cost calculated under Clause 44.0 from the total of the unpaid balance of the Contract Price and other amounts payable by the Owner under this Contract if the Contract had not been terminated and if the deduction produces:

- a negative balance – the Builder must pay the difference within 7 days of demand; and
- a positive balance – the Owner must immediately pay the difference to the Builder

40 In my view, where the contract clearly contemplates that if owners terminate the contract because the builder is in substantial breach, they are obliged to pay the builder the balance of the contract price, if any, after deducting the reasonable completion and rectification costs, the same must apply where the contract is terminated at common law by the owners' acceptance of the builder's repudiation.

41 Accordingly, I find the builder is entitled to the balance of the contract price of $42,190.57 less the reasonable cost of completion and rectification works incurred by the owners.

42 If I am wrong, I am satisfied orders should otherwise be made under s108 of the *Fair Trading Act* 1999, or alternatively under s53 of the *Domestic Building Contracts Act* 1995 which empowers the tribunal to make any order which it considers fair to resolve a domestic building dispute. In all the circumstances, and in particular noting the works were substantially complete at the date the owners accepted the builder's repudiation of the contract, I consider it fair that the owners pay the builder the reasonable cost for the work which it has carried out, and for which they have received the benefit.

43 The evidence before me as to the cost of the works carried out as at the date of termination is limited. The builder asserts after deduction of the cost of supplying some appliances it is $37,351.27.

44 The builder relies on the witness statement of Aidan Hooper, managing director of the builder, and the expert witness statement Tony Croucher of Buildspect Pty Ltd, a building consultant. Both are somewhat lacking.

45 It is unclear why Mr Hooper was called to give evidence. He confirmed under cross examination that he has no personal knowledge of the issues in dispute having been the managing director since 10 July 2009. He said that he had been involved with the company since March 2009 when he had been flying in and out of Melbourne from Western Australia, but that he had not been managing the issues with this project.

46 Mr Hooper confirmed his witness statement was prepared for him, and simply exhibits a number of documents, with which he seemed to have little

familiarity, including one headed 'Detailed Cost Report' which he said would have been printed off by one of the builder's administrative staff. As with the other documents exhibited to his witness statement he seemed to have little understanding of the provenance of this report confirming that if he had any questions about its content he would refer them to the builder's accounting staff.

47 Although it purports to do so, Mr Croucher's report does not comply with VCAT PN2 – Expert Evidence. It is little more than a recitation of the chronology as he was instructed, and is more akin to a legal opinion as to the rights and entitlements of the builder, rather than an independent expert report prepared by an expert whose paramount duty is to the tribunal. As raised, and discussed during the hearing, as Mr Croucher is not legally qualified, he is not qualified to give these opinions.

48 In any event, neither provide any evidence as to the cost of the appliances and accordingly, it seems to me that the only fair way to determine the reasonable cost of the works as at the date of termination is to adjust the contract price as contemplated by clause 44.0 of the contract.

49 In the amended Reply to Points of Defence and Points of Defence to Counterclaim filed on 8 April 2010, the first day of the hearing, the builder claims delay damages of $1,535.53. For reasons which I will discuss when considering the owners' claim for liquidated damages I find there is no merit in this claim and it is not allowed.

The owners' claims

50 The owners' claims have changed a number of times. Initially, in a letter they sent to the builder dated 3 August 2009 they claimed $31,500 for lost income, and $44,428.87 for interest costs, presumably before they sought and obtained legal advice.

51 In their counterclaim dated 18 December 2009 they claimed $19,932,53: $16,182,53 for completion works, $3,750 for liquidated damages. They also claimed loss of rental income from the date of termination of the contract to the date on which the works were completed by the owners. This claim was amended, in effect, when Dr Tzimourtas' witness statement dated 30 March 2010 was filed in which he stated he had spent $17,924.94 *in completing the premises and ensuring the premises is fit for tenants*; $3,500 for liquidated damages from 12 March 2009 to 22 June 2009 and loss of rental of $37,500 for the period 23 June 2009 to 7 January 2010 at the rate of $1,250 per week – a total claim of $58,924.94.

52 During the hearing of final submissions their claim was amended further and they now claim $41,610: $16,860.40 for completion and rectification costs, liquidated damages of $3,500 and loss of rent of $21,250 which they say is directly attributable to the delays in the completion of the project.

Completion and rectification works

53 Initially the owners claimed they had incurred $17,924.95 for rectification and completion works. This amount was subsequently reduced to $17,284.70, then to $17,139.40 and finally during the hearing of final submissions to $16,860.40. The builder contends these costs, if proven, are not recoverable by the owners because they were paid for by Trapcorp Australia Pty Ltd, of which both owners are directors. I will deal with this point first.

54 During the hearing I referred the parties to my decision in *Beamish v Rosvoll* [2006] VCAT 440 where at [61] I said:

> Notwithstanding Mr Rosvoll's pre-occupation as to who had actually paid for the works, I am satisfied that Mrs Beamish is entitled to an order for the full amount of what I have assessed as the reasonable cost of those rectification works which I have found to be reasonable and necessary. I accept that Mrs Beamish's loss is referable to the 'cost of rectification' and not whether the works have been carried out. Further, it is the breach by Mr Rosvoll of the warranties in s137C of the *Building Act* that gives rise to the loss and the cost of rectification of the defective work that quantifies the loss, not the carrying out of the works or payment for them (*Bellgrove v Eldridge* and *De Lutis Cesare v Deluxe Motors Pty Ltd* (1997) 13 BCLJ 136). It is immaterial that Mrs Beamish has only paid $30,000.00 towards the cost of the rectification works and that payment was made by a third party (*Roman Catholic Trust v Van Driel Ltd* [2001] VSC 310). It is not unusual in building cases for an owner to seek and obtain an order for damages referable to an estimate of the cost of rectification and completion works even where no works have been carried out. It is not necessary for an owner to actually incur the cost as a precondition for an award of damages.

55 It was submitted by counsel for the builder that *Beamish* had been incorrectly decided in relying on the single instance decision of Hansen J in *Roman Catholic Trust v Van Driel Ltd.* In his written submission counsel states that 'his Honour did not consider the House of Lords decision in Alfred McAlpine Construction v Panatown'[1]. Accordingly, I have revisited *Roman Catholic Trust v Van Driel Ltd* and am not persuaded the decision in *Beamish v Rosvoll* was incorrect and note his Honour did consider and in fact, relied upon, the House of Lords decision in *Alfred McAlpine Construction v Panatown* which he discussed at length at [108].

56 Further, the completion and rectification costs were paid for by a company of which the owners are the directors. Dr Tzimourtas gave sworn evidence, which I accept, that he and his wife are obliged to reimburse the company for any costs incurred on their behalf personally.

57 I turn now to the claim for $16,860.40. Unfortunately, Dr Tzimourtas has not itemised this amount in his witness statement, nor has it been itemised

[1] [2000] All ER 97; (2001) 1 AC 518

in the owners' final submissions. In his first witness statement Dr Tzimourtas simply refers to the copy bundle of receipts in the exhibit to his witness statement marked 'GT17'. This is not particularly helpful. However, these amounts are itemised in his further witness statement dated 19 July 2010 when the amount claimed was reduced to $17,284.70. At the hearing on 21 July 2010 two claims for the payment of amounts paid to South East Water were withdrawn and the claim reduced to $17,139.40. During the hearing of final submissions a further amendment was made, and the amount claimed reduced to $16,860.40.

58 Considering Dr Tzimourtas' evidence in response to questions put to him in cross-examination and having considered each of the items claimed, and the supporting invoices and/or receipts I allow the following:

Date	Item	
29/6/09	Appliances – invoice from Good Guys	$3,300
20/7/09	Electrical works – Ampvolt Electrical	$2,150.50
14/8/09	Plumbing certificate of compliance and invoice from All Solar systems Australia Pty Ltd	$4,446.52
1/9/09	Punctual Plumbers Pty Ltd – I accept the works detailed on the invoice were the builder's responsibility	$ 550.00
17/8/09	AGL – new connection – electricity. I am satisfied the power had not been connected as at 22 June 2009. There is no evidence to support Mr Huysman's evidence that connection had been arranged and it would seem unusual for the owners to have an invoice for a new connection if they had not needed to arrange it.	$ 177.80
7/9/09	National Infrastructure Solutions – excavation and installation of telephone wiring	$ 430.00
14/1/10	Auburn Electrical Services Pty Ltd – replacement of three faulty smoke alarms	$ 347.60
20/1/10	Repair of leak in solar hot water system flow pipe and repair of damaged copper fitting by Punctual Plumbers Pty Ltd	$ 321.20
9/3/10	Repairs and painting consequential to the leak in the solar hot water system flow pipe	$ 792
	TOTAL	**$12,515.62**

59 I do not allow:

- any utilities charges (from South East Water, AGL and Origin Energy) – there is no basis for payment of these amounts by the builder;
- the cost of the underground power pit – irrespective of the delay in the builder advising the owners it was required, the cost of an underground pit, if required, was not included in the contract price;
- $2,150 in accordance with the order form from All Solar Systems dated 12 August 2009 as the items included in this order form are included in the invoice dated 14 August 2009, which I have allowed;
- $27.23 - invoice from ADT dated 5 October 2009 – there are no details on this invoice and I am not persuaded it is the builder's responsibility;
- $242 - replacement of faulty pressure and temperature relief valve by Punctual Plumbers Pty Ltd on 29 December 2009 - the hot water service was not supplied nor installed by the builder;
- $286 for clearing of property sewer boundary shaft on 12 January 2010 – there is no evidence the blockage was caused by the builder's works;
- $123.37 – quotation from A&L Windows to fit missing or damaged extrusion. On the evidence before me I cannot be satisfied this is the builder's responsibility.

Liquidated damages

60 The owners claim liquidated damages of $3,500 for the period 12 March 2009 to 22 June 2009, the date on which they took possession of the property.

61 On 6 February 2009 the builder claimed an extension of time of 43 days from 11 December 2008 (the date the works were suspended for non-payment of the fixing stage payment) to 5 February 2009, the date on which it says it recommenced works.

62 This period included 13 calendar days for the Christmas break. The revised completion date was recorded as 30 April 2009. No explanation was provided for the additional days although I note that on 5 February 2009 Ms Wong sent Dr Tzimourtas an email advising works would recommence the same day, and confirming the builder was awaiting delivery of the vanity basins which had been incorrectly supplied, and the stone benchtops.

63 The 43 day claim is unsustainable. Payment of the fixing stage claim was made on 18 December 2008. In his email of 15 December 2008 Mark Crewther stated:

> …You just need to know that we are only claiming for work performed up to date and as soon as the amount is paid, your house will recommence….[emphasis added].

64 However, work did not recommence immediately. Dr Tzimourtas gave evidence that he and his wife had visited the site frequently after Christmas 2006 – it was close by their home – and that there was no sign of any activity. Despite counsel's best attempts to persuade me during cross-examination of Dr Tzimourtas that it was impossible for him to have identified whether any works were being carried out without going inside the house, the builder conceded in its correspondence to the owners that work did not recommence until some time in late March 2009.

65 On 4 March 2009 Ms Wong sent Dr Tzimourtas an email in which she advised:

> This is a quick note to notify you that the stone bench tops will be delivered on site 10/03/2009. John [Huysmans] is waiting on these to be delivered so that we can get the job recommencing. The tiles have been delivered and will commence once the stone benches are complete (sic) [emphasis added].

66 Again, on 18 March 2009 Ms Wong advised Dr Tzimourtas by email that the tiling would not commence until early the following week.

67 I find the works were delayed, and the owners are entitled to liquidated damages of $3,500 as claimed.

Delay damages

68 The owners also claim damages for delay from the date of termination until the commencement date under the lease: 23 June 2009 to 8 January 2010.

69 Initially, the owners claimed loss of rent of $37,500 for this period. It is clear the house was very nearly complete when they took possession save for the installation of the appliances and the hot water service, and some other very minor items as evidenced by their claim for completion and rectification costs of less than $17,000. On the owners' own evidence, many of the works carried out or arranged by them after they took possession of the property were not completion items, or could otherwise be said to be the builder's responsibility.

70 In addition, the owners arranged for significant landscaping and other works to be carried out.

71 During the hearing of final submissions counsel for the owners conceded they could not claim loss of rent during the period they were carrying out these works. The claim was therefore reduced by three months and amended to $21,250.

72 There are two difficulties with this claim. First, I am not persuaded on the evidence before me that the builder was ever told that the owners intended the house be used for investment purposes. Secondly, there is no evidence about how any delay in completion of the house directly, or even indirectly, caused the delay in renting it once all the owners' works were completed.

73 For the owners to succeed in their claim for loss of rent, it must have been in the reasonable contemplation of the parties at the time the contract was entered into that the house would be leased. The rule as stated by Alderson B in *Hadley v Baxendale* (1954) Exch 341; 156 ER 145 is apposite:

> Where two parties have made a contract which one of them has broken the damages which the other party ought to recover in respect of such breach of contract should be such as may fairly and reasonably be considered as *either* causing naturally, i.e. according to the usual course of things, from such breach of contract itself, *or* such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

In *Koufos v Czarnikow Ltd* [1969] 1 AC 350 Lord Reid said:

> The crucial question is whether, on the information available to the defendant when the contract was made, he should, or the reasonable man in his position would, have realised that such loss was sufficiently likely to result from a breach of contract to make it proper to hold that the loss flowed notionally from that breach or that loss of that kind should have been within his contemplation. [385]

74 Therefore, to apply Lord Reid's test, the question is whether a reasonable builder in the position of the builder who entered into the contract [accepting that all its rights have been assigned to the applicant builder in this proceeding] that the owners would suffer loss of rental payments if the house was not completed by 12 March 2009. I accept that there were initially some discussions about a dual occupancy development but that in itself is not evidence that both dwellings were to be used for investment purposes, rather than them living in one, and selling or renting the other.

75 There is no evidence that the owners ever discussed with Boutique or its representatives that the house was to be an investment. Throughout their correspondence they refer to *our new home*. For instance, in the 12 June letter they refer to the proposed final inspection on 17 June 2009 at which they expect the builder to provide:

> 1. The keys to <u>our new home</u> (emphasis added)

and the final sentence of that letter:

> Make no mistake we wish to see you at the property on Wednesday with the keys to our new home.

I put this to Dr Tzimourtas who said that was just the way the owners referred to every new house they had built. I do not find this persuasive. Home has the connotation of one's <u>own</u> home, not an investment property.

76 Even if I were satisfied that the builder knew the owners intended to lease the house when it was completed, there is no evidence at all to support their claim that the delay in completion prevented the house from being let until December 2009 with a commencement date under the lease of 8 January 2010. Dr Tzimourtas gave evidence that the owners had two real estate

agents look at the property in mid August 2009 who indicated a possible rental of $1600 per week. It is irrelevant what rental could have been achieved in August 2009. This was well after the contract completion date, and some two months after the owners took possession of the property. Although they did not let the property until January 2010 there is no evidence that this delay was in any way related to, or caused by the delay in completion.

77 Even if I were satisfied that the owners had a prima facie claim for loss of rent, there is no evidence to support the quantum of their claim. Such evidence might have included details about when the property was first offered for lease, the rental at which it was initially offered, the level of interest and number of applications from prospective tenants. Further, they had a duty to mitigate any loss. It is not unusual for the rent sought to be heavily discounted to achieve a timely lease. Although the property was ultimately leased for $1250 per week there is no evidence when the asking rental was reduced.

78 However, having allowed the owners the cost of completion and rectification works I am satisfied they are also entitled to delay damages whilst those works were being carried out. In all the circumstances, and doing the best I can on the evidence before me, I am satisfied I should allow a further four weeks at $250 per week, being the contractual rate for liquidated damages.

Conclusion

79 After taking into account the amounts I have allowed on the owners' counterclaim ($12,515.62 for the owners' claims for completion and rectification works, $3,500 for liquidated damages and $1,000 for delay damages; a total of $17,015.62), when adjusted against the outstanding balance under the contract the owners must pay the builder $25,174.95.

80 I will reserve costs and interest with liberty to apply.

DEPUTY PRESIDENT C AIRD