VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D829/2010

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic building work – subcontract – work not done within a reasonable time – termination – repudiation – sub-contractor making claims under *Building and Construction Industry Security of Payment Act* 2002 after repudiation – refusal to pay by Builder – whether a letter of refusal by Builder a payment schedule – no adjudication sought – entitlement determined at VCAT hearing - amounts claimed not owed – credibility of witnesses – subcontractor destroying works following termination – assessment of value of work done

APPLICANT	Broadform Constructions Pty Ltd
RESPONDENT	Majestic Builders Melbourne Pty Ltd (ACN 140 243 509) t/as Majestic Builders Melbourne
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	24 October 2011
DATE OF ORDER	5 December 2011
CITATION	Broadform Constructions Pty Ltd v Majestic Builders Melbourne Pty Ltd (Domestic Building) [2011] VCAT 2266

ORDER

1. The application is dismissed.
2. Order the Applicant to pay to the Respondent $35,129.89.
3. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Miss de Bono, Director
For the Respondent	Ms J. Johnston, Solicitor

REASONS

Background

1 The Applicant is a concrete contractor. Its principal, Mr McSweeney, is not a registered builder nor is he registered for carrying out domestic building work. The normal business of the Applicant is the supply of materials and labour for concreting works on commercial projects.

2 The Respondent is a builder. Its principal, Miss de Bono is registered as a builder to supervise domestic building work. It is a requirement of her registration that she employ only registered sub-contractors. Miss de Bono's husband, Mr Allan previously worked for the Applicant for a short while as a labourer on a casual basis.

3 On 3 May 2010 the Respondent entered into a major domestic building contract with Mr Allan for the construction of four new residential units on land that he owned in Frankston. The construction required the preparation and pouring of residential slabs for the four units and in May 2010 Mr Allan approached Mr McSweeney to see if the Applicant would be interested in carrying out that concreting work as a sub-contractor to the Respondent.

4 A quotation was given which the Respondent accepted. The Applicant substantially excavated for the four slabs and placed some formwork, polythene membrane and reinforcing steelwork but the work proceeded very slowly. The relationship between them became very strained.

5 Following an altercation between Mr McSweeney and a building inspector, a Mr Luke Ross, and demands by Miss de Bono that the Applicant rectify the defects that Mr Ross had identified and complete the job, the Applicant removed its material and machinery and left the site, damaging the excavations in the course of doing so.

6 The Respondent then engaged another concreter to carry out the work and the Applicant commenced these proceedings to recover what it claimed was due to it for the work that it had done. The Respondent counterclaimed for the losses that it claimed it had suffered because of the Applicant's breach of the contract to do the work.

The hearing

7 The matter came before me for hearing on 24 October 2011 with five days allocated. Mrs Johnston, Solicitor, appeared for the Applicant and Miss de Bono represented the Respondent.

8 I heard evidence from Mr McSweeney and a Quantity Surveyor, Mr Faiffa, for the Applicant and from Miss de Bono, Mr Allan, the Inspector, Mr Ross, a Building Expert, Mr O'Meara, and another Building Expert and Engineer, Mr Atchison, for the Respondent.

The witnesses

9. Miss de Bono impressed me as an intelligent and articulate witness. She gave her evidence in a dispassionate manner apart from becoming visibly upset on one occasion. Her husband Mr Allan was controlled and factual in his presentation. I found them both to be credible witnesses.

10. Mr Ross, the Building Inspector was an impressive witness and since he had no personal interest in the outcome of the proceeding beyond justifying the directions that he had given, I must regard him as being independent.

11. Mr O'Meara, Mr Atchison and Mr Faiffa are all well respected and well known Building experts who have given expert evidence in this Tribunal on many occasions.

12. Mr O'Meara was brought in to assess the value of the work immediately after termination but he also witnessed Mr McSweeney's conduct on site while he was there. He is independent and I accept what he said. Mr Atchison, gave evidence as to the cost of rectifying the damage to the site caused by the Applicant immediately before leaving and also assessed the value of the remaining work. Mr Faiffa's evidence related to the value of the work at the time of termination on the assumption that it was completed to the stage that the Applicant was ready to pour concrete. As a result of the findings that I have made, that issue was not directly relevant to my decision.

13. Mr Mc Sweeney was not an impressive witness. He had an aggressive manner in the witness box which was consistent with the evidence given by other witnesses that he shouted at Miss de Bono during telephone calls and on site, at Mr Ross on the telephone and at another building inspector on site.

14. Mr McSweeney gave the impression that he had no doubt at all in the justice of his case. That was particularly demonstrated in a very lengthy video recording that he made of his inspection of the work immediately before he removed the material from the site. In this recording he spoke quite forcefully and at length about the quality of his work.

15. There is nothing wrong with a party being confident of the justice of his case or the quality of his work but his confidence in that regard was not shared by Mr Atchison and, more significantly, the Building Inspectors and the Relevant Building Surveyor.

16. I formed the impression that Mr Mc Sweeney's evidence was directed more at justifying his own position than providing an accurate account of what occurred. For example, he claimed in his witness statement that he told Miss de Bono that the screw piles would need to be installed and inspected before he started work, yet he started work without them being installed and without any complaint. Because of the nature of screw piles, even if they had been installed first, which the experts said is contrary to normal practice, they could not usefully have been inspected before the excavations were done. Miss de Bono denies any such conversation and I believe her evidence.

17. In regard to the outcome of the Third Inspection (referred to below), Mr McSweeney said in paragraph 36 of his witness statement that he "…was not informed there was any problem with the works or the inspection". That is directly contrary to the evidence of Mr Ross, who said in his witness statement that he told Mr McSweeney over the telephone that he could not approve the works as there was loose soil in many of the beams that would need to be removed. Mr Mc Sweeney then said in cross-examination that Miss de Bono had told him that the work was approved. He could not recall the date she said that but claims that it was on site. If she had said that it was highly relevant, yet it was not in his witness statement. When paragraph 36 was put to him in cross-examination he said that paragraph 36 was incorrect.

18. I am satisfied that Mr Ross told Mr McSweeney that the work could not be approved for the reasons set out in his witness statement and that Mr McSweeney lied to Miss de Bono concerning the outcome of the Third Inspection.

19. I do not regard Mr McSweeney as a reliable witness.

The agreement

20. A quotation was provided by the Applicant and, following an exchange of emails, the Respondent accepted it on 2 June 2010. The agreed price was $62,000 plus GST and payment was to be on completion.

21. A discussion then occurred on site between Mr McSweeney, Miss de Bono and the plumber on 8 June 2010 and they had another site meeting with the electrician on 1 July.

22. As to the discussions that took place before the quotation was given and before it was accepted. I prefer the evidence of Miss de Bono and Mr Allan in regard to what was said. I find that Mr McSweeney told Mr Allan that he was registered to carry out domestic building work, that it was agreed that the quotation included the removal from the site of the soil that the Applicant would excavate and that the Applicant would move the other soil around the site at no charge.

The work

23. There were to be four new units constructed and the fifth unit was to be an existing house on the site that was to remain. One of the new units was to be built in front of the house and the other three behind. Some of the units required screw piles to be installed in the edge beams. Mr McSweeney offered to install the screw piles although he admitted that he had no experience in doing so. Miss de Bono declined his offer and the Respondent engaged a specialist contractor for the piles.

24. After some delays that were attributable to other work by the Respondent, the Applicant commenced work on 7 July 2010.

The First Inspection

25. The work seems to have proceeded satisfactorily at first, with excavations being done for the front unit and some blinding concrete being poured there to the satisfaction of the Building Surveyor.

The screw piles

26. Difficulties were then encountered because the Applicant did not have the edge beams of slabs dug in time for the screw pile installer, despite having received notice of the date the screw piles would be installed.

27. Further, despite having agreed to provide the up-to-date plan for the pipes to the screw pile contractors in order to show them the position of those pipes, he failed to do so and pipes were damaged. Mr McSweeney first denied having a drainage plan then said that he needed it himself. I prefer Miss de Bono's detailed evidence that he was given the plan.

28. Mr McSweeney said that the screw piles should have been put in first before the beams were dug and that Miss de Bono should have put in the pipes afterwards. Mr Faiffer said that the screw piles can be installed first, although the excavations would then have to be carried out around them. I accept the expert evidence that putting in the pipes first is the usual practice. I am also satisfied on the evidence that the procedure adopted by Miss de Bono of excavating the edge beams first and putting in the screw piles afterwards was the more reasonable approach.

29. Mr McSweeney blamed the screw pile installers, saying they were careless. After some argument with Miss de Bono he agreed to fix the broken pipes but did not do so.

Pipes broken by the Applicant

30. As work progressed, despite having been advised of the position of the underground pipes and having a plan of them, Mr McSweeney dug through them on a number of occasions. Again, instead of admitting fault he blamed Miss de Bono for having put in the pipes first, accusing her of not knowing what she was doing. Again, he agreed to fix the broken pipes but did not do so.

31. Mr McSweeney acknowledged in evidence that he had not previously poured slabs for a residential development. I also note that at the site meeting with the plumber on 8 June 2010 he was unaware of how to box pipes where they penetrated the slab. The plumber explained to him what was required and Mr McSweeney undertook to do it but failed to do so.

32. In contrast, Miss de Bono had previous experience in residential developments, having worked, albeit part time, as a supervisor for a builder for a number of years. Mr Ross said that she was very familiar with the works and specifications whereas he criticised Mr McSweeney's work, said that it was not in accordance with standard practice and that it had not been done with due diligence or proper care to avoid deterioration of the work. In particular, Mr Ross said that it was not appropriate to try to pour all four units at once. According to Miss de Bono. Mr McSweeney told her that he wanted to pour them all at once to save money on the concrete pump.

The Second Inspection

33. On 23 July, excavations for the slabs were approved by the Building Surveyor. Although the excavations were approved the membranes, steel and formwork were not promptly placed thereafter to allow the concrete to be poured, nor were they covered to protect them from the rain. Miss de Bono questioned Mr McSweeney about the delay and he blamed her, the screw pile installer and the lack of power. She thereupon provided him with a generator.

34. Following further arguments about inactivity on the part of the Applicant and a further deterioration in the relationship between the parties Mr McSweeney expressed concern about the sufficiency of the depth of the excavations. This was even though they had already been passed by the Building Surveyor.

35. He requested Miss de Bono to order a "founding depth" inspection. As part of the agreement she had with the Building Surveyor there was provision for a pier inspection but nothing called a "founding depth" inspection. It was not a mandatory inspection but in the hope of progressing the works Miss de Bono contacted the Building Surveyor who sent out an inspector, Mr Ross. Miss de Bono told Mr McSweeney that she would not be able to be present at the inspection but he told her that he would be.

The Third Inspection

36. On 4 August, Mr Ross attended the site for the inspection. Miss de Bono did not attend and Mr McSweeney was not on site either, despite having told Miss de Bono beforehand that he would be there. Two of the Applicant's employees were present.

37. By this stage the excavations had, according to Mr Ross, "deteriorated and collapsed". Many beams were filled with loose soil which needed to be removed and Mr Ross was unable to confirm the beam depths. Some screw piles were now partly covered and some needed cutting down. No formwork or reinforcement had been placed. It appears that there had been some rain and that the work had not been covered by the Applicant after excavation, which Mr Ross said should have been done. He also said that Mr McSweeney's proposal to pour all four slabs at once was not standard practice.

38. Mr Ross telephoned Mr McSweeney from the site to explain the situation. Mr McSweeney insisted that the excavation had already been approved and shouted at Mr Ross. According to Mr Ross, Mr McSweerney was "rude and aggressive" to him on the telephone. Mr Ross then showed the Applicant's foreman what had to be done and left the site. No reinspection was ever booked.

39. Miss de Bono rang Mr McSweeney to ask how the inspection had gone and Mr McSweeney said "all good". The significance of this however was not the fact that this was untrue, but that the Applicant did not do what Mr Ross had directed and then have a re-inspection but proceeded to cover up the excavations with polythene and reinforcement.

Termination

40. By 24 August, the concrete had still not been poured. That was fortunate, because the defects had not been fixed and the excavations had not been re-inspected. Miss de Bono was unaware at that time of the true result of the Third Inspection and she expressed her concerns to Mr McSweeney on site about the delay. He then demanded a purchase order and a written report of the Third Inspection. The only report that she had received was the verbal report from Mr McSweeney himself that it was "all good".

41. The Building Surveyor had prepared a Building Direction pursuant to s.37 of the *Building Act* 1993 ("the Building Act") but he had mistakenly sent it to the draftsman who had prepared the plans. Miss de Bono obtained a written copy of the Building Direction that day (24th). It stated (inter alia):

> "NOT APPROVED
>
> PARTICULARS IN RESPECT OF RECTIFICATION WORK(S) REQUIRED AS TO COMPLY WITH THE PROVISIONS OF THE BUILDING ACT 1993 AND REGULATIONS 2006 THE BUILDER IS HEREBY REQUIRED TO:-
>
> Units 1,3,4&5
>
> Clean out soil from all slab beams
>
> Expose screw piles min. 75 mm into edge beams
>
> Inspector Luke Ross
>
> Where requested provide the necessary information and / or rectify the above items and book a reinspection"

42. At the 24 August meeting, before becoming aware of the result of the Third Inspection, Miss de Bono had told Mr McSweeney that if he had not completed the work within seven days she would terminate the contract and engage another contractor. She also sent an email to that effect.

43. Later on that same day, Miss de Bono received a copy of the above Building Direction and on the following day, after having tried unsuccessfully to telephone Mr McSweeney, she sent to him an email annexing the Building Direction and requiring him to rectify the defects identified in it by 30 August. Despite that, no further work was done by the Applicant.

44. Mr McSweeney responded by letter complaining that he had been delayed in various ways but the letter did not answer the major issue, which concerned his ignoring the directions of the Building Inspector and covering up the works and lying to Miss de Bono about the outcome of the inspection. He then made the following demands:

    (a) That the survey pegs be reinstated. There were survey pegs placed when the Applicant began work and Mr McSweeney claimed to have carried out the excavations pursuant to them. I am not satisfied that they were removed by the Respondent's plumber as Mr McSweeney asserts.

(b) A “Pre-pour sign off” by Miss de Bono. There was no contractual obligation on the Respondent to “sign off” on the work before the pour. The Applicant was responsible for the sufficiency of its own work and could not pass on to the Respondent an obligation to judge the sufficiency of what it had done half way through the job and accept it. In any case, the excavations required rectification before concrete could be poured.

(c) Completion of any items not in the Applicant’s scope of works. It is not established that there were any.

(d) A traffic plan for the day of the pour. Since it was not a term of the Contract that the Respondent would provide such a plan to the Applicant, the existence, sufficiency or otherwise of a traffic plan was not the Applicant’s concern. It was for the Respondent to organize the site.

(e) A purchase order “confirming the company’s details”. There was no contractual obligation on the Respondent to provide one and the Applicant had entered into the contract and commenced work even though none had been provided.

45. On 26 August, Mr McSweeney sent a further letter suggesting, although not explicitly stating, that loose soil had been cleaned out before the polythene was laid. He also claimed to have no responsibility for the screw piles which was true, except that the degree of penetration into the edge beam was related to the extent of his excavations and there had been substantial over excavation by the Applicant. Further, Mr McSweeney never complained about the placing of the screw piles to Miss de Bono. He offered no explanation for lying to Miss de Bono about the Third Inspection nor did he say why he covered up the excavations without a re-inspection. In the same letter he said that he was suspending work and charging a stand down fee for his excavator of $50 per hour. Miss de Bono responded, asking him to have the work re-inspected.

46. Further argumentative correspondence followed but no further work was done by the Applicant.

47. On 30 August Miss de Bono found that the Applicant’s excavator was blocking the driveway. She wrote to him and asked him to move it but it was not moved until 6 September.

The Site Meeting on 1 September

48. A meeting on site was arranged by Miss de Bono for 31 August, to be attended by herself, Mr Ross and Mr McSweeney. At Mr McSweeney’s request it a rescheduled for 1 September. The Inspector on that occasion was a Mr Alexander.

49. At that meeting Mr McSweeney at first denied having known that the Third Inspection was not approved and then he alleged that the reason Mr Ross had not approved the work was that he (Mr McSweeney) had hung up on him. Mr McSweeney then refused to speak to the inspector about what was required and loaded his tools into the car.

50. That evening Mr Ross send an email to the Respondent setting out what had to be done for the excavations to be passed. Miss de Bono emailed these requirements to Mr McSweeney and the following day she spoke to him on the telephone but he denied that the work was necessary. He refused to pull up the polythene and said that he did not care what the Building Surveyor said. On that same day she sent a notice accepting the Applicant's repudiation of the contract and granting permission for it to collect its equipment from the site.

Subsequent events

51. On 6 September there was a further inspection by the Building Surveyor. The report arising from this inspection listed numerous defects that were required to be rectified and stated that a further inspection would need to be booked. One of the requirements was for the Builder to engage an engineer to assess the bearing capacity of the sand panels and edge beams that were, by then, under water.

52. On 7 September a Geotechnical Engineer inspected the site and said that the excavations would need to be pumped free of water and any soft spots excavated to a firm base.

53. Thereafter, the Applicant broke into the site on at least two occasions. On 7 and 8 September, despite the objections of Mr Allan on behalf of the Respondent, its staff damaged the excavations by driving the excavator over them. It damaged some pipes, including a sewer pipe, termite caps and survey pegs. It also removed all of the reinforcement and most of the polythene. The events that took place on 8 September were witnessed by Miss de Bono, by the new concreter, Mr Lucas and by Mr O'Meara as well as by Mr Allan. There were many photographs tendered of what happened. Mr Lucas was not called.

54. Mr McSweeney brought the excavator onto the site despite the objections of Mr Allan. Since the reinforcement had been placed by hand and there was a crane truck on site already, I can see no reason why the excavator needed to be brought in to remove it. If it was not Mr McSweeney's intention to deliberately damage the site, that was certainly the effect of what was done at his direction. From the descriptions of the way it was driven given by both Mr Allan and by Mr O'Meara, it is likely that the damage that was done was deliberate or at the very least, reckless. Mr McSweeney's claims that the Applicant took great care to avoid any damage and that no pipes were damaged is not credible in the face of the contrary evidence.

55. When the site was inspected on 9 September following the Applicant's departure, Miss de Bono witnessed the following damage:

    (a) Broken sewer main. Mr McSweeney pointed this out to both Mr Allan and to Mr O'Meara. It was broken in two places and sewage had drained into the excavations.

    (b) Broken plumbing uprights;

    (c) Broken termite caps;

    (d) Damaged beams and pads;

(e) Soil clogging the storm water pits;

(f) Broken or bent conduit pipes;

(g) Survey pegs destroyed;

(h) Beams containing soil or saturated with water.

These items were also noted by Mr O'Meara. Her evidence is further supported by Mr Allan's evidence and by photographs and I accept it.

56. The Respondent then engaged another concreter, Lucon Concrete Pty Ltd, to carry out the work on the slabs at an increased cost. Another concreter, Tharle Concrete Constructions was engaged to do the porches although at the time of her witness statement, not all the porches had been poured.

The Applicant's contractual obligations

57. It was known to both parties that these Units were to be dwellings. By s.8 of the *Domestic Building Contracts Act* 1993, it was an implied term of the contract entered into by the Respondent with Mr Allan that (inter alia) the work in constructing them would be carried out:

(i) in a proper and workmanlike manner; and

(j) in compliance with, and so as to comply with, all laws and legal requirements including the *Building Act* 1993 ("the Building Act").

This implied term is enforceable by subsequent purchasers (s.9).

58. The regime for inspecting building work with respect to which a permit has issued is set out in Part 4 of the Building Act The nature of concreting work is such that the foundation and steel fixing stages must be approved by the Relevant Building Surveyor before proceeding further. Moreover, by s.37 of the Building Act, the Relevant Building Surveyor or his representative may direct the person in charge of carrying out the building work to carry out work so that the building work complies fully or substantially with the permit, the Building Act and the regulations. If that person fails to do so, the Relevant Building Surveyor may cause a building notice to issue (s.38), but even if he does not, the work is nonetheless not approved and will not be in accordance with all legal requirements as the contract required. Moreover, if construction proceeds, a Certificate of Occupancy may not be issued at the conclusion of the work.

59. The person in charge of carrying out the building work is the Respondent but, since that part of the work was sub-contracted to the Applicant, that responsibility was assumed by the Applicant. I therefore find that it was an implied term of the contract between the Respondent and the Applicant, not only that the work would be done in a proper and workmanlike manner but also that it would be done to the reasonable satisfaction of the Relevant Building Surveyor and in accordance with any directions given under s.37.

60. It was not necessary for Mr McSweeney to ask for a "founding depth" inspection nor was it his function to do so. It is not a mandatory inspection under the Building Act. The foundations had been passed. It was not for him to then query

whether they ought to have been, whether by reference to the soil report, the plans, the engineering drawings or otherwise. He had excavated, there had been a foundation inspection and the Inspector was satisfied with the foundation. His insistence at the hearing that they should have been approved by the engineer because of a note on the drawings seems to me to be an afterthought designed to bolster his case. Miss de Bono said in evidence that she did not recall him ever asking for an inspection by an engineer. The Relevant Building Surveyor had not at that time required an inspection by the engineer although such a requirement was made later, after the excavations became flooded.

61. Following approval of the foundations, what the Applicant should then have done then was to place the polythene and the reinforcement steel as soon as practicable and before the excavations deteriorated. A foundation inspection assumes that the observed state of the foundations will be maintained until the footings are poured. If they deteriorate so as to be no longer satisfactory then the deficiencies must be attended to before proceeding further and it is no answer for the concreter to say that they were satisfactory at some earlier time when they were passed.

Repudiation

62. Having had the foundations passed, the Applicant then neglected them for an extended period during which they deteriorated. Then, after receiving a direction from the representative of the Relevant Building Surveyor to fix them, he refused to comply with the direction and instead, covered up the deficient foundations with polythene and reinforcement and refused to remove it. Later requests by Miss de Bono to remedy the defects were likewise met with a refusal.

63. It is quite clear from the evidence that the work carried out by the Applicant was not done in a proper and workmanlike manner. Indeed, it was seriously defective and the Applicant refused reasonable requests to rectify it. The Applicant was not willing to comply with its contractual obligations. Mr McSweeney was instead insisting that the Respondent accept deficient work and he refused and continued to refuse to comply with the directions of the representative of the Relevant Building Surveyor. The Applicant thereby evinced an intention not to be bound by the contract.

64. I am satisfied that the Applicant by its conduct repudiated the contract and that the Respondent, as it was entitled to do, accepted that repudiation by terminating the contract by letter.

How long should the work have taken

65. I accept the evidence of Miss de Bono that Mr McSweeney agreed at the beginning that the work would take approximately two weeks. That was confirmed by her in her email to Mr McSweeney dated 8 June. Mr Faiffer said that a reasonable allowance for excavation was a day per unit and a further day per Unit to place the polythene and steel. Mr Atchison agreed that it would take close to four days to excavate, three to four days to prepare and one to two days

to pour. From this evidence I conclude that a reasonable time to carry out the work would have been two weeks from the start of the excavation.

66. The Applicant started on site on 12 July and was still not ready to pour by 24 August. Mr McSweeney blamed Miss de Bono but it appears more likely that the time taken arose from his desire to save money on the concrete pump by pouring all units at once and also his lack of experience in preparing and pouring slabs for a domestic building site.

The value of the work

67. Mr Faiffer said that the value of the Applicant's work and loss of profit on the job amounted to $79,174.46. That was on the basis of his instruction from Mr McSweeney that the work was complete up to the stage where the Applicant was ready to pour. It was not. The steel and polythene had to be removed, the defects had to be fixed and then the steel and polythene would need to be replaced with bar chairs and the work would then have needed to have been boxed up. Mr Faiffer had not visited the site nor been shown photographs. He acknowledged that if the work was incomplete his conclusion would have been different.

68. Mr Atchison similarly had not visited the site but had been provided with photographs which appear in his report. He said that the Applicant had over-excavated. The evidence suggests that he believed that he needed to get down to orange soil. Mr Atchison said that that was not required by the soil report. All that was necessary was to dig to 100 mm into natural soil. Mr McSweeney kept digging after the Building Surveyor had already approved the foundations. I think the most likely explanation is his own inexperience rather than any requirement of the drawings. The significance of the over excavation of the beams lies in the extra cost of the blinding concrete that must be placed to fill the over-excavation.

69. Mr Atchison said that the residual value of the Applicant's work, being the excavated trenches, was $7,109 but he costed the rectification of the work at $28,895, as follows:

Toilet hire	268
Dig out shallow beams and remove excess soil	2,695
Locate and repair damaged sewer and storm water pipes	3,658
Excavate and repair main sewer	2,228
Re-set out Units 4 and 5	935
Repair of termite collars	506
Remove rubbish	1,474
Additional blinding concrete for over excavated beams	17,133
Total	$ 28,895

70. In response to Mr Faiffer's report, Mr Atchison said that for the Applicant to rectify the defects in the work and complete the job would have cost it

$84,586.40. Since the contract price was only $62,000 plus GST he said that it must have suffered a loss of $22,586.40 if it had continued with the work. If that is correct, it must follow that the contract was of no value to it. He said that a significant amount of work, as indicated in the Building Surveyor's reports, would have been required before concrete could have been poured.

71. In regard to the beams, I accept Mrs Johnston's submission that the measurements referred to by Mr Atchison of the depth of the trenches were taken at ground level rather than from the top of the slab. However, although the effect of this was to amplify the under excavation it also reduced the greater allowance for over excavation. The end result is therefore more favourable to the Applicant, so I see no reason to adjust Mr Atchison's figures on that account.

72. In the end, I can only assess the value of the work as it was following the Applicant's departure. By that stage, the material had been removed and the site damaged. I accept Mr Atchison's evidence that the value of what was left was then $7,109. However, because of the way the way damages are to be assessed on the counterclaim, that is entirely academic because those damages assume the presence of the work that the Applicant has done and allow only the cost of completing it from that stage.

The Claim

73. The Applicant rendered a number of invoices to the Respondent, none of which were justified in the circumstances. Details are as follows:

Date	Inv. No.	Details	Amount
30/08/2010	108	Move spoil from work zones	440.00
30/08/2010	109	Slabs (80% of price)	54,560.00
30/08/2010	110	Excavator Stand down rate	440.00
31/08/2010	111	Excavator Stand down rate	440.00
01/09/2010	112	Excavator Stand down rate	440.00
02/09/2010	114	Attendance at site meeting	770.00

74. Each invoice purported to be a claim under the *Building and Construction Industry Security of Payment Act* 2002. Miss de Bono said that she did not receive Invoice 111. Since I consider her to be a more reliable witness than Mr McSweeney, I accept that it was not sent to the Respondent. As to the claim for 80% of the contract price, the defects in the work and the damage done to the site even before the removal of all the materials was such that it is impossible to know the value at that time except to say that it was certainly substantially less than 80% of the contract price. The spoil removal, although claimed as a variation, was part of the scope of works. It is not a claimable variation within the meaning of the Act, nor are the other remaining claims. The stand down charges have no basis. The Applicant was not entitled to stop work and there was no provision for stand down charges in the contract. There was no entitlement

under the contract to charge for attendance at a site meeting. The meeting arose in any case as a result of the default if the Applicant.

75. The Respondent's letter of termination dated 2 September 2010 refers to the invoices as "your tax invoices" and states that the amounts claimed will not be paid. The Respondent contends that this is sufficient to amount to a payment schedule pursuant to s. 15 of the Act. That contention is disputed by the Applicant but it sought no adjudication under the Act. Since the procedure for summary payment under the Act was not availed of, the question whether or not these moneys are now owed is a matter for me to determine.

76. The job was never completed and what was done was first done negligently and then largely removed or damaged. There was no provision in the contract for part payments. The Act referred to could only have allowed a progress payment to be claimed if the work had extended beyond 20 business days and it should not have done. A reference date under the Act only arises as a result of the Applicant's failure to carry out the work within a reasonable time. The Applicant had already ceased work and repudiated the contract when the invoices were rendered. It is unnecessary to consider all these matters further because whether the amounts are ultimately due is now a matter for me and I am not satisfied that any of them were due when the various invoices were rendered.

77. Since the work contracted for was not completed and since the residual value of what is left is taken up in the calculation of the damages on the counterclaim the claim is dismissed.

The Counterclaim

78. The following amounts are sought in the Counterclaim:

Rectification works as assessed by Mr Atchison	26,268.18
Cost to have work performed by the replacement concreter	64,631.71
Cost of removal of soil excavated by the Applicant	4,982.00
Cost of porch slabs	1,248.00
Less: Contract price	(62,000.00)
Claim	$35,129.89

Evidence substantiating these amounts was given by Miss de Bono and Mr Atchison. No GST is sought on any of the amounts.

79. In her witness statement, Miss de Bono also claims damages for liquidated damages that she says were payable to "the owner of the property from 7 July to 9 September". There is insufficient explanation of this claim

Orders to be made

80. The claim will be dismissed and there will be an order on the counterclaim that the Applicant pay to the Respondent $35,129.89. Costs will be reserved.

SENIOR MEMBER R. WALKER