VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D563/2005

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic Building, conduct of the proceeding, credibility of parties, terms of contract, variations, completeness, defects, supervision by the owner, suspension, time and time extensions, prevention, ending the contract

APPLICANT	Raymond John Caldwell
RESPONDENT	Andrew Waiyoung Cheung
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Hearing
DATE OF HEARING	25-29 June and 2-3, 5-6, 23-26 July, 1 and 6-7 August and 5 October 2007
DATE OF ORDER	7 May 2008
CITATION	Caldwell v Cheung (Domestic Building) [2008] VCAT 853

ORDER

1 The Applicant must pay the Respondent the nett sum of $65,518.59 forthwith.

2 Interest and costs are reserved and there is liberty to apply.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For the Applicant	Mr D Pumpa of Counsel
For the Respondent	Mr G Hellyer of Counsel

REASONS

1 On the Richmond hill, facing the city, sits 22-24 Clifton Street, the property the subject of this dispute. It was built as two blocks of flats in the 1950s or 1960s. In 1998 the Respondent Owner bought it. In 2004 he entered four building contracts with the Applicant Builder to renovate and extend the flats. The Main Contract was dated 4 May 2004. The other three concerned changes to windows and doors ("the Window Contracts") and each was dated 4 October 2004.

2 The business relationship has not been a happy one. The Builder now seeks $139,278.00 from the Owner. The Owner's counterclaim is $168,422.17. The Builder's claim is stated in the final submission to be as follows:

a. Balance of contract	$59,701.00
…	
b. Variations 21/2/05	$34,911.00 (see p 608)
c. Variations 25/4/05	$1,280.00 (see p 651 items 20 - 23)
d. Tax Invoice 12/04/05	$13,750.00 (see p 639)
e. Tax Invoice 3/12/04	$1,839.00
f. Credit (Fire Hydrant) allow 2	($5,000.00)
	$139,278.00

3 The balance of the contract appears to be the final payment of $109,701.00 less $50,000.00 that was paid on 31 January 2005. The total shown on page 608 of the Tribunal Book is not $34,911.00, but $34,052.00, and the total of the figures on page 608 is $29,363.00.

4 I was unable to find a tax invoice that matched e, and the total of the above sum is not $139,278.00, but $106,481.00. The Builder appears to have omitted his invoice dated 19 April 2005 for $30,156.00, which brings the total closer to the amount claimed.

5 The Owner's claim is for allegedly incomplete and/or defective work, a nett sum for variations and agreed damages for delay. The parties agree that work under the Main Contract commenced on the day of signing – 4 May 2004 – and the time for work under that contract was 152 days. "Days" is defined in Clause 1 to mean calendar days, so the date for completion, without adjustment to the building period, would have been 4 October 2004.

6 The parties agree the contract sum for the Main Contract was $406,300.00. A major point of contention is the extent of the Main Contract – whether it was only for work to units 2, 7, 8 and 13 as contended by the Builder, or whether it was for more extensive work with the exception of the interiors to units 1, 3, 4, 5, 6, 9, 10, 11 and 12, ("the nine units") as contended by the Owner.

7 Each Window Contract was to change the windows and doors to three units of the nine and the price of each was $11,400.00. The parties agree that the Owner has paid the total sum due to the Builder for the Window Contracts - $34,200.00 and a total of $400,912.00 under the Main Contract.

PARTIES' CONDUCT OF THE PROCEEDING

8 There were aspects of the Owner's conduct of the proceeding that were unhelpful. In particular, the Owner's claim was based on his Proposed Further Amended Counterclaim ("FACC"). He did not file it separately and did not seek leave to file it, but included it in his Tribunal Book, filed 21 June 2007; on the Thursday before the Monday on which the hearing commenced.

9 Nevertheless, the Owner's documentation was easier to understand than the Builder's. Following the Builder's mathematical reasoning has been difficult at times. The figures and dates in the pleadings and submissions do not always match the documents to which they refer and the documentation of some variations is very difficult to follow. The Builder's pleading of variations was particularly unhelpful. They have not been listed. There is a bare assertion that the Builder is entitled to claim variations and the particulars are:

> Full particulars of the variations claimed and the final payment were contained in a claim from the [Builder] to the [Owner] of 14 June 2005.

The letter referred to lists dates upon which variations were claimed and amounts claimed, but does not describe them.

10 Given the difficulties I have encountered with the Tribunal and other documents and the way in which the parties have presented their cases, there have been occasions where I have had to rely on s53(1) of the DBC Act:

> The Tribunal may make any order it considers fair to resolve a domestic building dispute.

HISTORY

11 When the Owner bought the property, it consisted of two double-storey blocks of flats that faced each other. Each block had four one-bedroom and two two-bedroom flats. In 2001, the Owner decided to renovate the property and he engaged Interlandi Design Group Pty Ltd ("Interlandi") to do certain work including preparing a design and obtaining planning permission.

12 In 2003, Interlandi provided drawings, specifications and a scope of works for the project, and in that year the Owner undertook study at Holmesglen TAFE and completed a short domestic builders' registration course. According to his uncontradicted evidence, the Owner met Mr Neil O'Connor, who was one of his instructors who in turn introduced him to Mr

Alan Sherrard of Allan Nicholas & Associates. Mr O'Connor was eventually appointed as the Owner's project consultant although there had been discussions about him acting as a project manager. Mr Sherrard assisted him in this role. Mr Sherrard resigned from that role in mid-September. I accept the Owner's and Mr O'Connor's evidence that Mr O'Connor introduced the Builder to the Owner.

13 Neither Mr O'Connor nor Mr Sherrard are parties to this proceeding, so they have not given evidence in defence of their roles. Both were called to give evidence by the Builder, not by their client, the Owner.

14 From the evidence before me I find it difficult to understand what they did to assist the Owner. They did not appear to impose much order on the project. For example, in a competently run project I expect variations to be in writing before work is done, yet the variations were not in writing until after the work was done. Mr O'Connor's apparent failure to ensure site minutes were taken after Mr Sherrard's resignation also falls below the standard I would expect.

15 One reason why this hearing was so lengthy is that the scope of works contemplated by the parties changed from time to time before the contract was signed, and the contract documents for the Main Contract were capable of more than one interpretation. I also draw the inference that the Owner considered the loyalties of Mr Sherrard, Mr O'Connor, or both, lay with the Builder rather than with him. I do not comment on whether I consider his view accurate, except to say that Mr O'Connor was so cautious under cross examination as to render his evidence of little assistance to me.

16 In January 2004 it was contemplated that the works would include construction of unit 13 at the rear (west end) of the site; reconstruction of units 2, 7 and 8; refurbishment of the other nine units and certain demolition, excavation, work on services, rendering and external painting. The Builder's quote for this work dated 23 January 2004 was $632,000.00. The breakdown was undated but appears to have been sent on 23 January 2004.

17 There were further negotiations between the parties that reduced the contract sum to $406,300.00 (inclusive of GST) and also reduced the scope of works. The building period was to be 152 days; agreed damages for late completion payable by the Builder, or delay caused by the Owner were each $500.00 per week. The margin to be applied to extra work was 20%.

18 On 3 May 2004 planning permission was issued to the Owner, naming the Builder as builder under the permit. The first condition was:

> This permit is for Stage 1, units 2, 7, 8 & 13 including demolition, alterations to the façade, and shall be read in conjunction with any subsequent building permits.

CREDIBILITY OF THE PARTIES

19 Much turns on whose evidence I prefer and I have concerns about the accuracy of both parties. The Builder gave evidence that the Owner agreed to certain variations that would reduce the quality of the finished product and the cost to the Builder, but without seeking any reduction in the contract price. The Builder failed to get these variations in writing, the Owner always sought everything he might have been entitled to under the contract and I find the Builder's evidence on this issue impossible to believe. It also detracts from the credibility of his other evidence.

20 I also have grave concerns about the Builder's dealings with the Owner during the contract. The Owner sent the Builder a fax on 15 November 2004 ordering changes to the makes and models of the gas cook tops, electric ovens and the range hoods. He suggested a credit of $1,651.00 per range hood. The Builder's response leads me to the conclusion that the Builder was willing to be untruthful either at the point where the Main Contract was signed or when this letter was sent. He said, in his fax of 16 November 2004:

> With regards to your fax dated 15th November setting out white goods costs I would bring to your attention, at tender stage, I was advised by my white goods supplier that the white goods specified by your architect were no longer manufactured and we used a current price for an equipment model and make in our quote so your estimated costs are not relevant.

If he had known that the whitegoods were not available when he entered a contract promising to supply them, he should have said so then.

21 The Owner's evidence is also tainted by evidence of his dealings with Origin Energy Asset Management. On 11 April 2005 he wrote to "Orange" Energy Asset Management and said:

> …there need gas meter to final completion for all the contract work. It is only item not finishing in the building. We have been held up the time over three weeks by your mistake installation manifolds for gas services. [sic and emphasis added]

22 During the hearing he denied the accuracy of this assertion to Origin – his case was that delay was the Builder's fault. In evidence before me he said that he had been untruthful to Origin in order to spur them into action. I asked him, given his willingness to be deliberately untruthful to Origin, why I should believe anything he said. He answered that the Builder had told him everything was finished, but then acknowledged the difficulty I would have accepting his evidence.

23 In general I do not prefer the evidence of one party over the other.

SCOPE OF WORKS UNDER THE MAIN CONTRACT

24 The Main Contract documents includes the HIA standard-form Alterations, Additions & Renovations Contract dated 4 May 2004. On page four of the

HIA standard-form there is also reference to 55 pages of specifications supplied by Interlandi, 13 sheets of plans supplied by Interlandi and five sheets of engineers' designs prepared by Marcon Tedesco O'Neill Pty Ltd.

25 The special conditions in schedule 5 are:

> (1) Skylights for unit 7, 8 is Acryl or similar, the size is 900 x 900.
>
> (2) The builder acknowledge to sign "the scope of work outline" prepared by Interlandi Design Group Pty Ltd. Total pages are 25 pages.
>
> (3) All windows and doors for unit 13, unit 2, unit 7 and unit 8 are double glazed with fly screens.
>
> (4) Relocating where necessary water, gas and stormwater.
>
> (5) KDHW to be TAS OAK/Vic ASH as drawing.

26 The only excluded item in schedule 6 is:

> 1. Internal Refurbishment for unit 1, unit 3, unit 4, unit 5, unit 6, unit 9, unit 10, unit 11 and unit 12.

Relocating services and strata titles

27 Much turns on whether the Main Contract contemplated that the units would be strata titled. If it did, it would require the Builder to relocate services to all units, not just to units 2, 7, 8 and 13. The Builder submitted that there is nothing in the contract drawings to support the Owner's contention that the parties always assumed the built result would comply with strata title requirements.

28 The Owner submitted that the Builder was obliged to relocate services as part of the Main Contract because special condition 4 called for "relocation where necessary" and relocation was made necessary by the Owner's desire to strata title the units.

29 There was no reference to strata titling in the contract documents. The Owner said at paragraph 11(c) of his witness statement of 28 June 2006:

> On 18 December 2003 at about 10.00 am, I met with Neil O'Connor, Alan Sherrard and Ray Caldwell at the Site. At the meeting we discussed:-
>
> …
>
> (c) That the gas and water meters had to be moved out and relocated to the front and /or back of the building and re-lay the pipe to each of the Units to meet the requirements of the Plans and to strata the apartments. Ray Calwell said that if we didn't need to make those changes, we could save a lot of money. I said to Ray that these items were necessary for the Project.

30 Under cross-examination the Builder said he couldn't recall the conversation, but agreed, without enthusiasm for the proposition, that it was possible that it had taken place.

31 The Builder and Owner sent each other self-serving faxes on 27 and 28 February 2005 respectively. The Builder claimed he had only just become aware that the Owner wished to strata the units; the Owner claimed the Builder had known since day one. The probative value of both is very slight.

32 The Builder said under cross-examination that he first became aware that the Owner wished to strata the site in June 2004, after the contract had been signed; that is, he was not aware before the contract was signed.

33 In accordance with exhibit R26 I accept that the Owner contemplated converting the properties to strata title units in February 2004, but it falls short of proving the Builder was aware of this. I note that the contract also called for various whitegoods to be supplied, such as refrigerators, which are more consistent with letting flats semi-furnished than selling them.

34 Mr Hellyer of Counsel for the Owner, referred the Builder to page 3 of the Builder's Tribunal Book document, "RJC29". It appears to be an indicative quotation or estimate which was sent from the fax machine of Alan Nicholas (Mr Sherrard's firm) on 1 February 2004. The page is headed "refurbish of units 1, 3, 4, 5, 6, 9, 10, 11, 12" and the relevant line is "strata title of units requires extra electrical" and immediately below is "pc $500 per unit".

35 Although the parties might have discussed the possibility of strata titling, this page is support for the view that it was not part of the bargain between them, because this provision was not included in the signed Main Contract. Refurbishment of these units was not part of the agreed works and it follows that neither are the components of refurbishment. Further, there is no allowance in the Main Contract for works associated with strata titling as a "pc" (prime cost) item. The only prime cost item in that contract was "screen for unit 13".

36 There is a reference to the Body Corporate in the site minutes for Tuesday 25 June 2004, which includes the following:

> 1. Electrical all wiring to Body Corporate to be run in conduits.
> 2. Cavity of 279mm block walls to be Body Corporate to run services.
>
> …
>
> 5. Electrical under ground line to be organised by Owner.
>
> …
>
> 9. Gas – can only run in common ground – Owner. Possibility of easement running through strata.
>
> …
>
> 11. to install all services – i.e. prior to strata title.

The minutes give the impression that the strata title issues were new issues on this date.

37 I accept the Builder's evidence that the possibility of undertaking works to enable the properties to be strata-titled was raised before the contract sum, and the contract works, were fixed, but I find that as between the contracting parties, the Owner did not opt to do so until after the contract was signed.

38 I prefer the Builder's evidence to the Owner's regarding the relocation of services and any other work specifically called for by the Owner's desire to strata the property, and find such works were not part of the Main Contract. I have interpreted the contract in this light.

VARIATIONS

39 Variations are changes to the built fabric of the works that might result in changes to the amount to be paid under a contract, and/or to the time allowed to complete a contract.

40 Clause 26 of the Main Contract substantially paraphrases and repeats ss 37 and 38 of the *Domestic Building Contract Act 1995* ("DBC Act") and provides as follows:

> 26.0 Either the Owner or the Builder may ask for the Building Works to be varied. The request must be in writing, must be signed and must set out the reason for and details of the variations sought.
>
> 26.1 If the Owner requests the variation and the Builder reasonably believes the variation will not require a variation to any permit and will not cause any delay and will not add more than 2% to the original Contract Price the Builder may carry out the variation.
>
> 26.2 If the Builder requests the variation, the notice given by the Builder must state the following further particulars:
>
> - what effect the variation will have on the Building Works;
> - if the variation will result in any delays, the Builder's estimate of such delays; and
> - the cost of the variation and the effect it will have on the amount payable by the Owner under this contract.
>
> 26.3 If the Owner requests the variation and if the Builder has not agreed to carry out the variation under Clause 26.1, the Builder must give the Owner, within a reasonable time of receipt of notice under Clause 26.0, a notice
>
> - setting out the particulars listed in Clause 26.2; or
> - stating that the Builder refuses or is unable to carry out the variation and stating the reason therefore.

26.4 Subject to Clause 26.1 the Builder must not give effect to any variation unless the Owner gives the Builder a signed consent to or request for the variation attached to a copy of the notice referred to in Clauses 26.2 or 26.3.

26.5 If, within 7 Days of the Builder giving the Owner the notice of particulars under Clause 26.3, the Owner does not give the Builder:

- a signed request to the variation under Clause 26.4; and
- written evidence of the Owner's ability to pay for the variation,

the request by the Owner for the variation is deemed withdrawn.

41 Although many variations were in writing, none appear to have been in accordance with clause 26 of the Main Contract. All written variations were reduced to writing after they were allegedly undertaken, at a time when the dispute had already arisen, and were signed by the Builder only. I therefore treat them as variations that were not in writing.

42 Where variations are requested by an owner, they are governed by s38(6) of the DBC Act:

(6) A builder is not entitled to recover any money in respect of a variation asked for by a building owner unless –

(a) the builder has complied with this section; or

(b) the Tribunal is satisfied –

(i) that there are exceptional circumstances or that the builder would suffer exceptional or significant hardship by the operation of paragraph (a); and

(ii) that it would not be unfair to the building owner for the builder to recover the money.

43 Where variations are requested by a builder there is a similar provision to s38(6) and an additional provision under s37(3)(a):

(a) the builder -

(i) has complied with this section; and

(ii) can establish that the variation is made necessary by circumstances that could not have been reasonably foreseen by the builder at the time the contract was entered into;

44 In cross-examination the Builder acknowledged his obligations under both the Main Contract and ss 37 and 38 of the DBC Act not to undertake variations without a notice in writing. He said that some variations were noted in site minutes, but agreed there were no notices. The site minutes are of little assistance except where they clearly describe the work and the price the Builder seeks. In most circumstances this should be before the work is undertaken.

45 The Builder claims he is entitled to variations dated 21 February 2005 to the nett value of $34,811.00, variations 20 to 23 inclusive dated 25 April 2005 to the nett value of $1,280.00, a variation of $5,000.00 in favour of the Owner for fire hydrants and three "tax invoices". The tax invoices were of 3 April 2004 for $1,839.00, of 12 April 2005 for $13,750 and of 19 April 2005 for $32,897.00. I treat these tax invoices as variations.

46 Fortunately for the Builder, the Owner pleaded the existence of many variations in the particulars to paragraph 7 of the FACC, and they are discussed below. Under cross examination the Owner said he received a bundle of variations on 20 November 2004 and that although most works have been carried out, there were some variations he had not seen before and gave variations 15 and 16 as examples.

47 At paragraph 143(i) of the Owner's witness statement of 28 June 2006 he said the Builder's claim for "Plasterer" for $2,783.00 was not an agreed variation and that claims of $528.00 for bins, $3,477.00 for robe doors and $825.00 for entry brickwork were items of work required to be provided under the Main Contract. All these items were said to be in the invoices dated 13 and 21 February 2005. They are mentioned in a fax from the Builder to the Owner of 21 February 2005 which is at Tribunal Book page 608.

48 The problem with variations for any amount which are not in writing is that they suffer from conflicting recollections when the inevitable dispute arises. The only variations which are disputed appear to be those sought by the Builder. All such variations must be in writing, no matter how small the amount in question.

49 On each occasion that a variation should have been in writing but was not, the Builder must convince me under s38(6) of both of exceptional circumstances or exceptional or significant hardship to him, **and** that it would not be unfair to the Owner for the Builder to recover. The decision of Senior Member Young in *Prately v Racine* [2004] VCAT 2035 is of assistance when considering whether the Builder has suffered significant hardship. However, the Builder has made no attempt to prove either limb of s38(6) for any of the variations which the Owner disputes and as Senior Member Walker said in *Ho v Nguyen* [2005] VCAT 649:

> It is for the Builder to prove these matters and he has not done so. I cannot assume that it would not be unfair to the Owner to allow the claim.

12 April 2005 invoice

50 The Builder's invoice of 12 April 2005 (Tribunal Book page 639) was for two items - "construct front fence as quoted $9,000.00" and "Additional work as requested to "build in" gas supply fittings. Allow to cut existing concrete as required - $3,500.00" GST of $1,250.00 was added to give the total of $13,750.00.

51 The Owner said in his witness statement at paragraph 143(j) that these claimed items were not agreed to by him and "were works that formed part of the works for the Contract as set out in the drawings, specification and the scope of works." Whether or not they formed part of the contract works, they fall a long way short of items for which a builder may claim money for a variation, having regard to the Main Contract and the DBC Act.

Front fence

52 This item cannot be classified as a variation sought by either party as the Builder alleges the Owner sought it and the Owner alleges it was always the Builder's obligation to supply it.

53 The Owner agreed under cross-examination that the fence is not mentioned in the scope of works; there is also no mention of any fences in the specifications. However the fence is shown in plan and elevation on the drawings and it is not an excluded item.

54 The "quote" for the front fence is not in evidence and there is no written variation. The Owner's fax of 23 January 2005 to the Builder indicates that there was a time when he was willing to treat the fence as a variation. The fax was an offer to sell a unit to the Builder for some money and the value of outstanding or proposed items that would be owed to the Builder. The relevant item was "Front fence, Door, Paving, Mail Box: $9,000.00.

55 At paragraph 99 of his witness statement of 28 June 2006 the Owner said:

> The amounts and prices contained therein were not to be an admission or reconciliation of costs or variations for the Project.

56 The Owner later repeatedly denied that this work was a variation and he certainly did not agree the price for the work. Tribunal Book page 629 is Site Meeting Minutes of 21 March 2005 and the item regarding the front fence is:

> 8. Decision on fence location to be advised ASAP (Andrew/Neil) cost to be forwarded for approval.

57 The Owner said in evidence that these minutes were written by the Owner's son, Luke, and that he did not agree with them. In his fax to the Builder of 29 March 2005, the Owner included all fences as incomplete items required under the contract.

58 I find that the fence was an item the Builder was obliged to supply under the Main Contract. There is no allowance to the Builder for the cost of constructing the front fence.

Build in gas supply

59 It is not clear what this variation is for. The work is enigmatically described and is not mentioned in any other document that enables it to be identified with certainty. It is not allowed.

19 April 2005 invoice

60 This invoice is dealt with below under "Painting of nine units as quoted 26 January 2005."

Fire rated plaster board to units 9, 10, 11 and 12

61 Although not specifically pleaded by either party, paragraph 52(c) of the Owner's witness statement of 28 June 2006 states that the Owner agreed to the Builder's variation for installation of fire-rated plasterboard into the roof space above units 9, 10, 1 and 12. The quotation was $22,800.00 inclusive of GST and margin. The Owner said under cross examination that he neither enquired nor was advised if the variation would result in an extension of time. The final price for this variation was $22,990.00 which was paid by the Owner on 28 September 2004 and is included in the sums to which the Builder is entitled.

16 June 2005 invoice

62 The invoice is dated "16/06/05" and is headed "adjustment schedule". The explanation was:

> Please note that all variations have a builder's mark up of 10%, however the specification allows for 20%. Below is the additional 10% calculations.

$759.00 was added to the invoice of 21 February 2005, $2, 741.00 to the invoice of 19 April 2005 and $1, 839.00 to the invoice of 3 December 2004.

63 The invoice of 21 February 2005 did not total $7,590.00 before addition of a builder's margin, and neither did any part of it – it makes no mention of a builder's margin. The additional margin for the invoice of 19 April 2005 is dealt with below under "Painting of nine units as quoted 26 January 2005."

64 The tax invoice of 3 December 2004 is a claim for variations 1 to 8, 10 to 12 and 14 to 16 plus "Add floor to Unit 8 as laying flooring" of $701.00 less certain credits. None of these variations include a specific item for builder's margin, so I am unable to determine how much was claimed for builder's margin. I make no allowance.

Variations listed by the Owner:

65 The Owner claims that there were 29 agreed variations, 23 of which were numbered with a nett value of $39,708.00. In the FACC paragraphs 33 to 39, the Owner claims another six variations or credits with a total value of $39,941.60 to be credited or paid to him. It therefore follows that the nett sum the Owner claims is payable for variations is $233.60, to him.

66 Unless otherwise stated, all of the following variations were dated 16 November, all were signed by the Builder alone and all were sent or given to the Owner after the relevant work was done.

67 The Builder's claims for time are recorded but dealt with later under "time". The Owner either denied or refused to agree each time extension claimed.

1. Repointing roof

68 The Builder claims that on 20 September 2004 he sent variation request no. 1 to the Owner, requesting variation to repoint the existing roof. In his Witness Statement of 21 December 2006 ("Builder's Second Witness Statement") he said that the extra cost was $2,000.00 and there was no increase in the time for the contract. In his FACC the Owner said the variation for repointing the roof was $1,735.00.

69 A copy of variation 1 appears at Tribunal Book page 562 and is dated 20 September 2004. $1,735.00 has been written in as the cost of the variation, then crossed out and $2,000.00 substituted. The variation was signed and the change initialled by the Builder, but was unsigned by the Owner. Under "Time (increase or decrease)", "Nil" has been written in. The variation claim summary on the Builder's letterhead and dated 3 December 2004 also notes $1,735.00 as the sum.

70 The Owner must allow $1,735.00 to the Builder for variation 1.

2. Change garage door

71 The Builder and Owner agree that the value of this variation is $420.00 and there was no increase in time for it. It is also dated 20 September 2004, has nil for time. The Owner must allow the Builder $420.00 for this item.

3. Change entry doors

72 The Builder said that on 20 September 2004 he sent Variation Request No 3 to the Owner for removal of entry doors to the nine units and replacement with solid core doors and hardware. The Builder and Owner agree that the extra cost for this variation is $4,455.00. The Owner says that the doors on the nine units are not solid core doors.

73 The Owner admitted that the doors were solid core in the pleadings, but resiled from the admission at the hearing. On 7 August 2007 it was ordered under s 95 of the *Victorian Civil and Administrative Tribunal Act* 1998 that Mr Rod Lawrence be appointed as a special referee to determine whether the doors to the nine units were solid core doors constructed of waterproof ply. As stated in the order of 20 August 2007, the reference to the Special Referee was extended by me on site to encompass all exterior doors except glass doors. The doors to the nine units were found by the Special Referee to be solid core doors constructed of waterproof ply. The doors to units 2, 7 and 8; the garage and street doors to unit 13 and the doors to the laundry, the store room adjacent to the laundry and the store room adjacent to unit 2 are not solid core doors.

74 Again the variation was signed only by the Builder. He also claimed 9 days under "Time", but there was no indication of when the time started and ended. Under cross-examination he said that he claimed one day per door and was not sure when the work was done. He said he thought it might have been in August, or possibly July, and in re-examination said that because he got the locks in September, he assumed he got the doors then too. The Owner said the doors had apparently been done and new locks installed by mid-September.

75 In answer to my question, he said it would take him about half a day per door. The Owner denied that the Builder was entitled to a time extension for this item and the Builder failed to prove this work was on the critical path meaning that it would cause a delay to subsequent work. The Owner must allow the Builder $4,455.00 for the doors.

4. Remove beam

76 The Builder said that on 16 November 2004 he sent Variation Request No 4 to the Owner for removal of an undersized beam and replacement with a new beam as required by the engineer. The beam is in the Unit 13 roof area. The parties agree that the cost of the beam is $652.00, although the Owner said under cross-examination that he did not know if the work had been done.

77 The Builder has sought six days' time extension. The Builder has not indicated when the variation was carried out, although he said under cross-examination that it was "about July". He also admitted that if two tradespeople undertook the work, the cost of the variation would be the same, but that he would only be entitled to three days delay. The Owner must allow the Builder $652.00.

5. Remove proud bricks

78 Variation Request No 5 was for removal of the feature bricks on the Clifton Street elevation (the east elevation). The parties agree that the extra cost is $286.00.

79 The Builder also claims two days' time extension to cut off or push back the bricks. The Owner must allow the Builder $286.00.

6. Remove plaster (Units 7 and 8)

80 Variation Request No 6 was for removal of plasterboard to units 7 and 8, the hire of bins and the price difference between standard 10mm plasterboard and fire rated plasterboard. The parties agree that the price of the variation is $5,566.00.

81 The Builder claims a time extension of ten days. The Builder said in cross-examination that the work was done in July or August. When asked if it delayed the project he replied: "It's extra work". The Owner must allow the Builder $5,566.00.

7. Alter downpipes and gutters

82 Variation Request No 7 was for alteration of downpipes, alleged by the Builder to be as instructed by the Owner including adding a downpipe and altering the stormwater drains to suit the new downpipe, boring new holes in the balcony and replacing spouting to suit the downpipes. The parties agree the extra cost was $2,528.00. The Builder claims four days' extension of time. The Builder was asked in cross-examination what following trades were delayed by the work. He did not answer the question, but said instead that the work took four days. He was to bring invoices to support his claim for time, but failed to do so.

83 The Builder has not indicated when the variation was carried out, but said under cross-examination that it was "July or August". The Owner must allow the Builder $2,528.00.

8. Underground installation of power

84 Variation Request No 8 was for underground boring for the power supply. The variation did not quantify cost, but claimed a two day time extension. The Variation Claim Summary (Tribunal Book document 585) listed it at $4,688.00. The Owner states that the value of this variation is $4,688.00.

85 The Builder said in cross-examination that the variation was carried out, "in October" [2004]. Later in cross-examination he said that it was quoted on 19 November 2004. The Owner must allow the Builder $4,688.00.

9. CV works which constituted an agreed variation

86 The Builder claims that on 16 November 2004 he sent Variation Request No 9 to the Owner to supply labour and materials as per the CV Works quotation. He claims that the extra cost is $48,189.00 with a ten day time extension. The Owner claims that the value of the variation is $28,341.40. There was a provisional sum under the Main Contract of $5,250.00 for "electricity and relocating Board".

87 I accept the Builder's reasoning in his fax to the Owner of 21 February 2005 (Tribunal Book page 608) that the total variation for electrical work was $48,189.00 less the provisional sum of $5,250.00, leaving $42,939.00. I am not satisfied that there was an arrangement that the Builder would bear part of this cost, although this was asserted by the Owner in his fax of 21 February 2005 (Tribunal Book page 604).

88 The Owner must allow the Builder $42,939.00 for this item.

10. Ribbon plate – Units 7 and 8

89 Both parties agree that the value of this variation is $588.00. The Builder claims two days time extension. The variation request, signed by the Builder but not the Owner, is dated 16 November 2004. The Builder said in cross-examination that this work was done in July and that it required the

engineer to certify but the Owner had not paid the engineer. The Owner must allow the Builder $588.00.

11. Shower stand – Unit 8

90 Both parties agree the value of this variation is $350.00. The Builder claims two days time extension. The Builder said in answer to a question in cross-examination that although the amount claimed represents less than two days work, it required the architect to visit the site to approve the change to the sewer line and it was carried out "in October or November". The Owner must allow the Builder $350.00.

12. Remove kitchens (Units 1, 3, 4, 5, 6, 9, 10, 11, 12)

91 Both parties agree that the value of this variation is $760.00. The Builder claims three days extension of time. The work was removal of debris left by the Owner's cabinet-maker who had installed new kitchens in these units. The Owner must allow the Builder $760.00.

14. Wall tiling (Units 2, 7, 8, 13)

92 The parties agree the value of this variation is $350.00. Under cross-examination the Builder said the work was done in "about November" and took one day, as claimed. The Owner must allow the Builder $350.00.

15. Core drill – concrete for service ducts

93 The Owner parties agree the value this variation is $200.00. The Builder claimed one day on the Variation Claim Summary of 3 December 2004. The Owner must allow the Builder $200.00.

16. Flashings to step in roof (Unit 9)

94 The parties agree the value of this variation is $400.00. The Builder claimed one day on the Variation Claim Summary of 3 December 2004 The Owner must allow the Builder $400.00.

17. Windows (four less)

95 The parties agree that the credit to the Owner for this item is $600.00. The Builder remarked that this did not result in a change in time for the Main Contract. The variation request of 16 November 2004 was signed only by the builder and "nil" was written in against "Time (increase or decrease)". The Builder must allow the Owner $600.00.

18. Sky lights

96 The parties agree that the value of this variation is a credit to the Owner of $2,090.00. The Builder stated that this did not result in any change for the time for the Main Contract and nothing was written in the variation request against "Time (increase or decrease)". The Builder must allow the Owner $2,090.00.

19. Delete balcony roof for Units 7 and 8

97 The parties agree that the value of this variation is a credit of $3,739.00 to the Owner. The Builder stated that this did not result in a change to time for the Main Contract. Nothing was written in the variation request against "Time (increase or decrease)". The Builder must allow the Owner $3,739.00.

3/12/04 Credit for roof for Units 9 and 10

98 The Owner claims a credit of $2,400.00 for deletion of the roof to the entrances at units 9 and 10. This is part of the U-shaped roof in the inner courtyard to the units, which was to be constructed of "BHP Clip Lok 406". The roof is the same as referred to in variation 19 above - it was adjacent to Unit 9 on the south, Units 7 and 8 on the east and Unit 10 on the north side of the courtyard. I accept the Owner's evidence that the roof was called for under the contract and that, by agreement, it has not been built. In the absence of further evidence for the Builder, I order that the Builder allow the Owner $2,400.00 for this item.

3/12/04 Adding patch floor to Unit 8

99 The Owner values a variation in favour of the Builder of $701.00. This item appears in handwriting on the Builder's invoice to the Owner of 3 December 2004. The Owner must allow the Builder $701.00.

20 . Planter boxes in courtyard

100 The Owner and Builder value the variation at $1,175.00.00. There is a variation claim dated 25 April 2005 which includes the words "Time extra 4 days". The Builder could not say when the work was done, but asserted it took him four days. The Owner must allow the Builder $1,175.00.

21. Relocation of hot water service for Units 7 and 8

101 The Owner and Builder value the variation at $1,130.00. The Builder seeks four days time extension. The Builder said in cross-examination that he thought the work was done in October or November 2004. The Owner must allow the Builder $1,130.00.

22. External screens to internal film – Unit 13

102 The parties agree that external sight screens that were to be placed on some windows of Unit 13 were deleted and opaque film used. The parties agree the Owner is entitled to a credit of $3,203.00 for this item, which the Builder must allow the Owner.

23. Painting of external stairs

103 The Builder painted the soffit of the external stairs which the Owner and Builder agree should be allowed at $2,178.00. The Builder seeks an extension of time of nine days. Under cross examination the Builder said

he thought the work was done in January or February 2005. The Owner must allow the Builder $2,178.00.

Painting of nine units as quoted on 26/1/05

104 The Owner values this variation at $10,530.00, with no additional time. The Builder seeks $30,156.00. I note that the sum of $30,156.00 is the total on the invoice of 19 April 2005, Tribunal Book page 643. Tribunal Book page 645 is the Abar Painters & Decorators Pty Ltd invoice: "Progress payment for painting the nine units…" and removing carpets. There is also another Abar invoice of 5 April 2005 which is "Final payment for work done at Richmond" of $10,200.00 plus GST and $1,500 plus GST for "painting of handrail and entryway". The Builder added a margin of 10%, revised to 20% in the invoice of 14 June 2005. However exhibit R4 is a handwritten quotation from Abar to the Builder of 26 January 2005 for apparently the same work, for $10,530 plus GST.

105 The Builder's explanation for the invoice being substantially higher than the quotation was that the latter was for painting walls and ceilings only – it did not include the woodwork. He agreed under cross examination that he did not explain this to the Owner – he just passed on the quote and it specifically excluded "enamel" but did not mention wood work. However, the Owner appears to have been aware of the issue. In the much-quoted fax of 23 January 2005 the Owner suggested to the Builder:

> Painting 9 units including woods: $10,530

106 The Owner must allow the Builder $10,530.00 plus builder's margin of 20%, plus GST being $13,899.00 for this variation.

Removing two fire hydrants

107 The parties agree that two fire hydrants that were to be installed by the Builder were removed from the Main Contract. They were prime cost items at $2,500.00 each. In the FACC the Owner has sought $5,000.00. The Builder must allow the Owner $5,000.00.

Replacing French doors (WD 1.04) with sliding doors

108 The parties agree that four pairs of doors which were designed to swing open were substituted by sliding doors. The Owner values this variation as a credit to the Owner of $4,668.40, based on two quotations from Bradnam's Windows and Doors Pty Ltd, which appear at Tribunal Book pages 672 and 673. The Builder said there were design difficulties in installing the doors, and also that there was an agreement that the decreased value of the doors would be credited against the installation of certain windows numbered 1a, 2a, 3a, 4a and 5a.

109 These windows were referred to in the site minutes of 27 August 2004. At Tribunal Book page 464 there is the entry:

> Windows 1a, 2a, 3a, 4a, 5a are to be extras if [not] on window schedule.
>
> If included these can be offset as a credit to doors in Window Contract.

110 The Owner admitted under cross-examination that these windows were not on the window schedule and said they were the kitchen and en suite windows to Unit 1, both bathroom windows to Unit 2 and the bedroom window to Unit 8. He denied that he approved this line of the site minutes of page 464, which seems unlikely as he stated that all other lines in those minutes were discussed.

111 I accept the Builder's evidence that the cost of the five doors was offset against the saving on the sliding doors. There is no allowance for this item.

"Lost whitegoods taken from site"

112 The Owner claims that during the course of construction of the works to units 2, 7, 8 and 13, whitegoods which had been purchased in late 2003, were stolen from units 1, 3, 4, 9 and 10. The Owner does not claim the whitegoods were stolen by the Builder, but does claim, somewhat surprisingly, that they were an "agreed variation." The Owner has failed to prove this assertion or any other basis upon which the Builder might be responsible for the whitegoods. I accept the Builder's evidence that he did not have possession of this part of the site when the whitegoods were stolen and that there was at least one tradesperson engaged by the Owner on site at around the relevant time. There is no allowance for this item.

Builder's list of variations:

Plasterer

113 The Builder claims $2,783.00. This item is part of the amount claimed for variations in the Builder's final submissions and appears on page 608 of the Tribunal Book. The Owner's evidence is that he did not agree to this variation, but under cross examination he agreed that the work had been done and was not in the scope. Nevertheless, the Builder failed to prove that this was a variation sought by the Owner and that he agreed to pay for it. There is no allowance for this item.

Bins

114 The Builder claims $528.00. This item is part of the amount claimed for variations in the Builder's final submissions and appears on page 608 of the Tribunal Book. The Owner's evidence is that he did not agree to this as a variation and that it was part of the Builder's obligations under the Main Contract. The Builder failed to prove that this was a variation sought by the Owner and that he agreed to pay for it. There is no allowance for this item.

Wardrobe Doors

115 The Builder claims $3,477.00 for the wardrobe doors for the four units under the Main Contract. This item is part of the amount claimed for variations in the Builder's final submissions and appears on page 608 of the Tribunal Book. The Owner's evidence is that he did not agree to this as a variation and that it was part of the Builder's obligations under the Main Contract.

116 The Builder said under re-examination that the area shown on the drawings was just an alcove and the Owner sought sliding mirror glass doors with a shelf and rail. He said the doors were obtained from Crystal Shower Screens. It is noted from the site inspection of 20 August 2007 that the wardrobe doors in unit 7 are not mirrored, but vinyl sliding.

117 The Builder accepts that constructing the remainder of the wardrobes was his obligation, although the wardrobes do not appear on the joinery drawings, WD6.01 and WD6.02. The wardrobes are shown in plan WD1.04 and it would be an unusual wardrobe that would not have doors. Had the Builder's claim been for the difference in price between a standard wardrobe door and the doors actually provided, it might have been supportable. There is no indication that the Builder told the Owner that the wardrobe details were missing before a price was struck, or that they agreed on the work to be done. The Builder has failed to prove entitlement to this item.

Entry Brickwork

118 The Builder claims $825.00. This item is part of the amount claimed for variations in the Builder's final submissions and appears on page 608 of the Tribunal Book. The Owner's evidence is that he did not agree to this as a variation and that it was part of the Builder's obligations under the Main Contract.

119 The Builder failed to prove that this was a variation sought by the Owner and that he agreed to pay for it. There is no allowance for this item.

Further claims by the Owner

First glazing variation

120 The Main Contract called for double glazing. The Owner claims that the Builder recommended the use of 6.38mm laminated single glazing in place of double glazing and failed to allow a credit. He said they agreed there should be a credit but did not agree the amount. The Owner claims $22,127.60 for this item, being the difference between Bradnam's Windows and Doors Pty Ltd quotations for $39,870.60 for the double-glazed windows and $17,713.30 for laminated glass.

121 The Builder's response is that although the Main Contract provided for double glazing to windows to units 2, 7, 8 and 13 there was a verbal agreement to use single glazing. He said:

> … the difference, if any, between the cost of the double glazing and these windows and the laminated glazing as supplied was offset by the provision by the [Builder] of additional windows to unit 1.

122 I do not accept the Builder's evidence. The Window Contract governing Units 1, 3 and 5 did not expressly exclude any windows although I have accepted that two windows in Unit 1 were the subject of the variation with respect to French doors referred to above.

123 In support of his claim, the Owner obtained two quotations from Bradnams (Tribunal Book pages 703 and 704 for $17,713.30 with a delivery date of 6 August 2004, and pages 705 and 706 for $39,870.60 without a delivery date) Both quotations are for 29 windows. The quotations are directed to "Mr Coldwell". Neither quotation breaks down the price per window. The Builder did not give evidence about the difference in price.

124 Tribunal Book page 437 is a fax from the Builder to the Owner of 26 May 2004. Excluding the formal parts the message is:

> Andrew,
>
> Reply from window manufacturer re double glazing. The graph [chart of benefits] shows laminated same as double glazing for noise but poor in winter warmth. Lets know what you require.
>
> Ray

125 It is clear that the Builder was waiting on the Owner to make a decision and that he was not necessarily advocating lamination in place of double glazing. This correspondence is consistent with the Owner's recollection of the arrangement - that he would be entitled to a saving for substituting an inferior product for a superior one. The instruction to go ahead with windows and doors of laminated glass was given by the Owner on 27 May 2004.

126 I prefer the Owner's evidence on this item. The Builder must allow the Owner $22,127.60 for the first glazing variation.

The second glazing variation

127 The Owner claims that in or about December 2004 the Builder varied the Window Contracts and installed 6.38mm laminated single glazing in the windows and doors in the nine units in place of double glazing and did not give a credit. The Owner says the Builder did not seek his approval before making the substitution and claims $5,005.00. The Builder denies that the Window Contracts provided for double glazing.

128 The Builder's evidence is inaccurate. Each contract specifically calls for double glazing in schedule 5. The Builder must allow the Owner $5,005.00.

The slab variation

129 The Owner claims that in or about July 2004 the parties discussed varying the Main Contract to change the floor construction in the living room to unit 2. Drawing WD2.02 called for suspended slab and WD1.04 called for a timber finish. The adjacent storage area was to be a suspended slab with a trowel finish. According to the Owner, there would be no saving, so he decided not to change the floors, but the Builder did so anyway and said that he had changed his mind – timber construction was both cheaper and quicker.

130 The Owner claims $4,011.00 as the saving. The Builder claims the change was necessary to minimise the risk of "cupping" of the Unit 2 floor as the concrete slab lost moisture and that there was no difference to cost as the stump holes had to be excavated by hand. In accordance with s53(1) of the DBC Act, I consider it is fair that if, under normal circumstances, this variation would result in a saving, the Owner should obtain some benefit from the saving.

131 The Owner relied on the evidence of Mr Buchanan of Prowse Quantity Surveyors Pty Ltd to calculate the amount of saving. His evidence has been of assistance to me. Mr Buchanan agreed that his calculation for deletion of the concrete construction of the storage area should be revised down from $1,396.00 to $1,086.00 and I otherwise accept his calculations. The Builder must allow the Owner $3,336.00 for this item.

Floor waste drainage variation

132 The Owner claims that the Builder stated that it was unnecessary to install floor waste drainage for the laundries, balconies and bathrooms for units 2, 7, 8 and 13, it would be cheaper not to install them and installing them would cause delay. The Owner claims $3,230.00 as calculated by Mr Buchanan.

133 The Builder correctly stated that drawing WD1.04 showed floor wastes to the bathrooms and laundries, but "grated outlets" to the balconies of units 7, 8 and 13. He also said, somewhat surprisingly, that there was no provision for connection of the grated outlets to the stormwater system, that water from units 7 and 8 would fall in front of the windows of units 1 and 2 respectively and that the water from Unit 13 would discharge into the garage.

134 I accept the Builder's evidence that the Owner agreed that a drip groove be installed to the underside of the balcony slab in place of the grated outlets. I allow the cost of the drip groove as a contra to the grated outlets in the balconies.

135 I accept the Builder's evidence that the bathroom and laundry floor wastes were not adequately allowed for in the drawings, in particular because it was impossible to get a fall across the floors to the floor wastes and that this

necessitated application to the Building Appeals Board to delete the floor wastes.

136 The Builder has been saved the cost of installing bathroom and laundry floor wastes which, it is reasonable to assume, both parties considered were technically feasible when the Main Contract was signed. I note the Builder assisted the Owner in obtaining a dispensation from the Building Appeals Board to eliminate the floor wastes. I allow the Owner half his claim to take into account the cost of installing the drip groove. The Builder must allow the Owner $1,615.00.

Boundary Fence Credit

137 The Owner claims $2,389.00 as calculated by Mr Buchanan for the 1.6 m high timber and rendered masonry fence. The Owner claims that instead of building the fences as designed they were built of timber alone. Under cross-examination the Builder admitted that the fence as built does not match the fence as designed. He agreed that the nett difference in value of the fence as designed less the fence as built is $2,172.00. The Builder must allow the Owner this sum.

Hot Water Service Credit

138 The Owner claims $3,179.00 for installation of an electric hot water service in the communal laundry instead of a Rheem Optima gas hot water service as required by the "contract documents". The credit claimed was calculated by Mr Buchanan, to which GST has been added.

139 The specification, Section 17, page 44 stated "water heater, Refer Architectural Drawings Schedules and Scope of Works". The common laundry hot water system was not listed on the drawings and the relevant parts of the Scope of Works appears to be in Section 17 on page 13:

Common Laundry	2 x Double bowl sink waste hot and cold water
HWS	Locate 4 no. Rheem Stellar 850330 hot water services in the location shown on the drawings, new hot and cold water feeds and supply.

140 I am satisfied that the Rheem Stellar is a gas hot water system, but I am at a loss to understand why Mr Buchanan would base the difference in price on a different item from the one provided for under the Main Contract. I also accept the Builder's evidence that five hot water services were supplied and two internal unvented hot water services could not be gas but had to be electric.

141 I note that on 31 March 2005 the Builder sent the Owner a fax which said, somewhat disingenuously:

> As per drawing WD5.01 an electric hot water service is to be installed.

It is true that the electrical plan showed five hot water services, but no detail of make or model was supplied, whereas it was provided in the specifications and was not electric.

142 There was correspondence between the Owner and Builder suggested the Builder might charge extra for installation of an electric hot water system and the Owner sought $2,000.00.

143 I am concerned that the Builder might have installed the electric hot water system in breach of the agreement, but the Owner has failed to prove the electric hot water system supplied was less expensive than the gas hot water system specified and therefore that he is entitled to an amount for this item.

Amount and time for variations

144 The nett adjustment for variations is

Fire rated plasterboard to units 9, 10, 11 and 12	$22,990.00
Repointing roof	$1,735.00
Change garage door	$420.00
Change entry doors	$4,455.00
Remove beam	$652.00
Remove proud bricks	$286.00
Remove plaster (Units 7 and 8)	$5,566.00
Alter downpipes and gutters	$2,528.00
Underground installation of power	$4,688.00
CV works	$42,939.00
Ribbon plate	$588.00
Shower stand	$350.00
Remove kitchens	$760.00
Wall tiling	$350.00
Core drill for service ducts	$200.00
Flashings to step in roof	$400.00
Windows (four less)	($600.00)
Sky lights	($2,090.00)
Delete balcony roof for units 7 and 8	($3,739.00)
3/12/04 credit for roof for Units 9 and 10	($2,400.00)
3/12/04 adding patch to floor	$701.00
Planter boxes	$1,175.00
Relocation of Hot Water Service for Units 7 and 8	$1,130.00

External screens to internal film	($3,203.00)
Painting external stairs	$2,178.00
Painting 9 units	$13,899.00
Removing two fire hydrants	($5,000.00)
First glazing variation	($22,127.60)
Second glazing variation	($5,005.00)
Slab variation	($3,336.00)
Floor waste drainage variation	($1,615.00)
Boundary fence credit	($2,172.00)
Nett amount due to the Builder for variations	$56,702.40

145 The time extensions claimed by the Builder total 70 days.

COMPLETENESS

146 The Owner claims that the Builder did not complete the works. The Owner claims $141,529.29 for the cost of completing the building work. This sum consists of $131,929.29 as the cost of individual items plus $9,600.00 for the Owner to arrange and supervise the completion of the building works. The items are:

1. Footpath and crossover

147 The Owner claims that this item is at page 50 of the Main Contract specification and the cost of completion is $5,400.00. The Owner points out that item 19 of the Specification calls for the Builder to "Close off existing crossing and create new vehicle crossing to the satisfaction of the regulatory authority", however there was a time when both parties treated this extensive and expensive cross-over as not being part of the Main Contract. It does not appear on the drawings and is not mentioned in the scope. By faxes of 23 and 26 January 2005 by the Owner to the Builder and return, they negotiated a variation for the Builder to provide the crossing at the cost of $4,498.00.

148 On balance I find that the contract did not contemplate the crossover and footpath works arranged by the Owner. There is no allowance for this item

2. Supply and install window and door fly screens – contract special conditions

149 The Owner claims $3,272.00 for this item. The Builder gave evidence that the fly screens were made but have not been delivered and there was a fax from the Builder to the Owner of 20 April 2005 stating that the fly screens would have been ready for installation on "Friday", presumably 22 April.

150 The Builder said the cost of the fly screens from Lock U Tight was $3,132.00, however I note the quotation from Lock U Tight, although for

the same amount, was dated 17 May 2005. I do not find the Builder's evidence regarding the fly screens reliable and the Builder must allow the Owner $3,272.00 for this item.

3. Render north and south wall

151 The Owner claims $9,480.00 for this item. The Builder states that the render was deleted from the scope of works at quotation stage and a credit was given for $8,000.00; it was therefore taken into account in the Main Contract price. I rely on the Main Contract documents signed by the parties.

152 The parties agree that the Builder rendered the east and west sides of the building (the elevations facing Clifton Street and Dando Street respectively) and that he rendered the north and south sides of Unit 13. The Owner has since had the remainder of the north and south sides of the building rendered.

153 Drawing WD2.01 shows the north and south elevations were to be rendered with the exception of the walls between Grid C and Grid E, which were to be paint finished only. It was the obligation of the Builder to render the walls between Grids E and G on both elevations (the eastern ends of both elevations), which he did not do. I am satisfied that the remainder of the walls was rendered at the order of the Owner and that the new render matches the render provided by the Builder.

154 Under cross examination Mr Buchanan conceded that the areas to be rendered were less than he had calculated and that the cost of rendering the relevant areas would be $5,640.00. I accept his evidence.

155 The Builder must allow the Owner $5,640.00 for this item.

4. Construct balconies for unit 1, 2, 3, 4

156 The Owner states that these are referred to in WD1.04 of the engineering drawings and claims $6,041.00. The Builder claims that they are not part of the Main Contract. These "balconies" are actually four concrete suspended slab landings at ground level on the north and south sides of the building. They are shown on engineering drawing S2, ground floor plan.

157 In the absence of any evidence from the Builder as to the cost to construct them, the Builder must allow the Owner $6,041.00 for this item.

5. Supply and install down pipes for north and south sides and other walls

158 The Owner refers to WD1.04 of the engineering drawings and claims $2,899.99. The Builder states that this item is disputed and that the works comply with the drawings - he acknowledged his obligation to install down pipes adjacent to the four units under the Main Contract, but not to the remainder of the building.

159 Having regard to the downpipes shown on the ground and first floor plans of WD1.04, I prefer the Owner's interpretation. All downpipes are marked

in the same manner, regardless of the units to which they are adjacent. The downpipes are not there just to indicate where they are in the building, in contrast, for example, to the baths in the nine units.

160 The Builder must allow the Owner $2,899.99 for this item.

6. Relocation of gas and water services

161 The Owner claims $11,110.69 he paid to Conbrig Plumbing and Property Maintenance Pty Ltd which was for:

- Installing down pipes on the north and south walls,
- Connecting three stormwater drains to the curb,
- Extending two sewer vents through the roof line,
- Connecting two downpipes to Unit 13,
- Installing 100mm x 75mm down pipe and connecting to storm water drain on each of the north and the south side,
- Relocating the Hot Water service to Unit 13 and altering gas lines for units 7 and 13 to satisfy the gas inspector,
- Reconnecting gas cook tops which were too close to splashbacks, and
- Relocate the gas and water services for the apartment building … in accordance with the drawings.

The Builder states that this is disputed, it is not necessary and not within the scope of the works.

162 I have been assisted by the evidence of Mr Prell of Conbrig, who impressed me as careful and truthful. I find reconnecting the cook tops, relocating the Hot Water Service and altering the gas lines to units 7 and 13 were works that should have been completed by the Builder. I am not satisfied that relocating the gas and water services, or installing the storm water pipes or down-pipes were works under the Main Contract between the Owner and Builder.

163 The Conbrig invoice is not broken down sufficiently to distinguish between the work allowed and that which is not. In the absence of better evidence I find the Builder must allow the Owner $1,000.00 for this item.

7. Supply main entry gate

164 The Owner claims that this is on WD1.04 and WD4.01 and claims $1,485.00. The Builder states that it is not part of the Main Contract. It is noted that the entry is shown on the window schedule (WD 4.01) as a door with a side light. The Builder admitted that neither a door nor a gate was supplied by him. In the absence of evidence as to the cost of supplying the door as originally designed, I accept the Owner's evidence that the cost of the gate was about the same as the cost of the door. The Builder must allow the Owner the cost of the gate, being $1,485.00.

8. Supply and install two hose reels

165 The Owner claims $6,000.00 for this item, which he said was the amount he paid to install them. The Builder acknowledged under cross examination that the reels were required under the Main Contract and not supplied by him. I accept the evidence of Mr Meneilly of BDM Plumbing and Gasfitting that this was a reasonable charge for the hose reels. The Builder must allow the Owner $6,000.00 for this item.

9. Cleaning the site

166 The Owner claims $2,465.00 for this item, being $550.00 paid to WJM Concrete for an invoice of 28 June 2005 and $1,915.00 invoiced by MB Garden Designs on 11 July 2005. Under cross examination the Owner said the first invoice was for site cleaning to the north and south of the building and that the second invoice was for clearing the east (Clifton Street) side, including removing concrete paving.

167 I am not satisfied that the witness statement of Mr Bogdan of MB Garden Designs was accurate in the statement that when he arrived on site there was "rubbish everywhere". I note that he signed a document prepared by the Owner, rather than preparing the document himself.

168 I am not satisfied that the Main Contract called for removal of concrete paving to the east side. It is not shown on the demolition drawing WD1.01, and neither does it fall under the fifth bullet point of item 2 of the scope of works, the relevant words being:

> Site clearing … as required for the new works …

169 The Builder said he had been excluded from site by the date the final site clean could be undertaken, but he would still have had to incur the cost of the final site clean. It is reasonable that the Builder bear the cost of the site clean paid to WJM Concrete. The Builder must allow the Owner $550.00 for this item.

10. Supply and install four mounted lights for units 1, 3 and 4

170 The Owner refers to drawing WD5.01 and claims $1,160.00 for five lights and three switches installed by him. The Builder claims that units 1, 3 and 4 do not form part of the Main Contract. I accept the Owner's evidence that the exterior lights to these units did form part of the works. The evidence of Mr Kerr, electrician, for the Owner, was unconvincing. It was not clear whether Mr Kerr's document (Tribunal Book page 758) was a quote or an invoice, the witness statement was a document into which he had very little input, he acknowledged that $150 per light and switch set is usually reasonable and under cross examination he said "I'm just here to help [the Owner]".

171 The Builder must allow the Owner $150.00 by 5, being $750.00 for this item.

11. Supply and install tiles to ground floor/laundry

172 The Owner referred to page 8 of the scope of works and claims $7,623.00. The Builder's response is "conceded tiles are shown on the plans and a credit will be provided". Mr Buchanan gave evidence that the cost to supply and lay tiles is $6,930.00. When GST is added, it equals the sum claimed.

173 Although the Builder said that he was only obliged to tile the common laundry, page 8 of the Scope of Works states that the "entire pathway in the carpark" is also to be tiled. Drawing WD1.04 shows tiles from the front gate to the steps to the car park, in the common laundry and a path beside the common laundry. I prefer Mr Buchanan's evidence as to the required area. The Builder must allow the Owner $7,623.00 for this item.

12. Supply and install shower screen for unit 2

174 The Owner claims $495.00 but the Builder claims that it has been installed. The "Unit 2 bath isometric view" on drawing WD6.01 shows a "Hawthorn Shower Screen". I accept that the Builder has not provided the shower screen and in accordance with the Owner's evidence at paragraph 147(xii) of his first witness statement, I order that the Builder allow the Owner $450.00 for this item.

13. Repair unit 2 jagged floor

175 The Owner claims $450.00 for a floorboard near the entry door, which he said, had buckled. The photograph at page 225 of the Tribunal Book shows a dark mark, apparently between two boards, or on one board. The Owner gave evidence that the board absorbed moisture and warped, making the door difficult to open. The Builder denied that this board was defective when he left site and the Owner did not say why he thought that the problem was due to absorption of water.

176 The Owner admitted under cross examination that this defect was not included in a defects list prepared by his architect shortly after the Builder was excluded from the site. (INTERLANDI fax to the Owner dated 20 April 2005 - Tribunal Book page 649) His response was that the defect appeared in "May or June".

177 The Owner has failed to prove that the defect, if any, was due to a failure of the Builder. I make no allowance for it.

14. Supply and install window screens - units 11, 12 and 13

178 The Owner refers to WD2.01 and WD2.02 and claims $3,709.00 for this item. This item appears to be the same as variation 22, for which an allowance has been made. There is no further allowance.

15. Fences for car parking and balcony

179 The Owner refers to WD2.01 and WD2.02 and claims $8,590.00, being $6,870.00 apparently paid to 5 Star Fencing and the balance for items purchased by him and work done by himself and his brothers. The Builder claims that Fences other than the front fence, were not part of the Main Contract.

180 I find fences are shown in elevation on the cover of the architectural drawings, and on drawings WD2.01and WD20.2 and in plan on drawing WD1.04. The fences shown in plan not only divide the private open space of the units around the perimeter of the building, but also enclose the ground floor terraces (referred to by the Owner as "balconies") in the central court yard of the building.

181 The Owner provided a bundle of invoices and receipts, exhibit R46, which were singularly unconvincing and some of which was clearly unrelated to fencing. For example, there was no evidence of either a joist hanger or white ceiling paint associated with the fences. Nevertheless, the Owner was entitled to fences and I accept his evidence that he paid 5 Star and it took him time and cost him money to get them finished. In the absence of better evidence, the Builder must allow the Owner $8,000.00 for these fences.

16. Change the locks

182 The Owner claims $2,066.91 for this item, which was to change the locks when he took over the site. The Builder disputes liability for this item. I note the locks supplied were push-button locks, and the specification called for "push button key and knob set and a double-cylinder dead bolt to each [external] door". The Owner failed to establish the locks were not in accordance with the specification.

183 The Owner took possession of the site in circumstances that might have entitled him to the cost of re-keying the locks, but this was not his claim. In particular, he admitted under cross examination that he did not ask the Builder for the keys. There is no allowance for this item.

17. Building appeal report

184 The Owner claims $467.50 as the cost of obtaining the report from Group ii Building Surveyors, in order to seek a dispensation from constructing floor wastes in the laundry/bathrooms in units 7 and 8. I accept the Builder's evidence that the original design was defective as there was insufficient room to install floor wastes. This was not the Builder's responsibility. The Owner is not entitled to recover this sum from the Builder.

18. Carrara stone for kitchen cabinets and side and top

185 The Owner refers to WD6.01 and WD6.02 and claims $8,370.00. The drawings called for Carrara marble on the benches, on the sides of the cupboards adjacent to the benches and on the soffit of the overhead

cupboards. The Builder installed reconstituted stone on the bench tops and did not install any other stone. I do not accept the stone supplied is the equivalent of Carrara, but note that it has not been replaced. The measure of damages for this item is the difference between the cost of the stone as designed and the stone installed.

186 The Builder disputed this item and said stone could not be installed as per the drawings as there was inadequate support specified, but admitted under cross-examination that it was specified, not installed and the Owner should receive a credit. The Builder must allow the Owner $8,370.00 for this item.

19. Whitegoods

187 The Owner claimed $30,524.00 for four dishwashers, six washing machines, four microwaves, four refrigerators and two clothes dryers referred to pages 19 and 20 of the scope of works and for the difference in cost between the Quasair range hoods specified and the Blanco range hoods installed. The Builder admitted that the dishwashers, microwaves and refrigerators were not supplied.

188 He said he was only obliged to provide clothes dryers for Units 2, 7, 8 and 13. The scope of works calls for six, not four, and he admitted it was a Main Contract document. The scope of works is confusing with respect to the whitegoods. It commenced:

> Supply and installation by builder
>
> All white goods supplied by client:

Both original copies of the scope of works were provided to me; the Builder's as exhibit A5 and the Owner's as R27. In both versions, "13, 2, 7 and 8" has been written in beside "supply and installation by builder" and in the Owner's version only "All white goods supplied by client" has been struck out. In the Builder's version, the number 4 has been written beside each item. It is not easy to decide what the parties intended when they initialled both copies of the scope - the Builder has certainly provided some of the items listed there at his own cost.

189 I find the parties' intention was that the Builder would only supply whitegoods for units 13, 2, 7 and 8, therefore would supply four each washing machines and dryers, but would supply all the other items as listed.

190 The parties agreed that Blanco range hoods had been substituted for Quasiar, but as mentioned under "credibility" above, there was disagreement over whether there should be a credit to the Owner. I do not accept the Builder's assertions and allow a credit for the change from Quasair to Blanco.

191 The Owner has based his claim for amount on the evidence of Mr John Bazogias of Bayswater Bulk Brighton/The Good Guys. I was assisted by his evidence and accept that most of the items quoted have fallen in price since 2004. His evidence was consistent with the amount claimed by the

Owner. The Builder provided a quotation from The Good Guys of Berwick for $6,512.00 but none of the items are the same and the Builder has not discharged his obligation of proving that they are interchangeable.

192 I deduct two washing machines at $765.00 each and two dryers at $395.00 each, a total of $2,320.00

193 The Builder must allow the Owner $28,204.00 for these whitegoods.

20. Installation of 26 wall mounted lights in units 1, 2, 3, 4, 5, 6, 7, 8 and 13

194 The Owner refers to page 15 and 20 of the scope of works and drawing D5.01 and claims $7,540.00. He said the Main Contract called for the installation of 46 wall-mounted lights to the external walls of 1, 2, 3, 4, 5, 6, 7, 8 and 13, but the Builder supplied only 10 of the specified lights and a further 6 fluorescent lights in lieu of certain lights. The Owner's claim is for 30 lights, 4 of which had been installed by the date of the hearing and have been considered under item 10 above.

195 The Builder said that he was only obliged to install the lights to the exterior of Units 2, 7, 8 and 13 and the fluorescent lights referred to by the Owner were pre-existing. Having had regard to drawing WD5.01, the electrical plan, I note the lighting in the four units is extensively described and the only electrical items in the remaining nine units are the exterior lights, switched to the interiors of those units. I find the Builder was obliged to provide these items. In accordance with the evidence of Mr Buchanan, the Builder must allow the Owner $4,323.00 for this item.

21. Provide new 100 UPVC sewer lines and branches and connecting sewer to main sewer pipe

196 The Owner referred to page 12 of the scope of works and claimed $9,785.00 for this item. Item 17 of the Scope of Works is "Plumber" and provides in part:

> Provide new 100 upvc sewer lines and branches, …
>
> Scope as per Sanitary fixtures schedule and as shown on the drawings.

197 The Builder was asked in cross-examination whether he knew the sewer lines "had to be moved" and if "the Authorities required them to be moved". I accept the Builder's evidence that the sewer lines only had to be moved if the Units were to be strata titled, and find that this was not his responsibility. There is no allowance for this item.

Total for completion

198 For completion, the Builder must allow the Owner:

Fly screens	$3,272.00
Render	$5,640.00
Balconies	$6,041.00

Down pipes	$2,899.99
Relocation of gas and water	$1,000.00
Main entry gate	$1,485.00
Hose reels	$6,000.00
Cleaning site	$550.00
Four wall mounted lights	$750.00
Tiles to ground floor/laundry	$7,623.00
Shower screen unit 2	$450.00
Fences for car parking and balcony	$8,000.00
Carrara stone	$8,370.00
Whitegoods	$28,204.00
26 wall mounted lights	$4,323.00
	$84,607.99

ALLEGED DEFECTS

TV antennas

199 The Owner claims the TV antennas did not work and were repaired at a cost of $740.00 being $300.00 paid to the Antenna Mob for a new antenna on 9 March 2006 and $440.00 paid to Perfect Picture on an invoice dated 1 August 2006.

200 The Scope of Works does not call for the Builder to provide new antennas – it states "TV antennas to existing to remain" and it makes no reference to providing an antenna for Unit 13. However item 6 of the CV estimate sheet which became Variation 9 was:

> Supply and install TV reticulation to required standard to allow for connection to Foxtell in future if required, incl supply and testing of all necessary components + Antennas.

201 I accept the Owner's evidence that the television picture was defective and note that his evidence was that the works by the Antenna Mob were unsuccessful in rectifying reception. He gave no reason why the Builder should bear the cost of a failed attempt to rectify the problem. On the other hand, the Builder's suggestion that a new splitter and amplifier was unnecessary falls short of providing "TV reticulation".

202 The Builder must allow the Owner $440.00 for this item.

Replacing doors for units 2, 7 and 8

203 The Owner claims that the entry doors for units 2, 7 and 8 were not properly installed and there were gaps of approximately 5cm between the door and the floor. More importantly, he claimed that they are not solid

core doors and should be. The Builder admitted under cross examination that these doors should be solid core. The Owner claims their replacement was necessary and the cost was $1,441.00. In accordance with the findings of the Special Referee who attended site with me on 20 August 200, these doors were not solid core and their replacement is justified.

204 The Builder must allow the Owner $1,441.00 for this item.

Window works

205 The Owner claims $6,952.00 for the cost of completing the window works being $6,320.00 incurred by him and a supervision fee of $632.00. As the "supervision fee" has been claimed on a time basis, the claim for supervision is not considered with respect to this claim.

206 The claim for $6,320.00 is based on the Owner's assertion that the Builder failed to patch gaps to 30 windows. The Owner's assertion is supported by photographs which are at Tribunal Book page 221 and show lack of proper sills and gaps to the window sides. I accept the evidence of Mr Hajai of Impressive Solid Plastering Pty Ltd that this sum was paid to his firm and that it was reasonable for the work done. The Builder must allow the Owner $6,320.00 for this item.

Total for rectification

207 The Builder must allow the Owner the total of $8,201.00 for rectification.

SUPERVISION CLAIM BY OWNER

208 The Owner claims $9,600.00, being 320 hours work at $30.00 per hour to supervise the completion works. I have no doubt that the Owner did spend time completing the works, but he has provided no records to show how much time was spent and has not demonstrated the value of his time to the project.

TIME

209 As mentioned in the introduction, without time extensions the Main Contract should have been completed by 4 October 2004 and the Window Contracts should have been finished by 1 November 2004. The consequence for the Builder of not finishing on time was that the Owner then became entitled to agreed damages of $500.00 per week per contract. Conversely, if the contracts were delayed due to the Owner's fault, the Builder would be entitled to time extension costs, but the Builder has not claimed them.

210 The Owner's claim for agreed damages is from the date upon which the works should have been finished to 18 April 2005, when he took over the works. He has claimed $13,500.00 under the Main Contract and $34,500.00 under the Window Contracts.

211 Time was important to the Owner, as he said under cross examination. There were a number of variations, but when the Builder sought a time extension of four weeks at a site meeting on 9 July 2004, the Owner's response in a hand-written note on the minutes was "[No] way!" However, toward the end of construction by the Builder, both parties appear to have been very conscious of time under the contract, and much of the correspondence between them about time appears to have been self-serving.

Time for variations

212 As said above, the total time claimed for variations by the Builder is 70 days and the Owner has not conceded any time should be allowed. It is noted that the delay claims for variations applied only to the Main Contract, not to the windows contracts.

213 Variations sometimes lead to an entitlement to time as well as money, but this is not always the case. The Builder is obliged to prove how each variation delayed him. The time the individual item of work takes helps determine the time impact on the construction period caused by that variation, but is not enough alone. For example, a builder might engage extra labour to undertake the variation and there might be no delay at all. A one-person builder who personally does much of the work might always be delayed whenever there is a variation. Or a relatively small-value variation which takes little time to undertake might cause a substantial delay because it is on the critical path and it needs materials which are not available.

214 It appears the Builder considers he is akin to the second class - he says he was always delayed by variations. When cross-examined regarding the doors, he said that while he was working on the doors he could not work on other things. However I note there was at least one other person working with him regularly, his son, Luke, and no evidence has been given about his business structure or work methods.

215 If ss37 and 38 of the DBC Act are complied with, an owner will know whether each variation will cause delay, and a reasonable estimate of the delay, before that owner commits themselves to going ahead with the variation. In cases such as this one, claims for extra time come when the builder has no incentive to minimise delays caused by variations.

216 None of the claims for time gave dates for the work. There is no indication that any of the variations were "on the critical path".

217 I am reluctant to allow time extensions in this proceeding unless they have been agreed by the Owner or there is proof that they were on the critical path and caused actual delay. However strict application of that principle would lead to absurd results. The most obvious is that the Main Contract could not cause loss to the Owner until after the Window Contracts were due to be complete, because the Owner could not have let or sold the four units while work proceeded on the other nine units.

218 It is also difficult to reconcile nett variations of $56,702.40 with no extra time. That sum represents approximately 14% of the contractual sum under the Main Contract. Given that the work was to be finished in 152 days and in the circumstances of this case, it would not be unreasonable to expect time to be increased by the same proportion - about 21 days. However I have already expressed the view that the Main Contract works would not be useable until after the windows contracts were complete, so it is unnecessary to decide whether such a variation is justified in this case. I find that time for completing the Main Contract should be extended to1 November 2004.

Prevention

219 Although not specifically pleaded, the Builder has sought to prove facts which, if proven, lead to the conclusion that the Owner prevented or delayed completion of the works. As stated in *SMK Cabinets v Hili Modern Electrics Pty Ltd* (1984) VR 191, an owner who causes a delay cannot take advantage of such delay by charging the builder liquidated damages over the period of the delay.

220 On 14 October 2004 the Builder sent the Owner a fax (Tribunal Book page 542) as follows, omitting the formal parts:

> [I] wish to advise that you are in breach of the contract.
>
> I have unacceptable delays cause[d] by you and your architect, namely
>
> A. Permanent power supply
>
> B. Sewer
>
> C. Gas supply
>
> D. Lack of kitchen detail
>
> E. Delays caused by changes in windows
>
> F. Changes that have caused delays in completing work re render, plastering, carpentry, handrails etc
>
> I will be making a claim for cost relating to your delays.

221 I am not satisfied that any of the above items were the responsibility of the Owner, with the exception of matters associated with gas supply. In particular, the Builder admitted under cross-examination that a delay caused by ordering windows late was one where he blamed the Owner, but was responsible himself.

222 A major disagreement about the interpretation of the Main Contract concerns who was responsible for running new water gas and sewer lines to all 13 units. In his fax of 20 November 2004 to the Owner, the Builder said:

> Attached my plumber's quotation to run gas, sewer & water to all the units and body corp.

> I note on RS Connell & Sons P/L quote no allowance has been made for permits etc. If using this contractor you may wish to apply to the council ASAP

223 I am satisfied that the "attached quote" referred to was from P Crooks for $18,850.00 plus GST to run the services mentioned, renew the boundary trap to the south side of the building and install a new one to the north.

224 The Owner said he was not aware of the quotation from Connell, which I consider unlikely, and in answer to a question about whether he obtained any other quotes for this work, he said:

> No, it's under contract. This was the first time [the Builder] indicated he wasn't responsible.

225 Regarding responsibility, the first page of the architectural drawings is signed as a Main Contract document and bears a number of notes. The notes under "Services" include:

> Sanitary services:
>
> Sewer lines all to local council requirements; scope as shown on the drawings and specification.
>
> Water:
>
> Connect hot & cold water
>
> scope as shown on the drawings and specification.
>
> Gas:
>
> Connect gas to cook top.

226 The drawings do not indicate sewer, water or gas lines. The scope provides in part at item 17:

> All sanitary plumbing, gas supply and connections, hot & cold water inclusive of all installation of fittings and fixtures.

Surprisingly, as the site is sewered:

> Supply and installation of an all waste septic tank system to local council requirements.
>
> Provide new 100 upvc sewer lines and branches, 18 mm copper cold water and fully lagged 18 mm hot water and branches fully sealed and tested, to new fixtures….

227 The specification also calls for a septic tank. Under "fresh water" there is no specific mention of pipes and under gas, the only mention is the requirement that plastic warning tape should be laid above gas pipes.

228 Special condition 4 in Schedule 5 of the Main Contract is:

> Relocating where necessary water, gas and stormwater.

229 I find the connecting the gas and associated work which delayed completion was not part of the work called for under the Main Contract and therefore delays in having the work completed were the responsibility of the Owner.

230 In a fax from the Builder to the Owner of 23 November 2004, he said in part:

> I'm also awaiting a detail at the entry sill area to units 2, 7, 8. This item is over 3 months old!

231 I was not directed to a requirement for sill tiles at the doors in the Main Contract documents and neither could I find one. The Builder cannot use lack of a detail for something he did not need to do (and did not do) as a reason for being delayed.

232 The Builder said he was told by his plumber, Peter, from McKinnon Plumbing, that the Owner illegally used McKinnon's plumbing registration number and incomplete compliance certificate numbers to make an application to the proposed gas supplier, and that as a consequence all gas works had been suspended. This was the subject of a fax from the Builder to the Owner of 23 March 2005 (Tribunal Book page 626). The Owner responded by fax the same day (Tribunal Book page 627) saying that Peter gave the registration and compliance certificate numbers to the supplier. The Owner was not cross examined about this allegation and Peter from McKinnon Plumbing was not called to give evidence. This allegation by the Builder is unproven and I do not take it into account.

233 As I mentioned in the discussion of the Owner's credibility, he said in evidence before me that he was not delayed by the gas supplier, Origin Energy, yet on 11 April 2005 the Owner told Origin that they alone were holding up completion of the work; that "we have been held up the time over three weeks". On 13 April 2005, the day before the Owner sent the Builder notice of termination (see below) the Owner repeated his assertion to Origin. This time he said:

> The project has been held up and the builder has concerned. I reserve a right to claim a lost due to your delay. [sic]

234 Finally, on 21 April 2005, the Owner said to Origin:

> Due to gas supply is uncertain, our plumber does not know how to do the gas, and consequently water delay as well, the progress of the development has been suspended over four weeks. We reserve our right to claim a lost. [sic]

235 While I am not satisfied that connection of gas prevented the Builder doing other work, I am satisfied that until connection was complete, it prevented final completion and commissioning of gas items under the Main Contract. I therefore find that the Owner is not entitled to agreed damages for delay under the Main Contract as he took possession before he fulfilled his obligations regarding gas connection.

236 The window contracts were not delayed by gas issues. The Builder has given no satisfactory explanation for why window work was incomplete. The Owner is therefore entitled to the claimed agreed damages of $34,800.00.

Penalty

237 Mr Pumpa of counsel for the Builder, submitted on the first day of the hearing that it is a penalty if the agreed damages are cumulative. However no evidence was given by either party as to the actual losses to the Owner if the work were delayed and this submission was not developed in final submissions. The onus of proving the penalty falls on the person asserting it. The penalty has not been proved and the assertion is not taken into account.

ENDING THE CONTRACT

238 The Owner states that as at 30 March 2005 the building works had not been completed by the Builder in accordance with the Main Contract, the Builder suspended the works without reasonable cause and had not completed the building works in accordance with the Main Contract. On that day the Owner claims he gave notice to the Applicant pursuant to clause 46.1 of the Main Contract.

Show cause notice

239 The grounds stated in the 46.1 notice were:

> (a) you have suspended the Building Work without reasonable cause;
>
> (b) you have failed to proceed diligently with the works;
>
> (c) you are unable or unwilling to complete the Building Works.

240 The notice required the Builder to remedy defaults within 10 days.

Alleged suspension

241 I am not satisfied that the Builder had suspended the works. Work might have been progressing slowly, but as the Owner admitted under cross-examination, the Builder's plumber was still attending site.

Alleged failure to proceed diligently

242 Ideally, a default notice should be more specific, but the point has not been taken by the Builder so I will not explore it further.

243 The Builder was cross-examined on a letter from the architect Robert Ficarra to the Owner of 20 April 2005. He agreed with Mr Ficarra's comments about the following items*:*

> **Unit 2**
> Power points in kitchen splash back still to be installed.
> Kitchen joinery not fully installed.
> Paint drips on kitchen joinery.
> Door stops to be installed to all doors.
> Plaster patch work and painting around the ceiling track lighting to be attended to.
> Builders' materials inside, needs to be cleaned up.

The courtyard landscaping yet to commence.
Bedroom light fitting still missing.
New bathroom, grout joint adjacent to the bath and the floor has already started to crack, needs to be cleaned up and sealed properly.
Floor waste in bathroom missing.
Electrical wires in the corridor that haven't been fitted off, especially above the laundry cupboard.
Laundry cupboard doors to be adjusted, bottom is rubbing on carcass and difficult to close.
Washing machine taps missing.
Powerpoint to be finished in laundry.
Bottom of bathroom door to be painted.

Unit 7
Generally all items as per Unit 2 apply.
Floor waste to laundry missing.
Carpet laying not complete in bedrooms.
Junction of timber floor to door frames need sealing.
Balcony junction between wall and soffit needs to be caulked.

Unit 8
Generally as per Unit 7.

Unit 13
Generally as per Unit 2.
Windows to be cleaned, inside and out.
Skirting to bedroom 1, joint very visible.
Kitchen benchtop to be sealed against wall.

244 Despite the Builder's admission, it is noted that the floor wastes in the bathrooms and laundries had been subject to a dispensation from the Building Appeals Board due to inadequate design.

245 I accept Mr Ficarra's evidence that because of the listed deficiencies the units were not ready to occupy, I am not satisfied that any of these items were delayed by the Owner's failure to arrange for the connection of gas or other services. While the works could not be ready for use before the Owner rectified the gas issue, everything else could be brought to a stage where the contract was complete, but for the gas.

246 Some of the items listed were minor, but there are sufficient which are substantial to satisfy me that the Builder was failing to proceed diligently. This element of the show cause notice is proven and it is only necessary to prove one for the show cause notice to be effective.

Alleged unwillingness or inability to complete

247 Under cross examination the Owner said the only indication that the Builder was unable or unwilling to complete was that he did not send sub-contractors to site. I am not satisfied that this element of the default notice was proved.

Notice of Termination

248 I accept that on 14 April 2005 the Owner sent the Applicant a notice to terminate the Main Contract pursuant to clause 46.3 of the Main Contract. The notice was undated, but the accompanying letter was dated. In this proceeding I do not find lack of a date on this notice was fatal to its effect.

Reaffirmation?

249 The Builder's response is that the notice was received but the Owner reaffirmed the contract or withdrew the notice by allowing the Builder to return to the site to complete the works. I am not satisfied that the Owner reaffirmed the Main Contract. I characterise his action rather as a last chance to the Builder, from which the Builder failed to profit by finishing the works promptly.

Owner in breach?

250 The Builder also says the Owner was not entitled to issue any such notice as he was in breach by failing to make all due payments when the notices were given. It is common ground between the parties that the Owner had paid all amounts due under the Window Contracts and all amounts due to the end of frame stage under the Main Contract, with the possible exception of some variations. Under clause 27 of the Main Contract, amounts for variations were not due until the next progress payment was due.

251 The Builder submitted that a payment of $50,000.00 on 31 January 2005 as a part payment of the final payment amounted to an admission that the final stage was complete. I prefer the Owner's evidence that he did not believe the Builder was entitled to this sum but paid regardless. I note Mr O'Connor's evidence that:

> [The Owner] told me [the Builder] had put in a claim. … [The Builder was seeking payment in order to proceed. I told [the Owner] it would help to proceed and he should look at making a payment and possibly getting the job moving.

252 The Owner said the Builder promised to finish promptly, but "he lied". I am not satisfied that the Owner was in breach of his obligation to pay the Builder at the date of the notice of termination.

Failure to give timely notice?

253 The Builder said that he did not receive the notice under clause 46.1 until the Owner took possession of the site. I am satisfied that the Builder did receive the clause 46.1 notice, albeit late. I refer to the letter from his solicitors of 20 April 2005 which commences:

> We act on behalf of [the Builder] who has instructed us that he received your letter by registered post dated 31 March 2005 on Monday 18 April 2005.

254 There was evidence from the Owner's then solicitors that it was posted on the date it carried and no evidence to the contrary. Under cross examination the Builder was unable to say why he received it so late, and there was no contemporaneous complaint from him that the letter had been pre-dated. Therefore, I assume the Builder received notice of the letter from Australia Post but did not collect it until later. If the Builder was deprived of the ability to rectify by late receipt of the letter, it was not due to the fault of the Owner or his then solicitors.

255 I find that the Main Contract was properly terminated by the Owner. It therefore follows that he did not repudiate the contract by taking possession and it is unnecessary for me to also consider whether the Builder repudiated the contract, about which the Owner made submissions, but did not expressly plead.

QUANTUM MERUIT AND WORK AND LABOUR DONE

256 The Builder pleaded both of these heads of claim as alternatives to the contract claim, but did not give evidence or make submissions regarding them.

FINANCIAL RECONCILIATION

Window Contracts contract sum	$34,200.00
Paid under Window Contracts	$34,200.00
	$0
Main Contract sum	$406,300.00
Nett variations	$56,702.40
Cost of completion	($84,607.99)
Rectification of defects	($8,201.00)
Damages for delay	($34,800.00)
Paid by Owner to Builder under the Main Contract	($400,912.00)
Total payable to the Owner	$65,519.59

INTEREST AND COSTS

257 There is liberty to apply for interest and/or costs. The parties are reminded of the provisions of s109 of the VCAT Act.

SENIOR MEMBER M. LOTHIAN