

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
CIVILDIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D521/2008

CATCHWORDS

Which list of inclusions comprises the contract inclusions – whether initials forged – *Briginshaw* principle applied.

APPLICANT	Charant Developments Pty Ltd (ACN: 108 077 943)
FIRST RESPONDENT	Qui Nguyen
SECOND RESPONDENT	Thao Huynh
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Hearing
DATE OF HEARING	2,4,11,12 and 13 February 2009 Final written submissions received 24 March 2009
DATE OF ORDER	6 August 2009
CITATION	Charant Developments Pty Ltd v Nguyen & Anor (Domestic Building) [2009] VCAT 1553

ORDER

1. I find and declare that the list of inclusions headed 'Final Architectural Inclusions' comprises the contract inclusions.
 2. **This proceeding is referred to a directions hearing before Deputy President Aird on 19 August 2009 at 10.30 a.m. at 55 King Street Melbourne – allow 2 hours.**
 3. Costs reserved – liberty to apply. Any application for costs will be heard at the directions hearing on 19 August 2009.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For Applicant Mr A. Sandbach of Counsel
For Respondents Ms E. Ruddle of Counsel

REASONS

- 1 On 1 May 2007 the parties entered into a building contract for the construction of a new home by the applicant builder for the respondent owners with a contract price of \$430,000. The builder contends the contract comprises a cover page, pages numbered 4-14 of the standard HIA Victorian New Homes Contract and a four page document headed ‘Architectural List of Inclusions’ (‘the builder’s list of inclusions’). Each page of the builder’s copy of the contract and of the builder’s list of inclusions have the initials ‘CM’ (Charles Merola) on behalf of the builder, and initials ‘QT’ which the builder maintains are Qui Nguyen’s initials. The owners contend that the contract list of inclusions is a five page document headed “-final- Architectural complete inclusions” (‘the owners’ list of inclusions’).
- 2 The builder commenced these proceedings on 5 August 2008. On the application form it describes the grounds for the application as:

We are currently in dispute with our client since they have brought into play another list of specifications signed only by them. They are denying that the specifications we have signed by both them and us as builder is the one in play, which has now come to a head at the selection of their door handles. We need to resolve which list of inclusions/specs is the one on foot and hence binding of the two parties. [sic]

- 3 On 16 October 2008, at the request of the parties’ legal representatives, I appointed Gary Storey as an expert under s94 of the *Victorian Civil and Administrative Tribunal Act 1998* to express an opinion as to whether:
 - A the initials “QT” on page 4 of the contract and the inclusions titled “Architectural complete inclusions” were made by the same hand as on pages 5 to 14 inclusive of the contract; and
 - B the initials “QT” on page 4 of the contract and the inclusions titled “Architectural complete inclusions” were made by the same hand as on the documents entitled “-final- Architectural complete inclusions”
 - C In doing so, please specify all the matters you have regard to in reaching the opinion.

The questions to be put to the expert were drafted by the parties’ legal representatives.

- 4 I also set down for hearing the following preliminary question:
 - (i) Which of the documents entitled “Architectural complete inclusions” or “-final- Architectural complete inclusions” is the list of inclusions forming part of the contract.
- 5 Although one day was allocated to the hearing of the preliminary question, it proceeded over five days. The builder was represented by Mr Sandbach of Counsel, and the owners were represented by Ms Ruddle of Counsel. Mr

Charles Merola, a director of the builder, was its principal witness. Mr Nguyen gave evidence on behalf of the owners.

- 6 At first blush it might seem I am simply required to determine whether or not Mr Nguyen's initials have been forged on page 4 of the contract and the builder's list of inclusions as alleged by the owners. However, the owners also contend that it is clear from the evidence that their list of inclusions sets out the contract inclusions.
- 7 For reasons, which I will shortly discuss, I cannot be satisfied, on the evidence before me, that the owners' list of inclusions comprises the contract inclusions.

Which list of inclusions comprises the contract inclusions?

- 8 The builder contends the builder's list of inclusions comprises the list of contract inclusions. This document has the initials 'CM' – Charles Merola - on behalf of the builder, and 'QT' - Qui Nguyen - on behalf of the owners. The owners deny that the initials 'QT' (or 'QI' with an accent) are those of Mr Nguyen, and contend that the owners' list of inclusions comprise the list of contract inclusions. These five pages have the initials 'QT' only. They are not initialled on behalf of the builder.
- 9 Mr Merola gave evidence on behalf of the builder. He said that after many months of negotiations the owners attended his home to sign the contracts on 1 May 2007. In his affidavit sworn on 12 December 2008 he states that the building contract is

‘in the form of a cover page, a copy of numbered pages 4 to 14 of the standard HIA Victorian New Homes Contract, together with a four page document entitled “Architectural Complete Inclusions” being a List of Inclusions forming part of the Building Contract’.
- 10 Mr Merola says that he prepared two copies of the contract which he pre-signed on page 5, and initialled on each other page, as well as initialling the builder's list of inclusions. Mr Merola says that after the owners signed page 5 of the contract and Mr Nguyen initialled all other pages of the contract, he stopped initialling when he came to the list of inclusions. He produced an alternative list of inclusions, with the initials 'QT', which Mr Merola refused to accept. After heated discussions, Mr Nguyen initialled each page of the builder's list of inclusions. Mr Merola says he then went upstairs, copied the contract and gave the owners a signed counterpart and a copy of the contract. After they left he found the owners' list of inclusions amongst the other documents left on the kitchen table which he says he *'placed in my folder of related documents and paid no more attention to it'*.¹
- 11 The owners deny there were two 'original' contracts. Mr Nguyen said only one copy of the contract had been prepared by Mr Merola who, he agrees

¹ Witness Statement of Charles Merola sworn 12 December 2008 para 5(u)

had pre-signed and initialled it. He says when they arrived it was open at page 5 of the contract which he and his wife, Thao Huynh, signed, and that he then initialled the pages following page 5, including the list of inclusions. He says Mr Merola then went upstairs, copied the contract and gave them a photocopy. Mr Nguyen denies initialling page 4 of the contract, or the builder's list of inclusions, maintaining that the list of inclusions he initialled was the owners' list of inclusions, which he said he had emailed to Mr Merola on 28 April 2007. He said this was then amended further by Mr Merola who then printed it.

- 12 The parties agree that the contract negotiations were protracted, and it is clear that Mr Nguyen is a particular and careful person. It does not make sense that the owners would not have made sure that the list of inclusions were signed or initialled on behalf of the builder, particularly as, on Mr Nguyen's own evidence, negotiations about the list of inclusions continued until at least 28 April 2007. I prefer Mr Merola's evidence about the contract signing and accept that the owners produced their own list of inclusions which Mr Merola refused to accept, although it seems naïve to have simply filed away the owners' list of inclusions without comment.
- 13 Further, on 28 July 2008 Mr Nguyen sent an email to Anthony Merola (at the builder's email address), only part of which is relevant:

It was Charles who dealt with us, even when signing the contract on the 1st of May 2006 [7], you were not there either, only Charles was there, there were two piles of paper on the table. One pile consisted of photocopy of page 4-14 of the standard HIA contract, the other pile was the list of inclusion prepared by Charles for us to sign. The first pile was already pre-signed and pre-init by you guys, Charles asked me to init every pages, I and Thao signed and init the first pile and init pages of the second pile. Charles brought the 2 piles upstairs then came down and gave us a photocopy of the 2 piles of paper stapled together. This was the contract that I accepted from him. (sic)

- 14 Mr Nguyen said that he had always believed that he had signed or initialled all pages of the contract. After the contract signing he did not look at the contract again but gave it to Ms Huynh to file away as she looks after all their documents.
- 15 Initially he said that he had not seen the builder's copy of the contract and the builder's list of inclusions until he received copies on 12 August 2008 (sent to him under cover of a letter dated 11 August 2008) and it was then that he realised the initials on page 4 and on the builder's list of inclusions were not his. The first time this was raised with the builder was by facsimile from the owners' solicitors to the builder's solicitors on 18 August 2008. Mr Nguyen subsequently agreed under cross-examination that he had first seen the original contract held by the builder, and the builder's list of inclusions with both sets of initials, at a meeting convened by Consumer Affairs in June 2008. He said that he had not mentioned this previously because he had understood that meeting to be a mediation and

that he was unable to disclose what had occurred. However, he said he had only looked at the list of inclusions at the June meeting and it was not until he received a copy of the contract in August 2008 that he realised the initial on page 4 was not his. Frankly, this is difficult to believe.

- 16 Page 4 is the first of two pages headed ‘Particulars of Contract’. These have been completed by hand. The following is relevant:

The SPECIFICATIONS include 4 pages that were prepared and supplied by Charant Developments P/L [emphasis added].

The suggestion by counsel for the builder, that it was not until August 2008 that Mr Nguyen realised the detriment of agreeing that he had initialled page 4, is compelling. The copy of the contract which Mr Nguyen has exhibited to his first affidavit does not include his initial on page 4.

However, this is a photocopy and noting that the initials ‘QT’ appear below the initials ‘CM’ on every other page of the contract, it is not inconceivable that the initials ‘QT’ ‘dropped off’ when page 4 was copied. I am unable to determine what exactly happened: and if ‘QT’ did ‘drop off’ when page 4 was copied, whether it was when the contract was copied by Mr Merola or at some later time, or whether it was inadvertent or deliberate. In any event, no mention is made until August 2008 of there being any dispute about the initials on page 4.

- 17 Surprisingly, the second-named respondent, Thao Huynh was not called to give evidence. Mr Nguyen gave evidence that his wife takes care of all documents – I do not know whether she checks to ensure she has a complete set of documents. She was in attendance at the tribunal throughout the hearing. During cross-examination Mr Nguyen was asked a number of questions about the failure of Ms Huynh to give evidence. He said that she would not have been able to add anything as her evidence would have been the same as his. He said that her English is not very good, and suggested that if she had given evidence he would have preferred to have been her interpreter because ‘*I know the case*’. Noting that she was the only other person physically at the kitchen table when the contract was signed, I consider it appropriate to apply the rule in *Jones v Dunkel* (1959) 101 CLR 29 and draw a negative inference from her failure to give evidence. I do not accept the suggestion that the hearing would have been prolonged had she been called to give evidence as she would have required the assistance of an interpreter, to be a plausible or reasonable excuse. As has already been noted, one day was allocated to the hearing of the preliminary question which proceeded over five days.

The disputed initials

- 18 As noted above, Mr Storey was appointed as an expert under s94 of the VCAT Act to assist the tribunal. He expressed medium support for the conclusion that the initials on page 4 of the contract and the builder’s list of inclusions were in a different hand to those initials appearing on the other

pages of the contract. He explained the various levels of conclusion [opinion] as used in his office, when considering handwriting:

- conclusive
- very strong
- strong
- medium
- inconclusive

Therefore medium is at the lower end of the scale. His evidence was that he had found medium support partly because of the limited material he had been asked to examine. He had been provided with 15 samples of Mr Nguyen's initials. He said he would have preferred a sample size of 20 or 40 specimen initials, although sometimes, he finds, 4 or 5 specimens are sufficient for a definitive opinion.

- 19 The builder engaged Neil Holland, a forensic document examiner, who prepared two reports dated 2 September and 24 December 2008. the builder's solicitors initially provided him with copies of various documents, by email, including the contract, the builder's list of inclusions, and the owners' list of inclusions. A few days later Mr Merola gave him the original of the builder's contract and a number of other documents and correspondence signed or initialled by Mr Nguyen.
- 20 He also received verbal instructions from Mr Merola who told him that Mr Nguyen's initials on pages 4-14 of the contract were not in dispute. In his first report he records that a microscopic examination revealed that blue ballpoint pen had been used to write the initials on pages 4-14 of the contract, and on the builder's list of inclusions but '*Before a definitive opinion can be given as to whether or not they are the same ink would require a complete ink analysis*'. If this was done, the results are not before me.
- 21 He concluded that it was highly probable that the initials 'QT' as they appear on pages 4-14 of the contract and on both the builder's and the owners' lists of inclusions were written by the same person.
- 22 Following delivery of his first report, Mr Holland was provided with a copy of Mr Storey's report of 12 November 2008, including Mr Nguyen's specimen initials which had been provided to Mr Storey. He was also advised that the initials 'QT' on page 4 of the contract were disputed and asked whether this changed his opinion. In his second report dated 24 December 2008, Mr Holland confirmed his earlier opinion that it is highly probable that all the initials 'QT' were written by the same person.
- 23 After the hearing commenced it became apparent that the two experts had not examined and considered an identical set of documents. Considering the seriousness of the allegations, and the markedly different opinions which they had expressed, I considered it appropriate for Mr Storey to also

examine the additional documents which had been provided to Mr Holland. On 3 February 2009 I ordered:

1. Pursuant to s94 of the *Victorian Civil and Administrative Tribunal Act* 1998, the Tribunal requests Gary Storey of PO Box 211, McRae 3938 to provide a supplementary report considering the additional documents and handwriting samples provided to him today by agreement between the parties. Such report should:
 - (i) state what effect, if any, the additional handwriting samples have on the opinion expressed in his report dated 12 November 2008;
 - (ii) consider the items considered in the reports of Neil Holland dated 2 September 2008 and 24 December 2008 and notify the Tribunal and the parties if he considers that there are any matters that he considers forensically relevant and that warrant further investigation.
 - 24 In his further report dated 9 February 2009. Mr Storey confirms his earlier conclusion with the following important qualification:
- ADDITIONAL COMMENTS**
21. Please note that the opinion expressed in my first report does not exclude the possibility that the specimen writer wrote the questioned initials. The differences I observed are significant and cannot be satisfactorily explained on the available specimen material. If, and I am not saying this has occurred, the specimen writer wrote the questioned initials then it would seem he did so at a significantly different time to the time of writing the substantive specimen initials.
 - 25 I found both expert witnesses to be careful and considered in their evidence. They agreed that both the disputed and undisputed initials had apparently been written with speed. I reject any suggestions that Mr Holland's evidence should be regarded with caution because he has apparently misidentified the initials as 'QT' rather than as 'QI' with an accent because of his lack of knowledge of the way in which these letters are written in Vietnamese. In the orders appointing Mr Storey as a s94 expert (which were drafted in consultation with the parties' legal representatives) Mr Storey was specifically instructed to express an opinion about the initials 'QT' and in such circumstances it is quite reasonable that Mr Holland should have considered them as such. I have adopted the same description for the sake of consistency.
 - 26 I note that the experts were apparently only asked to express an opinion about the initials disputed by Mr Nguyen as being his. Whether Mr Merola's initials on the builder's list of inclusions were written at the same time as the initials on the other pages of the contract is not a matter about which an opinion has been expressed by either expert.

- 27 As I mentioned, on numerous occasions during the hearing, Mr Nguyen's allegation that his initials have been forged on page 4 of the contract, and on the builder's list of inclusions, and the possible ramifications of my findings, are serious. I accept that the *Briginshaw*² principle as recently referred to in *Nicholson v Knaggs* [2009] VSC 64 is relevant and should be applied:
- 128 To this should be added the approach laid down in *Briginshaw v Briginshaw* where Dixon J said:
- But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters “reasonable satisfaction” should not be produced by inexact proofs, indefinite testimony, or indirect inferences. (emphasis added)
- 129 More recently, the majority (Mason CJ, Brennan, Deane & Gaudron JJ) in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*, crystallized the *Briginshaw* approach in the following statement:
- [T]he strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove.
- 28 On the evidence before me, and accepting that the *Briginshaw* principle should be applied I cannot be satisfied that the disputed initials were not written by Mr Nguyen. Mr Storey's opinion is hardly conclusive. He expresses medium support only for the opinion that the disputed initials were written by someone other than Mr Nguyen. As noted above, there are five levels of conclusion which may be reached, and medium support is the second lowest, above inconclusive, so might otherwise be considered as 'weak' support. Further, Mr Storey's qualification in his second report, that if written by the same person, the disputed initials were written at a different time, is consistent with Mr Merola's evidence which I have accepted, that the owners produced their list of inclusions at the contract signing, already initialled by Mr Nguyen.

The fold and staple marks

- 29 The owners' list of inclusions initialled by Mr Nguyen and retained by the builder as set out above, has a fold mark affecting all the pages (not just one page as originally identified by Mr Storey) and there are a numerous staple marks. The original, which is no longer stapled, was tendered. Much was made of these although I do not think they are determinative or even persuasive. It is clear that they have been through a number of hands. Mr

² *Briginshaw v Briginshaw* (1938) 60 CLR 336

Merola said he had given it to his current lawyers, the HIA legal department, Bruno at Consumer Affairs and both experts. So a minimum of 6 people and possibly more have handled the document since this dispute arose. The parties' legal representatives have had access to them. There are any number of explanations as to how marks these came about, none of which are conclusive. And, they do not assist me in determining which set of inclusion sheets comprise the contract inclusions.

The 'computer records'

- 30 As discussed earlier, the contract negotiations were protracted. Mr Merola states that he emailed a copy of the list of inclusions to Mr Nguyen early in the contract negotiations. Mr Nguyen denies this and says the first copy he received by email was the document attached to the email of 27 April 2007.
- 31 In his first affidavit Mr Nguyen says that Mr Merola emailed him the document headed 'Architectural Complete Inclusions' on 27 April 2007 ('QN 2'). The document properties of this attachment as exhibited as 'QN3' are:

Created: 19 November 2006 12:31:00PM
Modified: 27 April 2007 10:41:15AM
Accessed: 26 November 2008 at 11:05:29 AM
Last saved by: Anthony Merola
Revision number: 55

- 32 Mr Nguyen said that modified does not necessarily mean there were any changes made to the document, it simply means the last time of operation. For instance, he said that attaching a document to an email can also alter the modified times. He agreed with counsel that the new modified time would reflect the time the email and the attachment were sent. He said that the times recorded are reflective of the times on the then current computer clock time which can be easily changed.
- 33 Although he said he didn't think he had responded to the email sent to him by the builder on 27 April 2007, I note that the 'sent time' recorded on the email ('QN1') is 9:08 AM with a recorded 'reply time' of 9:41 AM. This is an hour before the 'modified' time recorded on the document properties – 'QN3'.
- 34 It was suggested by Mr Nguyen that these times are reflective of the times on the server through which the emails were sent and received and that the relevant server is in Singapore which is 4 hours behind Melbourne. Surprisingly, no direct evidence about the location of the server and the impact on the time recorded on the emails was called, nor was there any expert evidence about this. However, in my mind this immediately calls into question the reliability of the times recorded in document properties and on the various computers.

- 35 Mr Nguyen's says that when he attended Mr Merola's home on 27 April 2007 to have further discussions about the specifications [inclusions], Mr Merola allowed him

‘to copy onto a computer disc directly from his computer an updated list of inclusions so that I could take the computer disc home and add amendments that I had discussed with Charles that day’.³.

- 36 Although he says in his affidavit he copied this onto a computer disc, he now says he copied it onto a USB key. Counsel for the owners suggests that I should regard these as being one and the same – that a USB key is simply a form of computer disc [sic]. However, it seems unlikely that Mr Nguyen, who works in IT and has done so for at least eight years, and who is a careful and particular person, would use confusing terminology.
- 37 Mr Nguyen exhibits what he says is this list of inclusions to his first affidavit as ‘QN4’. The properties on this document exhibited as ‘QN5’ are:

Created: 19 November 2006 12:31:00PM
Modified: 27 April 2007 1:51:52 PM
Accessed:
Last saved by: Anthony Merola
Revision number: 56

He was unable to explain why no properties were recorded next to ‘accessed’. Further, he was unable to explain why the ‘modified’ time was early afternoon, rather than in the evening when he said he had copied the document onto his USB key. This adds to the confusion about times – the document properties for ‘QN2’ as shown on ‘QN3’ reveal the document was modified on 27 April 2007 10:41:15AM, an hour and a half after it was apparently sent by the builder, yet the document properties for ‘QN4’ which Mr Nguyen says he copied from the builder’s computer in the evening of the same day, so at least 6 or 7 hours later record - it was modified at 27 April 2007 1:51:52 PM – approximately 3 hours later.

- 38 He then states that on 28 April he copied and pasted ‘QN4’ into a new Microsoft Word document which he amended and emailed to the builder on 28 April 2007. This document is exhibited as ‘QN6’ and is headed ‘-final-Architectural complete inclusions’. Its document properties (‘QN7’) are:

Created: Saturday, 28 April 2007 8:52:00AM
Modified: Saturday, 28 April 2007 8:52:10AM
Accessed:
Last saved by: qnguyen1
Revision number: 2

Inexplicably the covering email is not exhibited nor has it been tendered in evidence. For someone who is as careful and particular as Mr Nguyen it is

³ WS 10 December 2008 [8]

difficult to believe that he would have retained a copy of the emails from the builder, but not a copy of this very important email.

- 39 Further, despite Mr Nguyen's initial evidence that it was not possible to alter the identity of the person who last saved the document, he had to agree this could be possible when presented with an example of such a change where the builder's solicitors had changed the name to 'Flinstone'. He later conceded in cross-examination, that it is possible to change the properties including the date, time and user name by changing this information on the computer.
- 40 It is difficult to reconcile Mr Nguyen's admitted and apparent care to attention and detail with his evidence that he simply browsed through the contract and did not pay total concentration when checking it before he signed and initialled it. I find it difficult to understand why it would have been necessary for Mr Merola to have allowed Mr Nguyen to copy the updated list of inclusions on to a computer disk or USB key, as the case may be. The list of inclusions has been modified at least 56 times (refer 'QN5') although I am unable to say whether the builder has been responsible for all of the modifications. Quite why Mr Nguyen copied and pasted 'QN4' into a new document – 'QN6' rather than simply opening 'QN4', saving it to his hard drive and then amending it is unclear.
- 41 The only 'new' document I have before me is 'QN6'. Although there is a handwritten note at the top of 'QN6' '*Owner sent back to builder 28 Apr 2007*', and 'QN7' – the document properties for 'QN6' - has a typed heading: '*Owner's updated list of inclusion, sent to builder 28 Apr 2007*' there is no evidence that this was sent to the builder by email on 28 April 2007. Interestingly, I note that 'QN6' is a 6 page document whereas the owners' list of inclusions is 5 pages. I prefer Mr Merola's evidence that the owners took their list of inclusions to the contract signing, that he refused to accept it, and that he found it on the kitchen table after they had left.
- 42 Towards the end of the hearing the builder sought to lead evidence from Andrew McLeish, Senior Manager, PPB Forensics, about the integrity of the information obtained from the owner's computer or the information on the USB key including the date stamps. The builder contends this material suggests that Mr Nguyen has tampered with the inclusion sheets. On the evidence before me I am unable to reach any conclusions about the integrity of the data, and in any event do not consider that it assists me in determining which list of inclusions comprises the contract inclusions. Mr McLeish reports he was provided with the computer disk but had to create his own testing environment. He did not have access to the computers on which the information was otherwise stored. In fact, he qualified his report in the last paragraph where he noted:

As the internal time clock of a computer can be changed manually, the date and time stamps on the files provided on a CDROM can not be relied upon. The original computer and the USB thumb drive

containing the original file and the email should be used to verify any date and time stamps.

The builder did not take advantage of Mr Nguyen's offer to make his work computer, on which he said the relevant emails and documents were stored, available for testing.

- 43 Notwithstanding the test results set out in his written report, in answer to questions from the tribunal, Mr McLeish gave evidence that the Windows Operating System sometimes creates seemingly unusual date stamps. He said he did not consider it suspicious or unusual that the properties for 'QN7' revealed the document had been printed before it had been created. He also confirmed that different CD burning software will treat the metadata in different ways, and that this can vary between versions of the same software.
- 44 On 23 February 2009 the tribunal received a letter from Mr McLeish dated 20 February 2009 in which he seeks to clarify an answer he gave to a question asked in cross-examination. I have noted the owners' objections and the builder's submissions as to why I should have regard to the content of that letter. Noting Mr McLeish's qualification that:

As stated previously, it would be necessary to forensically examine the original computer and thumb drive to identify how many documents have been created, and from those, which document is represented in the email. In addition, the MD5 value would be used to identify the relevant and original file attached in this matter.

I do not consider his evidence assists me in determining the preliminary question.

Which list of inclusions comprises the contract inclusions?

- 45 In his affidavit sworn on 10 December 2008 Mr Nguyen refers to a number of items contained in the owners' list of inclusions which have been completed by the builder. The owners, in effect, contend that in carrying out these items the builder has accepted and acknowledged that the owners' list of inclusions comprises the contract inclusions. Mr Merola says that these items are all extras for which the owners have agreed to pay. In his affidavits, and in his sworn evidence to the tribunal, he said Mr Nguyen always said the owners would pay for any extras and that he had intended to prepare the relevant variations when the works were complete and he knew the exact additional cost.
- 46 Mr Merola denied that he had used the owners' list of inclusions during the course of the works. I have no reason to disbelieve him when he states that the first time he had referred to the owners' list of inclusions was when he went to order the cobra door handles:

...when the time came to order door handles I recalled that the male Respondent's document had a detailed list of door fixtures and

fittings. I thought this might assist me when ordering door fixtures and fittings.

and

On 13 May 2008, I took the male Respondent's document to Architrend, a supplier and learnt that the specification of door handle in the list of inclusions prepared by the male Respondent would cost \$400.00 each and required a great deal of additional labour. The allowance in the Building Contracts (sic) was for a door handles from the Architrend Lever range at a cost of \$80.⁴

The owners' list of inclusions includes a detailed specification for door handles in each room.

- 47 The builder also called the plasterer, the electrician, the cabinet maker and a representative from the supplier of the heating panels to give evidence about the circumstances leading to the carrying out of some of the works that are included in the owners' list of inclusions. Apart from the issue of the heating panels, this is of little assistance in determining the preliminary question.
- 48 Under the heading 'Heating and Cooling' there is provision for up to 10 heating panels in the builder's list of inclusions and up to 11 in the owners' list of inclusions. 'QN2', 'QN4' and 'QN6' (the list of inclusions which Mr Nguyen claims he emailed to the builder on 28 April 2007) all provide for 10 panels. Mr Nguyen states in his affidavit that after receiving 'QN6' Mr Merola had made a further six changes, before printing it in readiness for the contract signing, including changing the number of heating panels to 11. He does not depose to the circumstances, or any discussions leading to these further changes or when he became aware those changes were made. Under cross examination Mr Nguyen said he had quickly browsed through the contract and the list of inclusions before initialling them and had not checked to make sure they were correct. Further, Mr Nguyen conceded under cross-examination that the quotation he obtained from Supreme Hearing for 11 panels in 2006 had nothing to do with the builder. An updated quotation was obtained from Supreme Heating for 11 panels in September 2007 – four months after the contract was signed. This quotation was signed by Mr Merola on behalf of the builder in December 2007. This hardly supports the contention that the builder agreed at the very last minute to include 11 panels and amended the inclusion sheet sometime in the three days between when Mr Nguyen says he sent 'QN6' to the builder and the contract signing. It seems highly unlikely and improbable to me that the builder would have changed the number of heating panels from 10 to 11 after what appears from the document properties to be at least 56 revisions of the list of inclusions.
- 49 The evidence from the contractors does no more than confirm that Mr Nguyen was actively involved during the course of construction in direct

⁴ Witness Statement of Charles Merola sworn 12 December 2008 para 5

discussions and negotiations with them for extras for which he said he was prepared to pay the builder.

Qui Nguyen as a witness

- 50 As I have rejected Mr Nguyen's evidence I think it appropriate to record my observations of him as a witness. Mr Nguyen first came to Australia as a student in 1966. He finished his studies in 1972 when he went home to Vietnam before returning to Australia in 1989. He has been working as an IT Systems Administrator for Ford for the past eight years.
- 51 Despite counsel's best endeavours to ask clear and direct questions in cross-examination, Mr Nguyen was evasive in his answers preferring, it seemed, to answer the questions he thought should be asked, not those that were being asked.
- 52 When called to give evidence he immediately took the bible in his hand – before being asked to do so. He raised no objection to swearing an oath on the bible. However, in response to the first question put to him under cross-examination he confirmed he is a Buddhist although he said he is not '*much into religion*'. He said he had taken the oath on the bible because he '*was required by the law of Australia*' to do so. He confirmed that he had not told his legal advisers that he was a Buddhist and that both affidavits filed in this proceeding had been sworn on the bible. At my suggestion, he subsequently agreed to make an affirmation.
- 53 Surprisingly, he did not accept, when it was put to him in cross-examination, that he would obtain a financial advantage if the owners' inclusion sheets were found to be the contract inclusions. This seems to me to be disingenuous. The cost of the cobra door handles is approximately \$15,000 more than the cost of those allowed for in the builder's inclusion sheets. Mr Nguyen is well educated. He has a degree in electrical engineering from the University of Sydney and has been living in Australia since 1989 – the better part of 20 years.

CONCLUSION

- 54 This is an unfortunate case where the integrity of the parties has been called into question. This dispute insofar as it relates to the initials on page 4 of the contract might well have been avoided if the builder had used an original bound contract, rather than a photocopy, and provided a similarly bound duplicate to the owners. The builder's record and document system appear haphazard to say the least. It is unfortunate that the builder has not retained copies of the 56 revisions of the list of inclusions, or emails passing between the parties. However, on the evidence before me I cannot be satisfied that the owners' list of inclusions comprise the contract inclusions. For the reasons I have discussed I am not persuaded that the disputed initials are not those of Mr Nguyen. Further I am not satisfied that the owners' list of inclusions was provided to the builder by email on 28 April 2009, prior to the contract signing. I accept Mr Merola's evidence as

to what happened at the contract signing. Accordingly I find that the builder's 4 page list of inclusions comprises the contract inclusions.

- 55 As I anticipate there are other issues between the parties to be resolved I will refer the proceeding to a directions hearing. I will reserve the question of costs with liberty to apply.

DEPUTY PRESIDENT C. AIRD