

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO D776/2009

CATCHWORDS

BUILDING DISPUTE – Assessment of the cost of carrying out building work under s 13(3)(b) of the *Domestic Building Contracts Act 1995* – whether an owner’s losses found to be unproven at trial can be taken into account in assessing the cost of building work that may be awarded to the builder under s 13(3)(b) of the *Domestic Building Contracts Act 1995* – factors to be considered in determining whether it would not be unfair to order that the building owner pay for the costs of building work under s 13(3)(b) of the *Domestic Building Contracts Act 1995*.

APPLICANT	Charterarm Investments Pty Ltd (ACN 054 052 934) (in external administration)
FIRST RESPONDENT	Clynton Roberts
RESPONDENT BY COUNTERCLAIM	George Bougioukas (excused from attending)
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Hearing
DATE OF HEARING	30 March 2015
DATE OF ORDER	22 April 2015
CITATION	Charterarm Investments Pty Ltd v Roberts (Remitted Hearing) (Building and Property) [2015] VCAT 527

ORDER

1. The First Respondent must pay the Applicant \$211,279.19.
2. The question of costs of and associated with the remitted hearing are reserved with liberty to apply.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicant

Mr S Smith, solicitor

For the First Respondent

Mr Wirth of counsel

For the Respondent by
Counterclaim

Excused from appearing

REASONS

INTRODUCTION

1. On 8 March 2013, after a hearing which occupied more than 20 hearing days, I ordered that the First Respondent (**‘the Owner’**) pay the Applicant (**‘the Builder’**) \$217,716.91 (after setting off the Owner’s counterclaim).
2. My determination was the subject of an appeal to the Supreme Court of Victoria. That appeal was partly successful, with the result that orders were made setting aside my determination and giving the parties a right to have the proceeding remitted for further hearing in order to enable a re-assessment of the Builder’s claim pursuant to s 13(3)(b) of the *Domestic Building Contracts Act 1995* (**‘the Act’**). Section 13 of the Act, states, in part:

13. Restrictions on cost plus contracts

...

- (2) A builder must not enter into a cost plus contract that does not contain a fair and reasonable estimate by the builder of the total amount of money the builder is likely to receive under the contract.
- (3) If a builder fails to comply with this section –
 - (a) the builder cannot enforce the contract against the building owner; but
 - (b) the Tribunal may award the builder the cost of carrying out the work plus a reasonable profit if the Tribunal considers that it would not be unfair to the building owner to do so.
3. In my original determination of the Builder’s claim, I assessed damages pursuant to the contract between the parties. This was done because I found that the Builder had not infringed s 13(2) of the Act. However, on appeal, that finding was reversed. This meant that any entitlement on the part of the Builder had to be assessed by reference to s 13(3)(b) of the Act, rather than solely by reference to the contract.
4. On 27 March 2014, an *Application for Directions/Orders* was filed by the Builder, in which it sought to have its claim re-assessed on that different footing. The proceeding was first returned before me on 2 May 2014, at which time interlocutory orders were made to enable the matter to be listed for hearing. After some delay, the hearing was eventually listed to commence on 30 March 2015.

WHAT IS THE COST OF THE BUILDING WORK?

5. In my earlier determination of the Builder's claim, I found that the Builder was entitled to be paid \$236,752.91, calculated by reference to outstanding progress claims made under the building contract between the parties (**'the Contract'**), less \$19,036, being the amount found in favour of the Owner's counterclaim. However, given the determination of the Supreme Court of Victoria, the Contract is not enforceable by the Builder, with the result that the Builder is not contractually entitled to claim those outstanding progress claims. Therefore, the Builder now claims for the actual cost of the building work plus a reasonable profit.

6. In my *Reasons* dated 25 February 2013, I found that the amount claimed by the Builder under the Contract was commensurate with the actual cost of construction. I stated:

75. Therefore, I am satisfied on the balance of probabilities that the amount charged by the Builder pursuant to the progress claims submitted reflects the true cost of construction. My finding is reinforced by the fact that no evidence was adduced to suggest that any of the invoices related to other work or were not reasonably incurred.

7. I made that finding after considering invoices tendered in evidence and comparing the aggregate value of those invoices with the expert opinion evidence given by each of the quantity surveyors engaged by the parties. I further stated:

71. On the other hand, Mr Shah [the quantity surveyor engaged by the Owner] has costed the as-constructed works on a full elemental breakdown which he priced in May 2010, using rates applicable in June 2005. However, the Works were not constructed in 2005. They were substantially constructed during 2007 to 2009. In my view, pricing the as-built cost of the Works needs to be assessed by reference to the actual build period, rather than some earlier point in time. I do not consider it reasonable to use 2005 rates to assess the reasonable value of the Works completed because the Works were not constructed in 2005. In my view, Mr Shah's costing should have used, as a minimum 2007 rates or a combination of 2007 and 2008 rates. Indeed, Mr Shah conceded during cross-examination, that building costs have escalated between 2005 and 2008.¹

72. During cross examination, Mr Buchanan [the quantity surveyor engaged by the Builder] said that building costs had increased by approximately 5% to 6% from 2005 and 2006 and a further 5% to 6% from 2006 and 2007. Mr Buchanan's evidence on this point was unchallenged and I accept this evidence as being the case.

¹ In relation to the cost of the fireplace.

73. Consequently, if I add, as a minimum, 12% to Mr Shah's as built estimate so as to escalate his price to reflect 2007 rates, his estimate for the cost of the works if constructed during 2007 is \$1,388,030.56 (excluding GST).² If GST is added, the cost of the as built Works is \$1,526,833.62. According to the Builder it has been paid \$1,279,500. It claims a further \$264,252.91 (excluding the variation margin and delay damages claim), making a total claim of \$1,543,752.91.
74. Therefore, if all of the Works were carried in 2007, there is only a difference of \$16,919.29 between what has been claimed and the adjusted price estimate of Mr Shah. Given that a substantial part of the Works were carried out in 2008 to 2009, it is probable that the cost of the Works completed by the Builder is likely to be less than the estimate assessed by Mr Shah, had that estimate used rates commensurate with the Works having been performed between 2007 and 2009.
8. As indicated above, I found that the adjusted price estimate of Mr Shah, the consultant quantity surveyor engaged by the Owner, was \$1,526,833.62, which was only \$16,919.29 less than the amount claimed by the Builder under the outstanding Progress Claim 13 (\$94,475.10), Progress Claim 14 (\$95,240.37), Progress Claim 15 (\$47,037.44), plus the final claim for builder's margin (\$27,500). Therefore, I concluded that:
65. If regard is had to the expert evidence of both quantity surveyors, one can determine, at least in a rudimentary basis, whether the aggregate amount claimed by the Builder (excluding its claim for the margin on variations and delay damages) is commensurate with what the quantity surveyors opine is the reasonable cost of the as-built Works.

The Owner's position

9. Mr Wirth of counsel, who appeared on behalf of the Owner, submitted that an assessment of the cost of carrying out the building work does not necessarily equate to what the Builder actually spent but rather, requires an assessment of what the reasonable cost of construction was. He drew my attention to *Fazzolari v Samadah Pty Ltd*,³ where the Tribunal stated:
29. The cost of carrying out the work plus a reasonable profit can only be ordered under sub-section 3 if it is not unfair to the Developer to do so.
30. I accept Mr Catlin's submission that the section is aimed at achieving a result that is fair in all the circumstances. In this

² The actual percentage increase would be more than a 12% flat increase, if the costs of building increased by 6% per annum because the interest compounds from one year to another.

³ [2010] VCAT 370.

regard, I think that the term "...the cost of carrying out the work..." in sub-section 3(b) must mean the reasonable cost of carrying out the work, not what it actually cost the Builders to carry it out. It cannot be supposed that it would ever be fair to a building owner to allow a builder an amount that the builder had unreasonably incurred which would inflate the amount that he sought to recover under the sub-section.

10. Therefore, he submitted that notwithstanding my finding that the actual cost to the Builder of constructing the works reflected what was charged in the various progress claims, I should, nevertheless, adopt the valuation of the as-constructed work assessed by Mr Shah, rather than what it actually cost the Builder.
11. Mr Wirth submitted that Mr Shah's assessment of the value of the as-constructed work included work performed by the Owner after the Contract was terminated. He argued that in the earlier hearing, the Owner claimed that he had spent \$129,283.60 on completing the Works, following which Mr Shah inspected and assessed the value of the as-constructed works.
12. In the remitted hearing, the Owner elaborated on his evidence given in the earlier hearing:
 7. As I needed to complete the works so that I could either sell one of the townhouses or rent out one or both townhouses, I arranged myself for the completion of the works. I say that the costs which I incurred in order to complete the works were in the sum of \$129,283.60. Now produced and shown to me and marked with the letters "CR-1" is a Schedule of Costs to complete the works together with the associated invoices.
13. The Owner's evidence is uncontested on this point. Therefore, I find that the Owner did spend \$129,283.60 on completing the building works.

The Builder's position

14. The Builder contends that the cost to it of constructing the building works is \$1,441,573.12, which is evidenced in numerous invoices tendered in evidence in the earlier hearing. It relies upon the expert opinion of Mr Buchanan, the quantity surveyor engaged by it, who has previously given evidence that the aggregate sum of those invoices is commensurate with his own assessment of what is a fair and reasonable price of the as-constructed works.

What is the Builder's reasonable cost of construction?

15. The difference between Mr Shah's assessment of \$1,397,550.02 (as adjusted for 2007 rates less the amount expended by the Owner to complete the works) and the aggregate amount of the Builder's invoices of \$1,441,573.12 (as verified and adjusted by Mr Buchanan),

is only \$44,023.12, which if expressed as a percentage, equates to only 3.15 per cent.

16. In all likelihood, the discrepancy between the two figures results from both undervaluing in Mr Shah's report and overvaluing of Mr Buchanan's assessment. In particular, there are items in the schedule prepared by the Owner which describes his costs of completion, that are not reflected in Mr Shah's report. For example, coffee machines (\$3,500), cost of repairing laneway (\$1,485.40), installing film on windows (\$539) ducted vacuum system (\$1,400) privacy louvers to the George Street window (\$897) and other items. Moreover, some of the items of work undertaken by the Owner are more expensive than what was priced in Mr Shah's report for the same work, no doubt as a result of those items being purchased in 2009-10, compared to Mr Shah's report being assessed by reference to 2007 rates.
17. Similarly, the Builder's invoices tendered in evidence include the supply of kitchen appliances, which although purchased by the Builder were never installed into the building works. Those kitchen appliances were either retained by the Builder or returned to the supplier. The value of those appliances was \$10,873.50. Moreover, as highlighted by the Owner in the earlier hearing, there are many invoices rendered by the Builder which are self-generated, in the sense that they charge the Owner for work which the Builder did itself. The value of those invoices exceeds \$100,000. Although I accepted those invoices as being legitimate invoices, for the purpose of determining whether the contractual progress claims were valid, the fact remains that they provide very little information as to what work was actually undertaken. That makes it difficult to evaluate whether the price charged for the work, the subject of that invoice, was reasonable.
18. Therefore, I find that the fairest way to reconcile the difference between Mr Shah's assessment and Mr Buchanan's assessment is to split the difference. Accordingly, I will add \$22,011.56 to Mr Shah's assessment and deduct the same amount from Mr Buchanan's assessment, resulting in a figure of \$1,419,561.56, which is what I find to be the reasonable cost of the Builder carrying out the building work (excluding profit).

Direct payments by the Owner

19. The Owner further stated that there were other payments which he made and which were not counted as payments made to the Builder in the earlier hearing. According to the Owner, they were payments made directly to suppliers or sub-contractors of the Builder:

8. I say further that, in addition to the cost of completing the works, I made payments totalling \$74,912.46 which neither the Applicant nor the Tribunal at the first hearing, took into

account in determining the total amount which I paid to the Applicant in respect of the works.

9. The sum of \$74,912.46 is made up of:-

(a) The deposit of \$42,500; and

(b) Amounts paid directly to suppliers as follows:-

i.	Kennedy Interiors	\$14,500
ii.	CDK Stone	\$5,078.34
iii.	CDK Stone	\$2,298.88
iv.	Innovative glass	\$10,000
v.	Project Stone	\$535.24

20. During the course of the remitted hearing, Mr Wirth conceded that the deposit of \$42,500 had been taken into account in the earlier hearing. Therefore, the amount which the Owner contends represents payments made by him to suppliers in relation to work which was undertaken by the Builder is \$32,412.46.

21. Apart from identifying the name of the suppliers who received a direct payment, no detail has been provided as to what goods those payments related to. Even if I was to accept that the Owner has paid those amounts, two further questions arise for consideration:

(a) Has the invoice, the subject of the direct payment, also been charged by the Builder in the bundle of invoices reviewed by Mr Buchanan?

(b) If not, are the goods, the subject of the direct payment, part of completed building works valued by Mr Shah?

22. In Mr Buchanan's report dated 15 June 2010, he lists all of the Builder's invoices that he was provided with and has considered in forming his opinion as to the reasonable cost of the building works undertaken by the Builder. There are no invoices in that list which match the description of either *Kennedy Interiors* or *CDK Stone*, being two of the suppliers the Owner says he paid direct.

23. Moreover, I am unable to match the amounts which the Owner says that he paid to *Kennedy Interiors* and *CDK Stone* to the quantities of work described in Mr Shah's report.

24. Regrettably, the Owner failed to produce any documentation from either of these two suppliers or give evidence as to what the payments related to. This makes it impossible to verify whether the invoices actually related to building work that was priced by Mr Shah. Therefore, in absence of such evidence, I am not satisfied that these payments related to work under the Contract or the building work that was priced by Mr Shah.

25. The situation is different in relation to the amounts said to have been paid to *Innovative Glass* (\$10,000) and *Project Stone* (\$535.24). In particular, the Builder's invoices tendered in evidence include an invoice from *Project Stone* for \$28,413. Although, there is no discernible relationship between that invoice and the amount that the Owner says it paid to *Project Stone*, it seems that what ever materials or work was supplied by *Project Stone* related to building work under the Contract. Therefore, I find that, in all likelihood, the payment represents a payment for materials used in the construction of the building works, as assessed by Mr Shah. That being the case, this amount is to be treated as a payment made by the Owner under the Contract.
26. In relation to the payment to *Innovative Glass*, there are two invoices within *Folio 10* of the Builder's bundle of invoices from *Innovative Glass*. The first invoice, in the amount of \$18,804.50, includes an additional fee, described as *Amex Processing*, in the amount of \$302.50. The invoice states:
- Additional Fee for Amex Processing on Deposit Paid 9/12/08 \$10,000
27. The \$10,000 deposit paid on 9 December 2008 is consistent with the amount that the Owner says he paid by credit card to *Innovative Glass*. Although no other details are given by the Owner, it seems likely that he paid *Innovative Glass* a deposit of \$10,000.
28. This is reinforced by the fact that the two *Innovative Glass* invoices forming part of the Builder's original claim contain other information which makes it clear that what the Builder has claimed from the Owner is the balance of the total price charged by *Innovative Glass*. In other words, the total amount claimed by the Builder for the materials and labour supplied by *Innovative Glass* is \$10,000 less than the aggregate amount invoiced by that company.
29. Therefore, I find that the \$10,000 payment is also to be treated as a payment made by the Owner under the Contract.
30. That being the case, only \$10,535.24 of the direct payments said to have been paid by the Owner is to be treated as a payment made by the Owner under the Contract.

Reasonable profit

31. Mr Wirth submitted that the amount of reasonable profit to be added to the cost of carrying out the work is 13 per cent of the balance owing. He submitted that this reflects what the parties had originally agreed under the terms of the Contract. In particular, the Contract provided that, in addition to progress claims being submitted for the cost of building work, a fixed amount of \$110,000 (incl GST) was to be charged as the *Builder's Fee*, payable by four separate progress claims

based on the stage of the work completed. The original estimate for the cost of building work was expressed in the Contract to be \$850,000. Therefore, \$110,000 represented approximately 13 per cent of that amount.

32. Mr Wirth submitted that 13 per cent should then be applied against the balance owing of the cost of the building works, in order to calculate *reasonable profit*.

33. The Builder contends that 25 per cent profit should be applied against the balance of the Builder's claim as *reasonable profit*. It is not clear how this amount has been calculated, especially when one considers the expert opinion evidence of Mr Buchanan set out in his report dated 11 February 2015, which states:

In my experience the markup applied for profit by domestic building contracts on this scale of project i.e. less than \$1 million would fall into the range of 12.5% to 20% profit.

In my opinion 15% would be a reasonable profit to apply in a project of this type.

34. It is unclear to me why both parties have sought to calculate *reasonable profit* by applying a percentage figure only against the balance owing, rather than the aggregate value of the building works. To calculate *reasonable profit* by applying a percentage figure only to the balance owing at the end of the project would mean that all the work that had already been paid for would not be taken into account when calculating *reasonable profit*. I do not believe that s 13(3)(b) of the Act was intended to operate in that way.

35. If *reasonable profit* is to be calculated by reference to a percentage figure, then that percentage figure is to be a percentage of the aggregate cost of construction, rather than what is owed at the end of the project. That amount is then added to the cost of construction, from which the total paid is deducted, leaving an amount which then reflects the first limb of an assessment under s 13(3)(b) of the Act.

36. In the present case, if 13 per cent of the cost of construction is used as the multiplying factor, *reasonable profit* will be considerably more than the \$110,000 previously agreed and capped under the terms of the Contract.

37. The use of the word *reasonable* means reasonable in all the circumstances. Therefore, I consider that in the present case *reasonable profit* should be determined by having regard to the fact that the parties had originally agreed to cap the *Builder's Fee* at \$100,000 (excluding GST). Therefore, the fairest way to arrive at a percentage figure to be used to calculate reasonable profit is by measuring the capped *Builder's Fee* of \$100,000 against the total cost of the building work (excluding GST), which includes the additional amount expended by

the Owner to complete the project. This is because the agreed *Builder's Fee* was capped, irrespective of how much the building work ultimately cost.

38. The aggregate cost of construction, including what the Owner paid to complete the building works but excluding GST and any element of profit (*Builder's Fee*), was \$1,408,041.05, calculated as follows:
- (a) Builder's cost (excluding GST): \$1,290,510.50
 - (b) Cost to complete (excluding GST): \$117,530.55
 - (c) TOTAL BUILDING COST (excluding GST):..... \$1,408,041.05
39. The \$100,000 *Builder's Fee*, when expressed as a percentage of \$1,408,041.05 is 7.1 per cent. This is the percentage figure that I find should be multiplied against \$1,419,561.56, being the value of the building work undertaken by the Builder, in order to calculate the *reasonable profit* on that work.
40. Therefore, 7.1 per cent of the Builder's cost of the building work is \$100,788.87, inclusive of GST. That makes the total amount of the Builder's cost of the building work plus a *reasonable profit* \$1,520,350.43.
41. Of this amount, \$1,279,500 has been paid by the Owner directly to the Builder.⁴ In addition, I have found that \$10,535.24 paid directly to suppliers should also be counted as a payment under the Contract. Therefore, I find that the Owner has paid \$1,290,035.24 of the cost of carrying the building work plus a reasonable profit, leaving a shortfall of \$230,315.19.
42. However, calculating the cost of carrying out the building work plus a *reasonable profit* only answers the first limb of the assessment required under s 13(3)(b) of the Act. The second limb requires the Tribunal to consider whether it would be unfair to the building owner to order that he or she pay that amount.

IS IT UNFAIR TO THE OWNER?

43. Mr Wirth submitted that there a number of reasons why it would be unfair to order any amount payable to the Builder under s 13(3)(b) of the Act. In particular, he pointed to the following factors:
- (a) The disparity between the original estimate of the cost of the building work (\$850,000) and the actual cost of the building work, which exceeds \$1.5 million.
 - (b) The disparity between the original estimate of the cost of the building work (\$850,000) and the retrospective valuation of the

⁴ \$1,197,000 was paid in respect of progress claims for work done and \$82,500 was paid towards the *Builder's Fee*.

cost to construct the works as depicted in the original design documents available as at June 2005 (\$1,010,839).⁵

- (c) The Builder's responsibility to give a fair and reasonable estimate.
 - (d) The potential and actual consequences of the Builder not giving a fair and reasonable estimate.
 - (e) The Builder's responsibility to build to schedule.
 - (f) The ill-explained delay in the construction.
 - (g) The financial losses consequently suffered by the Owner.
44. In the present case, the disparity between the estimate given in the Contract and the actual cost of construction is a factor which is relevant to determining whether s 13(2) has been infringed, rather than a factor which, of itself, is relevant to the exercise of the Tribunal's discretion under s 13(3)(b) of the Act. In every case where the Tribunal is required to exercise its discretion under s 13(3)(b) of the Act, there will be disparity between the actual costs of construction and the estimated contractual price, otherwise the Tribunal's jurisdiction under that subsection will not be invoked.
45. In the absence of evidence establishing that a builder had performed unauthorised work or had grossly overcharged for work, there would be limited situations where disparity, of itself, would make it unfair to award a builder the costs of the building work and a reasonable profit.
46. However, where the cost blowout is caused by variations to the original scope of work or adjustments to prime cost items and provisional sums, resulting from a desire on the part of the homeowner to enlarge the scope of work or upgrade the specification, then it would be difficult to conclude that it would be unfair to require the homeowner to pay for the value of work which he or she requested and has taken the benefit of.
47. In the earlier hearing, considerable evidence was given by representatives of the Builder, concerning numerous variations made to the scope of the building work. Some of those variations were caused by factors which were either unknown at the time when contract price was first quoted, while other variations were made because the Owner wanted to upgrade the specification or change work that had already been built. Although the Owner gave evidence that some of the variations were only agreed to after the Builder had persuaded him that it was prudent to vary the work in the manner ultimately effected, the fact remains that there is little or no evidence that any significant

⁵ Paragraph 49 of the *Reasons* dated 25 February 2013.

component of the variation work was undertaken without some form of consultation and authorisation from the Owner.

48. That variation work led to a significant increase in the cost of the building work. That conclusion is reinforced by the expert opinion of both consulting quantity surveyors. According to Mr Buchanan, the difference in value between the price of the works based on the original design documents in 2005 (\$998,612) and the as-constructed works (\$1,441,573.12) is \$442,961.12. According to Mr Shah, the difference in value between the price of the works based on the original design documents in 2005 (\$1,239,313) and the as-constructed works (\$1,526,833.62)⁶ is \$287,520.62. As I indicated in my *Reasons*, the disparity between the two consulting quantity surveyors as to the cost of the works based on the original tender documents lies partly in differing instructions received by each of the experts as to what work formed part of the original scope of work. Nevertheless, even taking Mr Shah's cost estimate, the amount of \$287,520.62 represents a significant amount of variation work.⁷
49. The Owner retains the benefit of that additional work. This is not a situation where I found that the amount charged was not commensurate with the value of the work undertaken. As I have already indicated, almost all of the invoices tendered in evidence and forming part of each of the progress claims made under the contract, represented work completed by the Builder for which the Owner now enjoys the benefit of.

Delay

50. In the earlier hearing, the Owner counterclaimed against the Builder and its former director for an amount exceeding \$1 million. The counterclaim largely focused on over-holding costs incurred by the Owner as a result of the works being delayed.
51. Although I ultimately found that the Builder was 533 days late completing the works by the time the contract was lawfully terminated by it, the delay could not be solely attributed to the Builder failing to proceed with the building works diligently. In paragraph 158 of my *Reasons*. I stated:
158. First, I do not accept that it can be said that the Builder failed to proceed diligently merely because the Works were not completed within the contractual building period. Clearly, variations were made to the Works which had an adverse effect on the building period, albeit that no extension of time was claimed by the Builder. However, the failure to claim an extension of time is largely a matter for the Builder. It impinges

⁶ Adjusted to 2007-2008 rates. See paragraph 73 of the *Reasons* dated 25 February 2013.

⁷ See paragraphs 37 to 45 of the *Reasons* dated 25 February 2013.

on the Builder's right to extend the contractual building period, which may have flow-on effects, such as being liable for liquidated damages or damages at common law. However, a failure to complete the Works within the contractual building period does not, in itself, necessarily mean that the Builder has not worked diligently

52. Ultimately, I found in favour of the Owner in the amount of \$19,036, which represented the amount of liquidated damages prescribed by the Contract calculated over the delay period of 533 days. I found that the Owner was not entitled to general damages for delay because the liquidated damages clause in the Contract operated as a dispositive remedial code and barred any such claim. Additionally, I found that insufficient evidence had been adduced, in any event, to substantiate the common law damages claim.
53. Further evidence was led by the Owner in the remitted hearing, in order to substantiate losses which he incurred as a result of the delay. Those losses are now said to amount to \$304,104.55, made up as follows:
 - (a) rent lost in the amount of \$257,400; and
 - (b) additional interest on loans in the amount of \$46,704.55.
54. Mr Wirth submitted that the Owner's additional evidence concerning his loss was not given for the purpose of resurrecting his counterclaim but was adduced for the purpose of demonstrating that it would be unfair to award any amount to the Builder in circumstances where its delay in completing the building works has caused loss to the Owner, which exceeds the Builder's claim under s 13(3)(b) of the Act.
55. Even if I accept that the Owner has sustained the loss claimed, I am not persuaded that this factor would make it unfair to award the Builder the cost of carrying out the building work plus a reasonable profit. I have formed this view for a number of reasons.
56. First, a significant proportion of the delay resulted from variations made to the scope of the work. This is not the fault of the Builder. Although the Builder should have sought an extension of time, in accordance with the provisions of the Contract, the fact remains that delay cannot be attributed solely to the Builder failing to proceed diligently.
57. Second, the parties had expressly agreed that if the building works were delayed, compensation would be paid by the Builder to the Owner at a fixed rate. As I have already indicated, that was one of the reasons why the Owner's common law damages claim for delay did not succeed. In my view, it would not be unfair to hold the Owner to what he agreed at the time when the Contract was made, notwithstanding the effect of s 13(3)(a) of the Act. In particular, although the Contract

remains unenforceable by the Builder, this section does not extinguish all rights and obligations of the Owner under that Contract.

58. In my view, barring a builder from recovering the costs of carrying out building work plus a reasonable profit solely because a home owner has incurred unrecoverable losses, would give greater meaning to the words *unfair to the building owner* than what s 13(3)(b) of the Act intended. In particular, the words *unfair to the building owner* do not mean that the Tribunal should completely ignore the contractual relationship that existed between the parties. If that were not the case, the provision would simply declare the contract void or voidable. However, the provision does not go that far. It only bars a builder from being able to enforce the contract, leaving the builder with a different avenue for seeking payment; namely, an order from the Tribunal permitting it to recover money if the Tribunal determines that that outcome would not be unfair to the building owner.
59. In my view, factors which may make it unfair to an owner for a builder to be awarded the cost of carrying out building work, include (but are not limited to) the following:
- (a) Where there are defects in the building work;
 - (b) Where the work was not authorised;
 - (c) Where the home owner has no idea of the impending cost blowout;
 - (d) Where the amount charged was unreasonable; and
 - (e) Where the amount claimed was inconsistent with the terms of the contract.
60. In the present case, none of the above factors are present to any significant degree. Here, the Owner contends that it would be unfair to award any amount to the Builder because his *unrecoverable* losses exceed the amount claimed by the Builder. In that sense, the Owner seeks to utilise losses which he failed to prove in the earlier hearing and effectively set-off those losses against the Builder's claim. In my view, there are inherent difficulties in accepting that approach. In particular, it ignores the terms and conditions of the Contract. In that sense, it allows the Owner to, on one hand, rely on the terms of the Contract to deny the Builder additional time under the Contract (because he failed to follow the contractual regime for claiming extra time), while on the other hand, go outside of the Contract to utilise what would otherwise be unrecoverable losses to defeat the Builder's claim under s 13(3)(b) of the Act. Further, the approach effectively allows the Owner to re-litigate matters which have already been curially determined and are not the subject of any appeal.

61. Therefore, I am of the view that, in the present case, losses which would otherwise be unrecoverable are not material factors that make it unfair that the Builder should be awarded the costs of the building work plus a reasonable profit.

Reconciliation of claim and counterclaim

62. I have found that the Builder is entitled to be paid for the cost of carrying the building work plus a reasonable profit in the amount of \$230,315.19, pursuant to s 13(3)(b) of the Act. That amount takes into consideration payments made or deemed to have been made under the Contract. I have also previously found that the Owner is entitled to be paid \$250 per week for the period of delay, which I have determined to be 533 days. This amounts to \$19,036 in respect of the delay claim. Therefore, I will order that the amount of \$19,036 payable to the Owner is set off against the amount of \$230,315.19 payable to the Builder so that the net balance payable by the Owner to the Builder is \$211,279.19. In my view, it would be unfair to the Owner not to set-off that amount.
63. I will reserve liberty on the question of costs. In so doing, I remind the parties of s 109(1) of the *Victorian Civil and Administrative Tribunal Act 1998* and also of my earlier determination of that issue, as it related to the earlier hearing.

SENIOR MEMBER E. RIEGLER