VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D217/2009

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic Building – masonry code - Display home – Domestic Building Contracts Act 1995 – s.43 – house to be built to the same plans and specifications as the Display Home – "plans and specifications" means the way the Display Home was built – any difference to be "specifically identified" in the contract – meaning – must identify it as being a difference - identification outside the contract insufficient – consequences of non-compliance with s.43 – assessment of damages – whether damages other than rectification can be awarded – *Bellgrove v. Eldridge* and *Tabcorp Holdings Ltd v. Bowen Investments* considered – how principles to be applied

APPLICANT	Clarendon Homes Vic Pty Ltd (ACN: 090 713 732)
RESPONDENTS	Alina Zalega, Teodor Zalega
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	15 February 2010
DATE OF ORDER	13 July 2010
CITATION	Clarendon Homes Vic Pty Ltd v Zalega (Domestic Building) [2010] VCAT 1202

ORDER

1. I find that the facts and the applicable legal principles in this proceeding are as set out in the attached reasons.
2. Direct the registrar to re-list this proceeding for further submissions in regard to quantum.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Mr B. Carr of Counsel
For the Respondents	Mr T. Sedal of Counsel

REASONS

Background

1. The Applicants ("the Owners") are the owners of residential land in Hampton East ("the Land"). The Respondent ("the Builder") is a registered domestic builder. In about April 2006 the Owners decided to demolish the existing house on the Land and build a new house.

2. They visited the Respondent's display house in Bluff Road Sandringham ("the Display Home") and spoke to its representative, a Miss Dunstan. The Display Home was of a standard design known as "Beaumont". They were impressed with the Display Home and, on that and subsequent visits, they took extensive high quality photographs of its various rooms and finishes.

3. On the day following their first visit the Owners returned to the Display Home with two relatives and spoke again to Miss Dunstan who told them that the Display Home had been designed and built specifically to meet the building and planning regulations of the Bayside City Council. Prices and available options were discussed.

4. The following week they returned to the Display Home again and had further discussions with Miss Dunstan. In the course of these they told her that they wanted the exact replica of the Display Home, including the façade, bricks, render, kitchen, bathrooms and all the cabinetry. They also said that they wanted to have the colour selection as displayed.

5. The Owners decided to have the Respondent build such a house for them on the Land and to that end they made an appointment to see Miss Dunstan on 27 May 2006. They were given a client order form and some other documents and paid a $500.00 deposit.

6. In early August 2006 they signed a document entitled "New Home Tender" which had been prepared by the Respondent. This document incorporated some limited drawings.

7. On 20 August 2006, having attended a colour selection appointment, they signed a building contract ("the Contract") and paid a 5% deposit. The price was to be the base price of a Beaumont house, which was $265,900, plus a further $76,042.86 for the additional extras they had requested over the base price. The signatures of the parties to the Contract were witnessed by Miss Dunstan.

Construction

8. Possession of the Land was handed over to the Builder in the first week of November following demolition of the existing house. It then took some months to organise permits, and construction did not commence until 12 April 2007.

9. During the period of construction there were various disputes. Some of these concerned allegedly defective workmanship and others related to the differences between what had been built and the Display Home.

10. In December 2007 the Owners issued proceedings in this Tribunal in regard to a dispute concerning the kitchen. That dispute was eventually settled and a Deed of Release was executed by the parties on 17 March 2008. Construction then recommenced on 7 April 2008 with a new building supervisor being appointed by the Builder. Thereafter there were more disputes.

11. An occupancy permit was obtained by the Builder on 14 July 2008 for the house that it had built ("the House") but it would seem that the House was far from finished. On 4 September 2008 the Builder notified the Owners that a final inspection had been booked for 12 September. At that inspection the Owners complained of further defects and further correspondence then ensued.

12. On 25 November 2008 the Owners met with Mr Keenan, the State Building Manager of the Builder at the House. Mr Keenan urged the Owners to take possession of the House and to have the outstanding matters attended to over the following 90 days but they refused, insisting that the matters complained of be rectified first.

13. Further correspondence ensued until 19 January 2009 when Mr Keenan informed the Owners that nothing further would be done.

The dispute

14. On 4 February 2009 the Builder invoiced the Owners for the price of the House and threatened proceedings in this tribunal if the invoice was not paid. It was not paid.

15. On 12 February 2009 there was another final inspection at which the Owners claimed that the defects were still not fixed and the Builder maintained that the House had been completed.

16. On 26 March 2009 the Owners solicitors wrote to the Builder purporting to terminate the Contract. The Builder claims that the purported termination was wrongful and amounted to a repudiation of the Contract by the Owners. By paragraph 7 of its Points of Claim it purported to accept the alleged repudiation. On either view therefore the contract is now at an end.

17. Notwithstanding the termination the House remained vacant and the Owners did not move in until 9 December 2009 after learning that, if they did not do so, it would become uninsured.

18. The Builder now claims $46,957.01, being the amount of its final claim. It also claims interest at the contract rate of 20% per annum from 27 January 2009 until judgement.

19. The Owners counterclaim for damages for defective work, liquidated damages for late completion, various credits and also damages for the cost of modifying the House so that it will accord with the Display Home.

Hearing

20. The matter came before me for hearing on 15 February 2010 with 12 days allocated. Mr Carr of Counsel appeared on behalf of the Builder and Mr Sedal of

Counsel appeared on behalf of the Owners. The time allocated for the hearing proved inadequate and it was adjourned part heard until 27 April 2010 for a further 4 days.

21. Lay evidence was given by the Owners and by Mrs Zalega's sister and brother in law, Mr and Mrs Wawrzyniak, who also had a Beaumont house built for them by the Builder. Lay evidence was given on behalf of the Builder by its State Manager, Mr Keenan. There are no credit issues in this case. The outcome really depends upon legal issues and the expert evidence.

Expert evidence

22. The principal expert witness for the Owners was Mr George Cross who is both a Building Expert and a Structural Engineer. The Building Expert for the Builder was Mr Mo'ane and engineering evidence was given on its behalf by a Structural Engineer, Mr Hansford. There was also an issue concerning the mortar used and in that regard I heard from Mr Mudge for the Builder and from Mr Franceschini for the Owners.

23. To start with, expert evidence was given concurrently but when it became apparent that time did not permit this to be done at the renewed hearing, the rest of the expert evidence was given individually.

24. Of the building experts, I prefer the evidence of Mr Cross to that of Mr Mo'ane. I thought that Mr Cross' inspection of the property was much more thorough than that of Mr Mo'ane. In fairness to Mr Mo'ane it should be noted that he was called into the case very late and had little time to inspect the House and prepare his very lengthy report.

25. Mr Cross also had the advantage of being a building practitioner in Victoria, whereas Mr Mo'ane's practice is and has been in New South Wales. Mr Cross also exhibited a greater level of technical knowledge whereas Mr Mo'ane seemed to rely more on his experience over many years in the building industry.

26. Additionally, many of the comments in Mr Mo'ane's report appear glib and dismissive and do not directly or sufficiently address the concerns raised by Mr Cross. Often his response was simply to query how Mr Cross could have formed his opinion. He placed reliance a number of times on his assumption that various aspects of the work would have been inspected by the Building Surveyor, not realising that, due to the nature of inspections in Victoria they would not have been. He also said, although not in these terms, that it should be assumed that the builder's supervisor or the tradesman concerned knew what he was doing and that he <u>would</u> have followed the proper practice. In view of the generally poor quality of construction I am not prepared to make any such assumption.

27. There were many examples given by Mr Sedal in submissions as to other deficiencies in Mr Mo'ane's evidence and I do not propose to repeat those here except to say that what they showed was a lack of the degree of thoroughness that Mr Cross demonstrated. This related not only to his inspection of the house but also to the preparation of the report and the giving of his evidence.

28. This is a most unfortunate situation because one always weighs the evidence of the experts on a particular issue, one against the other, and although I have taken Mr Mo'ane's evidence into account on each issue, I have commonly found that I can place so little reliance upon what Mr Mo'ane said that I am having to accept what Mr Cross said without much or any contradiction or qualification.

29. As to the engineers, Mr Cross and Mr Hansford, I see no reason to prefer one over the other. It is rather a matter of examining the evidence issue by issue and determining which opinion to accept.

The issues

30. Dealing first with the Builder's claim, that is for the unpaid balance of the Contract Price, which is claimed to be $46,957.01. It is not disputed that the final payment under the contract was not paid to the Builder but, in view of the state of the defects and non-compliance with the contract as detailed below, the Builder was not entitled to the final payment and so its claim must fail. With that must also go its claim for interest. Nevertheless, in assessing the damages to be paid to the Owners I must take account of the balance due under the Contract and set it off.

31. The dispute is essentially about the matters raised in the counterclaim. The claims made in the counterclaim can be divided as follows:

    (a) Damages for defective work;

    (b) Damages with respect to the differences between the house as built and the Display Home;

    (c) Damages for delay in completion;

    (d) Credits for work and materials not supplied.

32. There are two principal legal issues namely:

    (a) The application of s.43 of the *Domestic Building Contracts Act* 1995 ("the Act") in regard to display homes; and

    (b) the appropriate measure of damages if I should find that damages are due to the Owners. In that regard, Mr Sedal referred me the recent decision of *Tabcorp Holdings Limited v Bowen Investments Pty Ltd* (2009) 253 ALR 1. How the principles enunciated in that case by the High Court should be applied was the subject of considerable argument.

33. I will consider each of these matters in the order stated above.

The defects

34. The most substantial complaint concerns the brickwork. Complaints included alleged weakness of mortar, insufficient brick ties, missing flashings, bridged and breached cavities, the damp course, excessive variation in the width of beds and perpends, blown out mortar joints and smudged mortar. All of these were demonstrated. In contrast, insofar as one can judge such things from

photographs, the brick work on the Display Home appears to have been of a high standard. What should be done about the brickwork?

35. There was considerable debate between the experts as to the standard by which the brickwork should be judged. The starting point is the Building Code of Australia ("the BCA"). Part 3.3.1 of the BCA deals with un-reinforced masonry. That provides, in effect, that the requirements of the BCA will be satisfied by:

    (a) a design that meets the performance requirements;

    (b) a "construction manual"; that is, the masonry is designed and constructed in accordance with AS3700 ("the Masonry Code") or;

    (c) the construction practice set out in Part 3.3.1 and the provisions which follow is adopted.

36. If either alternative (b) or (c) is adopted then the construction is deemed to satisfy the requirements of the BCA. If alternative (a) is adopted then it is necessary for the Builder to demonstrate that the alternative solution complies and meets the relevant performance requirements of the BCA. If the Builder does not seek to do that, and it did not in this case, then recourse must be had either to the construction practice set out in Clause 3.3.1.1 et sequitur of the BCA, or alternatively, the masonry must be designed and constructed in accordance with the Masonry Code.

37. The Builder does not seek to justify the construction of the external brick walls by reference to the BCA. Rather, it seeks to rely upon what it said is compliance with the Masonry Code.

38. The Masonry Code is an Australian Standard. It does not have any regulatory force except insofar as it is called into effect by the BCA. It is a national standard for the construction of masonry and is not the same as the construction practice set out in the BCA. It contains detailed provisions as to how the various integral parts of a masonry structure should be constructed.

39. Debate between Mr Cross and Mr Mo'ane centred on Section 12 of the Masonry Code which is entitled "Simplified Design of Masonry for Small Buildings". I accept Mr Sedal's submission that this is, in effect, a "stand alone" section of the Masonry Code to simplify the task of a builder constructing masonry for a small building. That interpretation is reinforced by the opening words of the section in 12.1, which are as follows:

    "12.1 SCOPE OF SECTION

    This section gives rules for the design and specification of masonry and buildings complying with the following

    (a) a leaf thickness of 90mm or greater;

    (b) the top of all walls are supported by a roof or floor structure acting as a diaphragm;

    (c) walls that are supported on concrete slabs or footings complying with AS2870 or suspended slabs complying with AS3600; and

(d) geometric limitations of Clause 12.1.2.3.

Masonry that complies in full with the provision of this Section is deemed to satisfy the requirements of other relevant parts of this Standard. (See Appendix J)" (My emphasis)

41. Appendix J is an explanatory page setting out the assumptions that have been made by those who prepared Section 12. For example, it sets out the floor live loads that have been assumed and the deflection of lintels as well as a number of other assumptions. It seems to me that, if one or other of these assumptions is not applicable, it will be necessary to demonstrate to the relevant building surveyor how these differences should be addressed in order to make the approach adopted in Section 12 appropriate to the building in question.

42. Mr Cross said that the design of this building does not accord with Section 12 of the Masonry Code. As I understand his evidence, the design is constituted by the plans, specifications and contract documents. In the present case, those documents do not specifically say that the building is to be constructed in accordance with Section 12. Further, according to Mr Cross, they do not provide for the following requirements of Section 12:

(a) There is no design in accordance with Section 12.

(b) There is no provision that the mortar must be selected according to Clause 12.2.4.

(c) The damp proof course and flashings are not specified in the design as required by Clause 12.2.6.

(d) The durability that the wall ties are to have has not been specified as required by Clause 12.2.7.1.

(e) The wall ties duty rating has not been specified as required by Clause 12.3.4.

(f) The earthquake category has not been specified according to Table 12.7 and the earthquake loads have not been investigated.

(g) The plans do not require the reinforcement for the isolated pier that is stipulated for in Table 12.12.

(h) There is no bracing design as required by Clause 12.5.3.

(i) The spacing of the brick ties between windows and doors and adjacent to the control joints has not been specified as required by Clause 12.6.4.1 nor has any information been provided as to how the control joint gap shall be filled.

(j) The documents do not require the removal of hard and incompressible substances from the control joint before sealing.

Further, Mr Cross said that, since the site is a class "P" site, Table 12.14 for the spacing of brick ties at the articulation joints cannot be used because it does not provide for the spacing of brick ties on such a site.

43. In addition, Mr Cross said that the House as constructed does not comply with Section 12 in the following further respects:

    (a) The mortar does not comply with Clause 12.2.1;

    (b) The required flashing has not been provided in accordance with Clause 12.2.6.3;

    (c) The windows have not been flashed as required;

    (d) The perpends do not fall within 3mm of 10mm in thickness;

    (e) Brick ties have not been installed at 300mm spacings at the top of the walls or at intersecting walls;

    (f) There are no brick ties at all to connect the front brick wall over the garage to the frame, nor is that area flashed;

    (g) The damp proof course does not extend through to the exterior of the wall.

44. Mr Mo'ane said that in regard to the respects in which Section 12 was inappropriate, such as the classification of the site, the engineer had dealt with that and prescribed a solution. Otherwise, he said that Section 12 was the part of the Masonry Code able to be used for small buildings and that it was appropriate to use it.

45. I accept Mr Cross' interpretation. I think Section 12 is a short hand alternative to compliance with all of the other sections in the Masonry Code for the construction of a small building but, as the passage quoted makes clear, in order to be able to rely upon it, it is necessary for the Builder to comply with it fully. I accept Mr Cross's evidence that you cannot pick some things out of Section 12 and other things from the rest of the Masonry Code. If the Section 12 approach is to be used then full compliance is necessary. Otherwise, all of the other parts of the Masonry Code must be complied with. If they are not, then recourse would need to be had to either a performance based design or the acceptable construction practice set out in Part 3.3.1 of the BCA.

46. Whether it is the design of the building that has to fall within Section 12 or whether it simply has to be constructed in accordance with Section 12 it does not seem to me that the House, either as designed or as constructed, fully complies with Section 12. Accordingly, I do not think that Section 12 applies and the construction should be assessed in accordance with the Masonry Code or, to the extent that this is inconsistent with the BCA, in accordance with the BCA. I therefore accept Mr Sedal's submission that that is how I should approach the matter.

47. I now turn to the particular defects in the brickwork that are alleged.

    (a) **The vapour barrier**

    The vapour barrier does not extend up the exposed edges of the slab but in most instances appears to terminate below ground level. In some areas where it rises above ground level it has peeled away from the edge beam, leaving the side of the edge beam exposed. There was a lot of evidence about that but in the end I

think the simplest of the alternative solutions proposed by Mr Cross is to extend the vapour barrier to the level of the proposed ground surface.

(b) **The damp proof course**

It was not disputed that the damp proof course should protrude beyond the mortar course in which it is laid. This has not been done, with the result that there is a bridge of mortar that could allow dampness to pass from below the damp proof course to above, reducing its effectiveness. I accept that the remedy for that is to rake out the mortar to expose the damp proof course. Further, according to Mr Cross, the damp proof course of the alfresco is too high. That was demonstrated on site. It will have to be replaced. I also accept Mr Cross' evidence that a damp proof course should have been provided to the garage and that to provide it now will be difficult

(c) **Articulation Joints**

There was no dispute as to this item. The articulation joints numbered 9 and 15 on the contract drawings have been omitted and the Builder acknowledges that they must be installed.

(d) **The mortar**

I agree with Mr Cross that the mortar was "blown out" and weathered in places. He suggested that this indicated that the mortar was under strength. As a result it was tested by chemical analysis and also by means of a scratch test. Samples were taken from various parts of the brickwork and, unsurprisingly, the results were not uniform. However it seems clear that the mortar does not have either the chemical composition or the strength of an M3 mortar but rather, has a strength equivalent to an M2 Mortar.

The specification required mortar of 6 parts of sand to one part of cement. It was not disputed that this must have been an error because there is no such mortar recognised by the BCA. According to the evidence, an M3 mortar is composed of 1 part of cement and 1 part of lime to 6 parts of sand and it seems likely that this is what was intended by the specification.

I accept Mr Cross's evidence that the mortar does not meet the requirement of the specifications or the BCA. Mr Mo'ane said that it was by no means certain that the mortar tested was typical but the mortar experts did not say that the number of samples taken was insufficient for them to give the evidence they gave. Mr Mo'ane also said that he thought that the mortar was of sufficient strength and so would perform the function required of it. It was, he said, "fit for the purpose". However it was not of the strength required by the Masonry Code or the BCA.

According to Mr Mudge, the strength of the mortar can be increased by applying a proprietary product so this deficiency on its own would not be critical.

(e) **The brick ties**

Mr Cross said the brick ties have not been provided in accordance with either the BCA or in accordance with Clause 4.10 of the Masonry Code. Mr Mo'ane

queried Mr Cross as to how he could know what brick ties have been provided since he had looked at only random locations. Mr Cross said that it was impracticable to attempt to inspect every brick tie in every location in the building. He said that a random inspection would be symptomatic of the tradesman's work on the site. Unless one were to dismantle the building that appears to be a practical approach, although one would have to inspect a sufficient number of brick ties to ensure that one had a representative sample.

Mr Mo'ane said that the maximum 600mm spacing in Section 12 was appropriate except for the top 300mm and the intersecting walls. He said that would be appropriate for this building. However, since Section 12 is not applicable the requirement is that of the BCA.

Mr Mo'ane also said that he had inserted a "Seesnake" colour cavity camera down the cavity in several locations and found that the brick ties in each section that he inspected to be in accordance with the BCA. There was no recording of this inspection tendered but this evidence is inconsistent with Mr Cross's evidence and my own limited observations.

A DVD of the wall cavity that was tendered was difficult to follow. It indicated that some ties had been provided although their location did not seem to follow any pattern. My own limited inspection on site of wall ties was confined to the cavity wall behind the dining room where I saw only two or three ties and the cavity bridged and breached by both mortar and insulating material, and also above the garage, where the brick ties that I saw had been hammered flat and were not connected to the frame.

Since Section 12 cannot be used I accept Mr Cross's evidence that brick ties should have been provided as required by the BCA, that is, every 600 mm except around windows, doors, intersecting walls and along articulation joints, where the spacing must be every 300 mm.

I am satisfied that the bricklayer has not inserted brick ties in accordance with the requirements of the BCA which calls into question the integrity of the brickwork as a whole, because it is impossible to know precisely how many have been provided save to say that, from the observations that have been made, there are not nearly enough.

Mr Mo'ane points to the obvious fact that the structure is nonetheless still standing despite "…high temperatures and severe storms…" over the past two and a half years since it was built. He suggests that this means that the performance requirements of the BCA are met. However to be satisfied as to the structural adequacy of a building I would need engineering evidence and Mr Mo'ane is not an engineer. The test for structural adequacy is not: "Is the building is still standing?" Mr Cross, who <u>is</u> an engineer has said that the brick ties as specified in the BCA are required and so I should accept his evidence.

The question of retrofitting brick ties was raised, with Mr Mo'ane suggesting that it could be done from inside the building. Mr Cross said that would be a very messy way of doing it. The methodology is unclear but Mr Cross said that to fit

them now would involve removal of a large amount of brickwork. I accept that evidence.

(f) Sill clearances

Mr Cross said that there are no sill clearances below the windows of 5mm on the ground floor and 10 mm on the upper floor as required by the BCA. That accords with my own observation. Mr Mo'ane said that the bricklayer might have left the gap but that it has been taken up now by settlement since construction. Mr Cross said that such a gap would not be taken up after only two and half years and that the bricks are now hard up against the windows. I note that Mr Cross's first inspection was in September 2008, which was less than two years after the bricks were laid. I prefer Mr Cross's evidence.

(g) Tray flashings

Mr Cross said that tray flashings are required to be installed in the north wall and over the east kitchen bench wall of the kitchen area where the external brick veneer walls become internal walls below the roof lines. Mr Mo'ane appeared to agree but said that it cannot be established that they have not been installed. Mr Cross inferred that they have not been installed because there are no required apron flashings or weep holes which would allow the flashings to properly function if they had been installed.

On site, I noticed some weep holes above the lower roof at the rear of the house but Mr Cross said they were at the wrong height to drain any tray flashings. Mr Mo'ane suggested that the absence of tray flashings would be reflected in water penetration issues underneath. There was some evidence of deterioration of finished surfaces in two small areas at the foot of the nib walls at the entrance to the entertainment area directly beneath, which might be consistent with water penetration but that could also be referable to the changing of the skirting boards. Mr Cross said that there would not necessarily be any indication of water penetration for some time due to the water being absorbed by other building materials.

Mr Mo'ane said in his report that it was reasonable to consider that there was an experienced and qualified construction supervisor employed throughout the construction and that a private building surveyor had a statutory obligation to ensure that it was constructed in accordance with the BCA and that that would include inspecting the tray flashings. Here his New South Wales experience does not reflect Victorian practice. There is no compulsory inspection which would take in tray flashings and such is the lack of quality of many aspects of this house that I think it would be dangerous to make any assumption that it was properly supervised either by an experienced and qualified construction supervisor or that the building surveyor has done anything other than carry out the minimum number of inspections required. I prefer Mr Cross's evidence.

(h) Window flashings and weep holes

Mr Cross said that the plans required a continuous perimeter flashing to be installed at the first floor level and part of it has been omitted. He said that

flashings below brick window sills have been omitted in their entirety. He said that the design did not accord with the BCA. He suggested that the windows are not flashed sufficiently in order to perform their function. Mr Mo'ane said that on his inspection he was satisfied that the flashings had been installed but since I am not satisfied as to the extent of Mr Mo'ane's inspection I prefer Mr Cross's evidence.

(i) Mortar breaching and bridging of cavities

Mr Cross said that the BCA requires there to be cavities of not less than 25mm in a brick veneer construction exclusive of insulation and bracing. He said that the cavities in the house have mortar extrusions that in some cases entirely bridge the cavity, allowing moisture to pass from the external brickwork to the internal walls.

Mr Mo'ane said that he had been unable to identify areas of moisture ingress but he did not dispute the breaching and bridging of the cavities. He said that, in the period since the House was built, Melbourne has incurred some of the wettest rain periods in recorded history (a surprising assertion that he was unable to substantiate) and that it is therefore reasonable to assume that if the cavities were breached in the manner suggested by Mr Cross there would indeed be evidence of water ingress to the structure. His comments in this regard sit uneasily with an assertion he made in the preceding page of his report to the effect that, within 45 minutes of direct rain on an exterior brick veneer masonry wall there would be as much water running down the inside of the brick cavity as on the face of the wall. That was another assertion that he was unable to substantiate.

From my own inspection the extent of breaching and bridging was very substantial indeed to the extent that, in some places, the gap was completely closed by mortar. Although I accept that there will be some breaching of a brick veneer cavity due to extrusion of mortar the walls should be laid in a manner so as to minimise this and that has clearly not happened in this case. I accept Mr Cross's evidence in this regard.

(j) Flashing into parapet

Mr Cross said that no flashing or weep holes has been installed in the parapet wall and that flashing and weep holes are required. I accept his evidence.

(k) Aesthetic defects

I agree with Mr Cross that many beds and perpends are "blown out", particularly on the east side of the building and that the beds and perpends in some areas of brickwork show a wide variation in many areas. I accept Mr Cross's evidence that these are excessive. They certainly look very unsightly and they are not just in isolated spots. I agree with Mr Cross that many mortar joints have been badly finished and smudged. Finally, the bricks used in the construction have hollow cores which are exposed above the lintels.

The appearance of the brickwork in the House contrasts with what I could see from the photographs of the brickwork in the Display Home. What has been supplied is not what the Owners contracted to receive.

Consequences of faults in the brickwork

48. Mr Cross estimated that it would be necessary to dismantle about 10% of the external brickwork to install brick ties. To create the necessary articulation joints, the required gaps around the windows and doors, to put in the damp proof courses and fix the uneven beds and perpends would, he said, bring the proportion of brickwork to be replaced up to about 30 %. He said that the "blow-out" of mortar had affected up to 75% of the brickwork, 15% of which was very bad. There is also smudged mortar, there are badly executed beds and perpends and the appearances of the hollow cores of the bricks above the lintels aver the windows. Mr Cross said that it would be cheaper and more satisfactory to relay all of the brickwork rather than try and patch it piecemeal. I accept that evidence. I am not satisfied that the walls can be repaired satisfactorily. The Owners did not contract to receive walls of uncertain quality that are patched up piecemeal. They are entitled to good workmanship to at least the standard of the brickwork in the Display Home which, according to the photographs, had a very good appearance.

Out of level floors

49. The upper floor is supported by manufactured beams known as "smart beams". They comprise a timber top and bottom connected by a vertical web of a laminated timber material. The timber at the top of the beam supports the upper floor whereas the timber at the bottom of the beam holds the ceiling of the ground floor.

50. The floor on the first floor is significantly out of level. Mr Mo'ane who had some levels taken but did not take levels himself, acknowledged that it was out of level but suggested that it was within tolerance. Mr Cross prepared a plan showing the variation in levels of both floors. He took the levels himself. Mr Mo'ane provided no such plan although he said that levels were taken in his presence.

51. There was a disagreement between the experts as to what variation in floor levels could be said to be within tolerance. Mr Cross referred to the 2007 edition of the Guides to Standards and Tolerances, which is the edition applicable to contracts for domestic building work entered into after 1 July 2007. Mr Mo'ane referred to an earlier edition of the Guides which was applicable to work before that date. I accept that the 2007 edition is that to which I must have regard.

52. According to Mr Cross's evidence the floors were out of level in all rooms on the upper floor including the two toilets. The floors in the en suite in the bathroom in the upper floor were not out of level.

53. Mr Cross gave detailed evidence as to the likely cause of the problem which primarily relates to the fact that the lower slab was laid out of level. That fault was not corrected by levelling the ground floor or taken into account when

setting out for the upper floor. There were also problems with the design of the upper flooring system to do with the positioning of the supporting beams.

54. I accept Mr Cross's evidence that the floor needs to be levelled. The methodology that he suggested of applying a levelling compound to the ground floor and cutting out the floors around the walls and levelling them on the upper floor seems appropriate. In the process of doing this it will also be possible to replace the damaged floor joists dealt with below.

Damage to the floor joist

55. In the course of installing a vacuum system and various other services, penetrations were required to be made in the webs of the joists. Instead of doing this in a manner that would not compromise the structural integrity of the joists, extensive damage was been done by hammering holes in a large number of them. Some advice has since been sought from the joist manufacturer and a suggestion has been made as to the repair of some of the joists. According to Mr Cross's evidence, all damaged joists will either have to be repaired in accordance with the manufacturer's recommendations or alternatively, a new, additional joist will need to be inserted beside the existing joist. I accept this evidence. Any penetrations in these new joists must be in accordance with the manufacturer's recommendations.

Wall bracing

56. There was considerable concern expressed by Mr Cross in his first report as to the sufficiency of wall bracing in the structure. Precisely what bracing was used and where cannot be ascertained with any certainty because the walls have now been sheeted with plaster. No design for wall bracing was provided in the documents given to Mr Cross apart from the plan for each storey that did not show the bracing capacity for the bracing materials and panels.

57. I heard extensive evidence about the sufficiency of the wall bracing from Mr Cross for the Owners and from Mr Hansford for the Builder. Mr Hansford acknowledged that some work had to be done notably, connecting the bottom plates of the stud frames of the top storey with the top plate of the bottom storey by bolting them together at the corners in accordance with a design that was attached to his report.

58. The key issue here was whether the building should be classified as "N1" or "N2" for bracing purposes. As to that, I accept that the house is not in an exposed position. Despite the doubts that appear to have given rise to Mr Cross's initial concern, there is now a certificate of compliance for the design provided by two structural engineers. Notwithstanding that certificate, Mr Hansford acknowledges that the top wall bottom plates and the lower wall top plates need to be bolted together as shown in his design.

59. On the basis of this evidence as it has finally unfolded, I am not satisfied that the wall bracing will be insufficient if Mr Hansford's recommendations are ad opted.

Roof bracing

60. Mr Cross also raised issues with the roof bracing. Again, there was conflicting engineering opinion about this because the bracing has not been installed where Mr Cross said it ought to have been for maximum affect. There are two problems identified by Mr Cross with the roof. The first relates to the bracing which he said does not comply with AS4440-2004 in a number of respects which he identifies. The second is that the nailed connections between the trusses and other parts of the building are, he says, insufficient.

61. Mr Hansford agrees with Mr Cross that each truss is to be crossed four times but said that this means that it only has to be crossed twice on both sides of the apex of the roof. That seems a reasonable interpretation of the requirement. Mr Hansford said, in effect, that because of other factors including the battening of the trusses for the roof tiles, the roof structure as a whole has more than adequate strength. As to the connection between the frames and the other parts of the building, these are to be bolted as per Mr Hansford's design.

62. On balance there is insufficient evidence that the roof bracing is inadequate.

Particle board installation

63. The Owners complained about squeaking in the upper floor near the top of the staircase. It was not apparent to me at the time of the on site inspection. Mr Cross said that the nailing of the floor sheets is inadequate. If that is so, that can be addressed when the floors are levelled.

Wet area construction

64. Mr Cross said there are no details of the construction waterproofing of the wet areas apart from a waterproofing insulation certificate from an installer. His chief concern appears to be the fact that the Builder has constructed hob shower bases. He said there is no provision for these in the relevant Australian Standard. He also expressed concerns as to the thickness of the waterproofing membrane based upon observations that he made of the edge of the membrane at the doorway of the bathrooms.

65. Mr Mo'ane said that the waterproofing was done by a "qualified and licensed applicator" although there is no provision in Victoria for such a person to be licensed. He agreed that the waterproofing of wet areas was critical but added that it "requires inspection by the builder surveyor prior to floor tiles being fitted". In Victoria no such inspection is carried out by the building surveyor. Mr Mo'ane said that he could not see from his inspections any indication of the membrane was not performing to its intended design and nor could I. Mr Mo'ane expresses no opinion as to whether the BCA makes any provision for a shower base of the type installed.

66. Since the shower is of the nature and design contracted for and also similar to the Display Home, and since there is no indication that it is leaking, I find no defect.

Balcony construction

67. The front balcony leads off the master bedroom and is surrounded on one side by the House and on the other sides by a parapet wall. It drains to a central drainage point. The material from which the floor has been constructed is not known because no plans are available detailing how it was to be built. Mr Cross said that the fall is 1 in 125 which he said is insufficient because it abuts an external wall of the building and so is an external surface slope which, according to the BCA, should have a fall of 1 in 20. For the same reason he said that there should be a step down from the internal floor onto the balcony. He referred to installation instructions issued by James Hardie in regard to the manner recommended by that company for the installation of its product, but there is no evidence that a James Hardie substrate was used.

68. It does not seem to me that the parts of the BCA to which Mr Cross refers relate to a balcony. They seem to be concerned with the external ground surface adjacent to a building. Mr Cross acknowledged that there is no standard provision in the BCA for a balcony roof adjacent to an external floor and said that a performance based design was required.

69. Mr Mo'ane pointed out that, although there were leaks during construction, the balcony has not leaked since it was completed. Since there is a habitable room beneath it and a great deal of water would have fallen on this balcony over the last two and a half years, I believe that any leak would have become apparent by now. Nonetheless, it was conceded, sensibly, that there should be an overflow and a rain head installed.

70. Another matter mentioned by Mr Cross was the articulation joint in the balcony wall which he said has not been maintained and has been rendered over. I note there is no cracking in this articulation joint and so it does not appear that there has been any movement at all in it since construction. However the joint should have been maintained. As to the floor of the balcony, he said that no articulation joint can withstand 10mm of expansion without breakage. I accept his evidence in this regard but there is no evidence that the articulation joint has been continued through the flooring material and so the requirement of the membrane to expand would presumably not be there. Save for reinstating the control joint and installing an overflow and a rain head I am not satisfied that any defect has been demonstrated.

Plasterboard and internal walls

71. Mr Cross referred to the plasterboard code and said that it required the substrate that is, the timber framing, to be constructed to a tolerance of 4mm in the length of 1,800mm. I note that items 9.10 and 9.11 of the 2007 Edition of the Guide to Standards and Tolerances requires a tolerance of 4mm over 2 metres which is somewhat similar. Mr Cross said that the tolerance has not been met in a number of places that he identifies in his report. He also said that a Level 4 finish ought to be achieved.

72. Mr Mo'ane agreed that that a Level 4 finish is appropriate for a domestic residence and provides what he said is an excerpt from AS2589.1-1997 concerning Level 4 finishes, as follows:

> "This level is generally the accepted level of finish for domestic construction. It is used for light textures or wall coverings in smooth textured finishes are illuminated by critical lighting and where smooth textured finishes and satin/flat/low gloss paints are illuminated by non critical lighting. In critical lighting areas, flat paint is applied over light textures tend to conceal joints. Gloss and semi gloss paints are not generally suitable over this level of finish".

73. He said that a Level 4 finish cannot be expected to be without blemish or be an absolutely smooth surface. That may be so, but what is sought is not perfection but a reasonable appearance similar to the Display Home and the walls and ceilings were both painted and constructed by the Builder.

74. The following defects are claimed in the plasterwork:

(a) **Garage plasterboard not connected**

The plasterboard in the garage on the east wall is not connected to the studs and is bowed in the centre. This was acknowledged at the hearing although denied in Mr Mo'ane's first report. On the site inspection, the middle of the plasterboard could be pushed in and out, having no connection at all to the studs.

(b) **Alfresco ceiling**

Mr Cross complained about the method of fixing this ceiling but the real complaint here is about the level of the ceiling, which was to be the same as the Display Home. That is dealt with below.

(c) **Visible butt joints**

I accept that the butt joints to the living room plaster are clearly visible during normal daylight conditions and the ceiling is not level. This ceiling needs to be reworked.

(d) **Nib wall in the living room**

The nib wall in the living room is not vertical. This is particularly noticeable when one is coming down the stairs and visually lines up the nib with other parts of the house.

(e) **Entry**

The west wall of the entry is bowed and the column next to the stairwell is not vertical.

(f) **Balustrade**

The balustrade at the top of the stairwell is not level. The stair balustrade is also not rigid

(g) **Bedroom one**

The south wall in bedroom one is not straight;

(h) **Bathroom wall**

The wall in the bathroom is not straight. It is particularly obvious in this location because the tiles in the shower recess have been tapered in order to take account of the fact. The wall will have to be straightened before any remedial work is done in regard to the tiles;

(i) **Installation of plaster**

Plasterboard sheets have been installed parallel to the main trusses in the ceiling of the library. According to Mr Cross's evidence, which I accept, this is bad building practice because battens were not used.

(j) **Return air vent**

The hole for the return air vent directly opposite the top of the stairwell has been simply cut out of the plasterboard without any framework behind it to support the cut out. It needs to be properly framed and finished.

The roof tiles

77. I accept Mr Cross's evidence that the roof tiles have the following faults which he was able to demonstrate on site:

(a) Every second row of roof tiles should have been fixed and it was not.

(b) The ridge tiles and hip tiles should have been fixed and they have not been.

(c) Some of the tiles require re-seating.

(d) Some of the tiles have been poorly cut and need to be replaced. These are above the north east corner of the living room.

Roof flashing and drainage

78. I accept Mr Cross's evidence that there are the following faults in the roof flashing and drainage which he was able to point out to me on site:

(a) A "vee" gutter has been installed at the north east corner of the living room and this type of gutter should not have been used in that location. In addition, there is no over-flashing. The vee gutter must be replaced with a box gutter and an over-flashing must be provided.

(b) The box gutter at the front of the house has an inadequate slope and has been cut down at the outlet location. The gutter needs to be removed and replaced.

(c) As already stated, the balcony needs an overflow drain with a proper rain head and downpipe.

(d) Dissimilar metals have been used throughout in the roof flashings. Mr Mo'ane agreed that the use of dissimilar metals is generally a problem but said that there is a new type of zinc/lead flashing on the market which has a further protective coating which avoids the problem. He then suggested that this was the material that the Builder used. He did not say how he knew that without testing it nor did he produce any information from the Builder

about what was used which the Builder must have. In the absence of that I prefer Mr Cross's evidence. These need to be replaced in order to ensure that no corrosion takes place. Many of these will be replaced in the course of replacing the brickwork and other items.

(e) The spreaders discharging water from the first storey roof onto the lower storey roof at the front of the House must be removed and replaced with two downpipes connected to the stormwater drain.

Showers and bathroom tiling

79. The shower recesses are undersized. The contract provided for the shower in the ground floor powder room to be 900 x 900 (that is, 3 full tiles in each direction) and for the shower recesses in the first floor en suite and bathroom to be 1,200 x 950. The internal dimensions of the shower in the ground floor powder room are 855 x 833. In the first floor en suite they are 1125 x 900 and in the first floor bathroom, 1135 x 870. Those dimensions are of the base area of the shower recess.

80. Mr Carr submitted that the dimensions shown on the plans are intended to be external dimensions and, looking at the plans, I think that he is right. But even allowing for that they are still undersized.

81. Following on from this deficiency in size, the grout lines do not match up and the patterned tiles are not where they ought to have been. I will deal further with this issue below.

Fire rating

82. According to Mr Cross's evidence the Builder has not installed any fire resistant material in the gap between the top of the bricks and the underside of the roof covering in the west boundary wall of the garage. Mr Mo'ane agreed that it was not in compliance. That must be done and the rest of the requirements of the BCA must be attended to in regard to the fire rating.

Paintwork

83. Mr Cross has criticised the paintwork, both in terms of defects and an inadequate number of coats. Mr Mo'ane said that assessment of the quality of paintwork is subjective but thought that it had been done in a tradesman like manner. In many instances it was difficult to separate painting problems with the problems with the plaster. There was not much emphasis upon this at the on site inspection but I saw many irregularities of the nature referred to by Mr Cross.

84. In view of the amount of rectification work to be undertaken, the whole of the interior of the House will require an additional coat of paint which should take account of any deficiencies. Priming and undercoating of the newly repaired surfaces will be taken up in the rectification cost of those parts of the building that are to be repaired. An allowance for an additional coat of paint in the interior of the House should be on top of that in order that the repaired surfaces match the un-repaired surfaces.

Site cut and grading

85. Mr Cross says that the final finished ground levels should be uniformly graded away from the House at a slope of 50mm in 1,000 mm. I accept his evidence in that regard but I agree with Mr Mo'ane that landscaping was not part of the Builder's scope of works. That is a responsibility of the Owners.

The "Display Home" Differences

86. The next complaints to be dealt with are the respects in which the House as built differs from the Display Home.

87. By showing a prospective owner a display house a builder is suggesting to anyone who inspects it that, if that person enters into a building contract for the construction of that house he will receive a house that is not different in any material respect in terms of quality of both work and materials or design from the display house, unless of course there is some agreement to the contrary. It is somewhat analogous to a sale of goods by sample. If the builder wishes to construct something different from what is seen in the display house then that should be made clear to the prospective owner so that he knows what he is to receive.

88. In many instances a prospective owner might have little or no knowledge of building and be quite unable to identify, from the detailed plans and specifications that the builder gives him to sign, that what he is contracting to receive is any different from what he has seen at the display house. Such a person might well be deceived by a builder who displays one thing and then builds another.

89. The situation is addressed by s.43 of the *Domestic Building Contracts Act* 1995, which is as follows:

> **"Requirements concerning display home contracts**
>
> 43. Requirements concerning display home contracts
>
> (1) In this section display home means a home that is made available for inspection to encourage people to enter into contracts for the construction of similar homes.
>
> (2) A person who makes a display home available for inspection must ensure that the following documents are prominently displayed in the display home-
>
> (a) a copy of the plans and specifications used for its construction; and
>
> (b) a draft copy of the major domestic building contract that the builder on whose behalf the display home is displayed would be prepared to enter to construct a similar home.
>
> Penalty: 50 penalty units. Default penalty: 1 penalty unit for each day.
>
> (3) If-
>
> (a) a display home is made available for inspection by or on behalf of a builder; and

(b) a building owner enters into a contract with the builder for the construction of a similar home-

the builder must construct the home using the same plans and specifications and to at least the same standards of work quality and quality of materials as were used for the construction of the display home. Penalty: 50 penalty units.

(4) However, subsection (3) does not apply to the extent that the contract specifically identifies how the construction of the home will differ from that of the display home.

(5) This section applies to any building suitable for use as a home, regardless of whether it is being used as a home at the time it is displayed."

90. This section has been in the Act since it was first enacted in 1995 yet there has, so far, been no guidance from the courts as to its interpretation nor have I found anything in the Minister's second reading speech to assist me. Before proceeding further I need to consider how the section should be interpreted.

91. The starting point is s.43(3) which requires that the builder must construct the house using the same plans and specifications and to at least the same standards of work quality and quality of materials as were used for the construction of the display home. If he wishes to construct the house using some other plans or specifications or to a different standard of quality as to work or materials then he must first, in order to satisfy s.43(4), ensure that the contract specifically identifies what those differences will be. So how is that to be done?

The purpose of the section

92. The apparent purpose of the section is to ensure that each respect in which the construction of the house will differ from that of the display home is specifically identified in the contract. That can only be for the purpose of ensuring that the difference is brought to the prospective owner's attention. I therefore think that the words "specifically identifies" means "specifically identifies to the prospective owner". Something will not be specifically identified to the prospective owner in the contract unless it is set out with sufficient particularity to draw to his attention each respect in which the house that is to be built will differ from the display home that he has inspected.

The identification must be made in the contract

93. The section provides that the specific identification must be made in the contract, not by some other means. Apart from that, it does not say that it is to be done in any particular way. The term "contract" refers to the whole of the contract between the parties, not just to a document called such. In most instances there is a form of contract setting out the contractual terms, a set of architectural and engineering plans, depicting what is to be built and how, and a set of specifications listing the materials to be used and the appliances to be installed. Sometimes these documents will overlap but they all constitute the "contract". Usually, as in this case, the contract document will expressly incorporate the other documents into the contract but since they are clearly part of the agreement anyway, this will usually be unnecessary.

94. So the "specific identification" can be in any of the contract documents, but it must amount to a specific identification.

How is the difference to be specifically identified?

95. It is not sufficient simply to prepare plans and specifications that provide for the difference. If that were sufficient, then obviously subsection (3) would have no operation. Putting something different in the plans or specifications identifies what is to be built. It does not "specifically identify" that it is a difference. The method of "specific identification" used must be sufficient to specifically identify the difference, or each difference, if more than one.

96. The verb "specify", of which "specifically" is the adverb, is defined in the Shorter Oxford Dictionary *(ignoring obsolete or irrelevant uses)* as follows:

> "To mention, speak of or name *(something)* definitely or explicitly; to set down or state categorically or particularly;"

97. To identify something is, in general parlance, to say what it is in terms of identifying it with something else, in this case, a "difference". To specifically identify a difference must therefore be to say "definitely", "explicitly", "categorically" or "particularly" both what it is and that it is a <u>difference</u> from the Display Home. The section does not require the contract to refer to the section or use the words "specifically identify" or any other form of words. However, if sub-section (4) is to be relied upon, the effect of what is stated in the contract must be sufficient to identify unequivocally, as to each difference, that it <u>is</u> a difference and <u>what</u> the difference is.

98. Subsection (4) does not require a builder to prove that the prospective owner was aware of the difference if the difference is otherwise specifically identified in the contract. However if it does not come to the attention of the prospective owner that might be one factor the Tribunal will look at in deciding whether what was done was sufficient to specifically identify the difference. To squirrel away the identification of the difference in some corner of the contract where the owner may well not see it and not draw it to the owner's attention will not be sufficient. In each case it is a question of fact as to whether a difference has been specifically identified.

The same plans and specifications

99. The phrase "the same plans and specifications" refers to the plans and specifications that were used to build the Display Home. Sub-section (2) requires these to be prominently displayed in the Display Home but even if they are not, the Builder must nonetheless construct the house using those same plans and specifications. The standard of work and the quality of the materials used for the construction of the house must also be the same as those that were used for the construction of the Display Home.

100. Further, the word "used" would suggest that, whatever might have been drawn on any sheet of plans or written in any specifications for the display home, it is how the display home was built that is determinative of what the "plans" and "specifications" are for the purposes of the subsection. They might be the plans

that were lodged for the permit but they need not be. The design might have been altered during construction and the alteration might not have been documented. It is even possible, although highly unlikely, that there were no written plans and specifications prepared for the display home at all and the builder just made up the design as he went along. In order for the prospective owner to get what is displayed the "plans" and "specifications" must be the plans and specifications pursuant to which the Display Home was built, in whatever form they might be. Of course, the subsection contemplates that the display home will be built in accordance with written plans and specifications because these are required to be on display.

Variations

101. The section does not say that the contract cannot be varied after it has been executed, but whether varied or not, the Builder cannot at any time construct the house using plans or specifications, or to a standard of work or materials, other than those that were used for the construction of the display home unless, at the time the difference in construction occurs, the contract contains the specific identification of each difference. Therefore, before any variation is implemented, the specific identification will first have to be made as part of the variation to the contract.

102. In most cases, the very fact that the variation relates to a particular difference would probably be sufficient for the purposes of sub-section (4). For example, if the owner were to ask for a particular type of fitting to be supplied that is different from the display home then a variation of the contract to substitute that fitting would both effect a change in the scope of works and also provide the specific identification required. It must be a true variation which results in a variation to the contract itself, because the identification must be made by the contract. An identification made outside the contract is not within the subsection. The variation must also specifically identify the variation in the sense stated above.

Civil liability

103. By s.8 of the Act a number of warranties are implied into the building contract. Of these, is the warranty implied by s.8(c), as follows:

> "The builder warrants that the work will be carried out in accordance with, and will comply with, all laws and legal requirements including, without limiting the generality of this warranty, the Building Act 1993 and the regulations made under that Act"

104. Section 43(3) imposes upon the Builder a legal requirement namely, to construct the home using the same plans and specifications or at least the same standards of work and the materials as were used for the construction of the Display Home. This section imposes a penalty upon the Builder for not doing so but, in itself, creates no civil remedy for the Owners. However, since compliance with the section is a legal requirement, the Builder warrants in accordance with the implied warranty under s.8(c) that the house will be constructed in accordance with that legal requirement.

105. In addition, in the present case there is Clause 11 of the Contract which contains an express warranty to a similar effect.

The plans and specifications in the present case

106. In this case, the only plans in evidence that are said to have been used for the construction of the Display Home are two pages (Exhibit 35) that the Owners obtained. One of these contains the front and one side elevation and is numbered "Sheet 4". The other contains elevations and details of the Kitchen, Powder Room and Laundry and is numbered "Sheet 8". This numbering would suggest that there at least 6 other sheets of plans. There are 13 sheets of plans annexed to the Contract so it is likely hat there would have been a similar number for the construction of the Display Home.

107. It seems extraordinary that the plans and specifications for the Display Home are not in evidence. It must have been constructed in accordance with plans and specifications or no building permit would have been issued. No satisfactory evidence has been given by the Builder as to why these other sheets of plans have not been produced. No evidence was given on behalf of the Builder that they were "prominently displayed" in the Display Home at the time the Owners made their inspections as required by s.43(2). The Owners said that they were not and I accept that evidence.

108. All I have to go on are the photographs taken by the Owners and it is fortunate that these are both very clear and also of numerous parts of the building. In the absence of the actual plans and specifications I infer that the plans and specifications (apart from these two sheets) of the Display Home provided for it to be constructed in the manner in which it appeared when it was inspected and photographed by the Owners. As stated above, that is what is critical in any event.

109. The Builder was therefore required by s.43(3) to construct the House using the same plans and specifications and to at least the same standards of work quality and quality of materials as were used for the construction of the Display Home.

Is there any difference specified?

110. Mr Carr pointed to a number of provisions in the Contract and other documents that he said required or permitted the House to be constructed in a different way from the Display Home and suggested that that would be sufficient to satisfy the section.

111. In the Contract, he drew my attention to Clause 52.0 which provides as follows:

> "The builder reserves the right to change specifications, materials and supplies without notice provided that the materials or specifications are of a similar finish and standard".

112. This clause does not specifically identify how any such changes will cause the House as constructed to differ from the Display Home. If any change that the Builder wished to make pursuant to this clause after the Contract was entered into would have the effect of constructing a house otherwise than by using the

same plans and specifications or the same quality of work or materials that were used for the Display Home, then it would be necessary for the Builder to first obtain a written variation of the Contract in which the difference was specifically identified in order to satisfy s.43(4). Without such a variation it does not seem to me that Clause 52 can be relied upon.

113. In the specifications, at the foot of each page, the following appears:

> "I/We acknowledge that this specification details the fixtures and fittings to be provided and may differ from those displayed."

Below that are the words:

> "Clarendon Homes Pty Ltd CAN 090 713 732 reserves the right to change nominated suppliers and specifications to items of similar quality".

The Owners' signatures appear between those two sentences. Neither satisfies the requirements of subsection (4) because no difference is specifically identified in either case.

114. Many of the items in the specification do not state with any particularity what is to be supplied but say that they are to be selected "…from builder's standard range", leaving it to the Owners to make the selection. That is not what was contemplated by the section. The specifications should have specified what was actually in the Display Home or specifically identified what was to be supplied and also specifically identified that it was different from the Display Home.

115. Further, an owner selecting something pursuant to such a provision in the specifications will not in itself amount to a variation of the contract. The selection might give rise to an estoppel in an appropriate case but will not be a specific identification in the contract of a difference for the purposes of subsection (4).

116. There is nothing else in the Contract that I have found which specifically identifies any difference between the house to be constructed pursuant to it and the Display Home.

117. There are 3 questions then to be answered in dealing with this part of the counterclaim. They are, in regard to each item claimed:

(a) Is what has been built different from the Display Home in terms of quality of work or materials or plans or specifications?

(b) If yes, was the difference specifically identified in the Contract or in a written variation pursuant to the Contract?

(c) If no to (b), are the Owners estopped from relying upon the absence of the specific identification in regard to that difference?

(d) If no to (c), what damage have the Owners suffered by reason of the difference?

118. Since the form of Contract used does not seem to have contemplated this interpretation of s. 43, most of this case will hinge upon (c). I now turn to the specific differences alleged.

Cupboard "Blum" hinges

119. The kitchen cupboards had "Blum" hinges. They are a special type of hinge which allows the drawers and doors to close slowly. They were in the Display Home, and indeed were demonstrated to the Owners, but they were not supplied in the House. As a result of terms of settlement entered into, the Builder agreed to fit Blum hinges but it fitted instead a different device having a similar effect. It was not disputes that Blum hinges should be installed and the Owners are entitled to the cost of installation.

Cracked kitchen bench top

120. It was not suggested that the kitchen bench top in the Display Home was cracked. The kitchen bench top in the House has a crack in it where the cook top has been cut out. The crack has been repaired so as to be scarcely noticeable but it is nonetheless cracked. The Owners are seeking replacement of the bench top. This part of the claim relates more to defective materials rather than non compliance with s.43 but strictly, since the Display Home did not have a cracked bench top there is a claim for breach of warranty on that account as well. I invite submissions as to the appropriate remedy.

One piece splashback

121. The splashback in the kitchen of the Display Home was in one piece. The splashback installed in the House is in two pieces. It was not specifically identified in the Contract that a two piece splashback would be supplied and so the Builder was required to install a one piece splashback. There is therefore a breach of warranty. I invite submissions as to the appropriate remedy.

Kitchen windows to bench level

122. The kitchen windows in the Display Home extended to the bench top and did not have an architrave along the bottom. The visual effect was very pleasing. The kitchen windows in the house as built have been built at a higher level and have such an architrave. The result is, to the Owners, less visually pleasing although cosmetic issues are often subjective. Was the difference in the windows "specifically identified" in the contract?

123. On sheet 9 of the contract drawings there are some kitchen details provided which clearly show that the windows are to be built above the bench level. The page has been signed by Mr and Mrs Zalega but the mere fact that the page in a contract or a plan or specification is signed does not necessarily mean that the contents of the page were brought to the attention of the persons whose signatures appear on it. In any event, what must be specifically identified to satisfy sub-section (4) is not how the House will be constructed, which will appear from the Contract, but how the construction of the House will <u>differ</u> from that of the Display Home and also, that it <u>will</u> differ in that respect. Although the kitchen detail shows the manner of construction it does not specify that it is a difference. Accordingly there was a breach of warranty but this claim seems to have been compromised by the terms of settlement. I invite submissions.

Shower tiles and sizes

124. A prominent feature of the Display Home was the very attractive tiling in the shower. The shower recesses were constructed from large (300 x 300) ceramic tiles. The middle strip of tiles from top to bottom contained a pattern in the glaze which was continued along the floor to produce a visually pleasing effect. The photographs of the shower recesses in the Display Home look very attractive indeed. What has been constructed is nothing at all like that *(Exhibits 97 and 98 and Exhibit 99 and 100).*

125. I have already noted that not one of the shower recesses has been constructed to the size required by the plans. In addition, the tiles have not been laid the same way they were in the Display Home. This is not an inconsequential matter because the tiles in the Display Home were a feature of the shower recesses. Quite apart from the dimensions, the shower recesses will need to be reconstructed simply on the tiling aspect so as to accord with what was in the Display Home.

The tiling of the bath hob

126. The tiles on the bath hob in the Display Home were mitred. The tiles laid in the House are butted together with the horizontal tiles overlapping the top edge of the vertical tiles. It was not suggested that this amounts to defective workmanship and there is no evidence that it is. However it is not the way the Display Home was constructed. There is nothing in the Contract that clearly identifies that these tiles are to be laid in a different manner from those in the Display Home by butting them together instead of mitring them. That being so there is a breach of warranty and I do not regard this as insignificant. The tiles should be replaced with mitred tiles.

Exhaust fans

127. The fan in the bathroom was placed in the ceiling outside the shower recess whereas in the Display Home it was placed above the shower recess. None of the fans are in the positions of the corresponding fans in the Display Home. It was suggested by Mr Keenan in cross examination that their positions were dictated by the presence of the overhead joists. However, as he acknowledged, the spacing between the joists is 600 mm and the bottom chord of each joist was only 90 mm wide. I cannot see that it was necessary to reposition the fans so far out of position. In any event, if the House had been built to the same plans as the Display Home, as it should have been, then the fans could have been put in the same position. There is no difference specifically identified in the Contract in regard to the positioning of any of the fans and so it is a breach of warranty by the Builder to have placed them where they are. I invite submissions as to the appropriate remedy.

En suite window off centre

128. The en suite toilet window is off to one side in the House, although it was almost in the centre of wall in the Display Home. As built, it looks quite odd. This

difference was not specifically identified in the Contract and so there was a breach of warranty by the Builder in constructing it in this way.

129. Since I have determined that the brickwork needs to be replaced the centring of the window should not be a major cost but the Owners are entitled to have it centred.

Laundry tap nozzle

130. The outlet for the laundry tap in the Display Home was a square shape and was accompanied by tap work of a particular design. The outlet in the House is curved with a mixer tap mounted on the wall. It appears that the plumbing fittings were selected by the Owners and that the spout is the one that goes with the taps that they selected. Since they have brought about this difference by their own action the Builder cannot be held responsible. They requested the difference, the Builder acted upon that request by installing what they wanted. The Owners are therefore estopped from alleging that the tap and nozzle are otherwise than as required by the Contract.

Glazing certificate for "low E" Glass

131. Special glass was to be incorporated in the large bi-fold doors in the family and media rooms. The Owners suspect that the special glass was not provided and they have called upon the Builder to provide some evidence that the glass installed is in fact low "E" glass. The Builder has failed to provide such evidence. It is apparently not possible to determine what sort of glass it is without destructive testing. This special glass added an extra $1,795 to the price of the house.

132. The documents relating to the purchase of this glass ought to have been produced in discovery. If they were not then that should have been taken up before now if an issue were to be made of it. Since no breach of contract is proven no relief can be granted. It is not appropriate to order the Builder to prove that it has not broken the contract in this respect.

133. In any event, since there is no direct allegation that this glass was not used, there is no issue estoppel and the matter can be pursued another time if it should turn out that the proper glass was not installed.

Lower alfresco ceiling

134. The alfresco ceiling in the Display Home was lower than the ceiling the Builder has constructed. The Owners consider that the lower ceiling in the Display Home had a more pleasing appearance. The photograph of the ceiling in the Display Home certainly looks quite different from what has been built. There was no specific identification as to the difference in the Contract and so the Builder was bound to construct it to be the same as the Display Home. That being so there is a breach of warranty in regard to this item. I invite submissions as to the appropriate remedy.

Install rainwater heads in balcony overflow spitter

135. I have already dealt with this item above and liability is accepted.

Stair handrail mounts

136. The handrail in the staircase in the Display Home was supported by metal brackets screwed to round wooden bosses that were mounted on the walls. The bosses were stained with a timber colour. In the House, the brackets are attached to what appear to be particle board bosses that have been painted to match the walls. This difference is not identified in the contract and so there has been a breach. This is the substitution of a cheaper alternative to what was in the Display Home. The mounts should be replaced.

Mirrored doors

137. The Display Home had 4 mirrored doors and only 3 were supplied. The Builder has offered to replace the 3 doors with 4 doors as required and the Owners are certainly entitled to that.

Extra clothes rail

138. Liability is also accepted for this item. The rail must be supplied.

Painted rendered brickwork façade

139. It is not disputed that the discoloured paintwork on the façade needs to be done.

Stainless steel hinges

140. The stainless steel hinges on 3 external doors are showing signs of corrosion and need to be replaced. I accept that to be the case.

Mis-matched lintels

141. This claim was established and can be attended to in the course of the replacement of the brickwork.

Distorted toilet bowl

142. One of the toilet bowls is distorted and, according to Mr Cross, it is a second. The Builder denies that it is a second but whether that is so or not is not the issue. This bowl is distorted and so is not what the contract required. The bowl will need to be replaced.

Stainless steel balcony rail

143. The Display Home had a stainless steel balcony rail. The Contract specifications called for a painted rail and that is what has been constructed. The difference was not specifically identified in the Contract and so the stainless steel rail ought to have been supplied. The difference is substantial. The Owners were entitled to a stainless steel balcony rail. They were later told they would receive a painted one. I invite submissions as to the appropriate remedy.

The Media room and Family room glass doors

144. One of the doors is said to be 30mm too narrow. That does not seem to be disputed and since the difference is not identified in the Contract this amounts to a breach. The replacement of the door on this account alone does appear to be somewhat excessive. I invite submissions as to the appropriate remedy.

145. In regard to the other door however, that was supplied pursuant to a variation agreed to by the Owners. They asked for that door and the Builder supplied it. They are estopped from denying that it is in accordance with the Contract.

The appearance of the slab

146. Mr Cross says that in order to comply with the BCA the landscaping will have to finish below the bottom of the rebate in the slab, exposing a strip of the edge of the concrete slab to view. There was a great deal of discussion about how that would be dealt with. The Display Home was built on strip footings and so no slab freeboard was visible because there was none. The fact that the House was to be built on a slab and not on strip footings, although clear enough on the plans to someone with knowledge of building, was not specifically identified in the Contract and so the House should have been built on strip footings.

147. In terms of remedy however, I am not satisfied that the ground level cannot be landscaped up to the bottom course of brickwork, so long as it is graded away from the House. It does not seem to me that this part of the landscaping is required to be concrete as Mr Cross suggested. I invite submissions as to the appropriate remedy.

How are damages to be assessed?

148. The measure of damages for defective workmanship by a builder has, since the High Court decision in *Bellgrove v Eldridge* (1954) 90 CLR 613, always been assessed in accordance with the principles stated in that case.

149. In *Bellgrove*, a house was built with foundations and brickwork that were so defective they could not be rectified. The owner sought the cost of demolishing the house and erecting another in its place. The builder said that the house, albeit defective, had some value and argued that the measure of damages was limited to the diminution in value caused by the defects, that is, the value of the defective house and land as compared with the value that the house and land would have had if the work had been in conformity with the contract. In rejecting this argument the High Court (Dixon CJ, Webb and Taylor JJ) said at p.617:

> "In the present case, the respondent was entitled to have a building erected *upon her land* in accordance with the contract and the plans and specifications which formed part of it, and her damage is the loss which she has sustained by the failure of the appellant to perform his obligation to her. This loss cannot be measured by comparing the value of the building which has been erected with the value it would have borne if erected in accordance with the contract; her loss can, prima facie, be measured only by ascertaining the amount required to rectify the defects complained

of and so give to her the equivalent of a building on her land which is substantially in accordance with the contract." (emphasis in original)

150. However the members of the Court added an important qualification:

> ”The qualification, however, to which this rule is subject is that, not only must the work undertaken be necessary to produce conformity, but that also, it must be a reasonable course to adopt. No one would doubt that where pursuant to a building contract calling for the erection of a house with cement rendered external walls of second-hand bricks, the builder has constructed the walls of new bricks of first quality the owner would not be entitled to the cost of demolishing the walls and re-erecting them in second-hand bricks. In such circumstances the work of demolition and re-erection would be quite unreasonable or it would, to use a term current in the United States, constitute "economic waste". (See Restatement of the Law of Contracts, (1932) par. 346). We prefer, however, to think that the building owner's right to undertake remedial works at the expense of a builder is not subject to any limit other than is to be found in the expressions "necessary" and "reasonable", for the expression "economic waste" appears to us to go too far and would deny to a building owner the right to demolish a structure which, though satisfactory as a structure of a particular type, is quite different in character from that called for by the contract. Many examples may, of course, be given of remedial work, which though necessary to produce conformity would not constitute a reasonable method of dealing with the situation and in such cases the true measure of the building owner's loss will be the diminution in value, if any, produced by the departure from the plans and specifications or by the defective workmanship or materials.
>
> As to what remedial work is both "necessary" and "reasonable" in any particular case is a question of fact.”

151. On the basis of this qualification it has been thought that is always open to a court, or a tribunal such as this, to find that, having regard to the nature or extent of a particular defect, it would be unreasonable to award the cost of rectification and that a lesser monetary award could be made instead to adequately compensate the owner for the defect. Many defects are relatively minor and quite disproportionate to the cost of rectification. For example, if a house were erected a few millimetres out of position on a building site it would usually be quite unreasonable to award the owner the cost of demolishing the house and re-erecting it in the correct position.

152. Mr Sedal submitted that this approach has now been called into question by the recent case of *Tabcorp Holdings v. Bowen* [2009] 253 ALR 1, a case upon which he relied.

The Tabcorp Holdings case

153. In *Tabcorp*, a tenant demolished the foyer of a leased building contrary to the wishes of the landlord and in breach of a covenant in the lease which required the landlord’s permission for any alteration to the premises. Although acknowledging that what it did was in breach of the covenant it argued that all that it should be ordered to pay was the difference between the value of the

building before the alteration and its value afterwards. Damages were assessed in that manner by the Trial Judge but the decision was overturned on appeal to the Full Federal Court. On appeal to the High Court, it was held that, as the landlord was contractually entitled to the preservation of the leased premises it was entitled to damages equivalent to the cost of restoring them to the condition they would have been in had the covenant not been breached.

154. It was an unusual case. The tenant's conduct was found to be in "contumelious disregard" of the landlord's rights and its wishes. The work involved the destruction of a foyer that had only recently been constructed at considerable expense to the landlord's own taste. The tenant knew that it needed the Landlord's consent for the work, it knew the landlord did not consent and yet notwithstanding all of that, it decided to proceed.

155. The High court described the covenant as an express negative covenant. Had the landlord been aware beforehand of the intended breach by the tenant, it could have obtained an injunction to restrain what occurred and thereby preserved the status quo. By proceeding clandestinely, the tenant avoided that possibility. Nevertheless, the Court considered that in assessing damages it should be borne in mind that the purpose of the covenant was to protect the legitimate interest of the landlord to have the existing condition of the premises preserved.

156. In the present case, the legitimate interest of the Owners was to have the House constructed in accordance with the Contract. That in turn required construction to be in accordance, not only with the construction documents but also with all relevant legal requirements, which calls in the Builder's obligation to comply with s.43. That is quite a different situation. The Builder was not seeking to do something that equity might have restrained it from doing. It was performing a contract to construct a house. It did so defectively and, in regard to the Display Home, in disregard of its obligations under s. 43.

157. As to the normal rule as to the assessment of damages in contract, the Court in *Tabcorp* said (at p.6):

> "The "ruling principle"… confirmed in this Court on numerous occasions…, with respect to damages at common law for breach of contract is that stated by Parke B in *Robinson v Harman* (1848) 154 ER 363 at 365):
>
> > "The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed."

158. The Court referred with approval to the judgment of Oliver J in *Radford v. De Froberville* [1977] 1 WLR 1262 and to the following passage (at p. 1270):

> "Now, it may be that, viewed objectively, it is not to the plaintiff's financial advantage to be supplied with the article or service which he has stipulated. It may be that another person might say that what the plaintiff has stipulated for will not serve his commercial interests so well as some other scheme or course of action. And that may be quite right. But that, surely, must be for the plaintiff to judge. Pacta sunt servanda. If he contracts for the supply of that which he thinks serves his interests –

be they commercial, aesthetic or merely eccentric – then if that which is contracted for is not supplied by the other contracting party I do not see why, in principle, he should not be compensated by being provided with the cost of supplying it through someone else or in a different way, subject to the proviso, of course, that he is seeking compensation for a genuine loss and not merely using a technical breach to secure an uncovenanted profit."

159. The Court in *Tabcorp* referred to the statement in *Bellgrove v. Eldridge*, to the effect that it must be reasonable in the circumstances to incur the cost of the work necessary to produce conformity with the contract, but said that the example given about new bricks instead of second hand bricks suggested that the "reasonableness test" will only be satisfied in "fairly exceptional circumstances" *(see p.8 of the decision).*

160. In *Tabcorp*, the Tenant relied on *Ruxley Electronics and Construction Ltd v Forsyth* [1994] 1 WLR 650, as did Mr Carr for the Builder in the present case. In that case the builder had constructed a swimming pool that was shallower than the contract required. The House of Lords held that the expenditure necessary to rectify the defect was out of all proportion to the benefit to be obtained from doing so. Their Lordships said that, in such a case, the appropriate measure of damages was not the cost of reinstatement but the diminution in the value of the work occasioned by the breach, even if that would result in a nominal award. In rejecting the owner's claim for the cost of removing and rebuilding the pool to the correct depth, they considered the following matters relevant (pp.354-355:

"The trial judge made the following findings which are relevant to this appeal: (1) the pool as constructed was perfectly safe to dive into; (2) there was no evidence that the shortfall in depth had decreased the value of the pool; (3) the only practicable method of achieving a pool of the required depth would be to demolish the existing pool and reconstruct a new one at a cost of £21,560; (4) he was not satisfied that the respondent intended to build a new pool at such a cost; (5) in addition such cost would be wholly disproportionate to the disadvantage of having a pool of a depth of only 6 feet as opposed to 7 feet 6 inches and it would therefore be unreasonable to carry out the works; and (6) that the respondent was entitled to damages for loss of amenity in the sum of £2,500."

161. The Court in *Tabcorp* queried whether, on one view, the result arrived at in *Ruxley* could be reconciled with what Oliver J had said in *Radford* but nonetheless quoted the above passage without apparent disapproval. It observed that the facts in *Ruxley* were "quite exceptionable" and were distinguishable from the case before it.

162. In *Tabcorp*, in order to secure for the landlord the benefit of the covenant it was necessary for reinstatement damages to be paid and it was found to be not unreasonable for the landlord to insist upon such payment. On the facts of that case, that can scarcely be doubted. In so finding, the court said (at p.9):

"The Tenant's submissions rested on a loose principle of "reasonableness" which would radically undercut the bargain which the innocent party had contracted for and

make it very difficult to determine in any particular case on what basis damages would be assessed. That principle should not be accepted."

163. As stated in *Bellgrove*, the question of reasonableness is one of fact. Mr Sedal submitted, correctly I think, that the Builder bears the onus of proof that it would be unreasonable to award the full rectification cost. That was the view taken by Rares J of the Federal Court in *Tabcorp* and I respectfully agree.

164. Damages for breach of contract are compensatory. To use the words of Oliver J in *Radford*, the innocent party is seeking compensation for a genuine loss and not merely using a technical breach to secure "an uncovenanted profit".

165. I think the following principles concerning the assessment of damages for the breach by a builder of a domestic building contract can be spelled out from the cases referred to:

    (a) Where the work and materials are not in conformity with the contract, the prima facie measure of damages is the amount required to rectify the defects complained of and so give to the owner the equivalent of a building which is substantially in accordance with the contract *(Bellgrove);*

    (b) The qualification, however, to which this rule is subject is that, not only must the work undertaken be necessary to produce conformity, but that also, it must be a reasonable course to adopt *(Bellgrove);*

    (c) Reasonableness is a question of fact *(Bellgrove)* and the onus of proving unreasonableness so as to displace the prima facie measure is upon the builder. It is the builder who is seeking to displace the prima facie position *(Tabcorp per Rares J.)*;

    (d) In considering whether it would be unreasonable to award the cost of rectification, the tribunal should consider all the circumstances of the case before it. The nature and significance of the breach should be looked at in terms of the bargain the parties had and the relative importance of the breach within the context of the contract as a whole The decision in *Ruxley* suggests that account can be taken of the following matters at least:

        (i) Whether and to what extent the work, although not in conformity with the contract, is nonetheless serviceable;

        (ii) Whether and to what extent the defect has affected the value of the work or the building as a whole;

        (iii) The cost of rectification, the proportion that the breach bears to the cost of rectification and whether the cost of rectification would be wholly disproportionate to the real damage suffered by reason of it;.

        (iv) The likelihood that, if rectification cost is awarded, the sum so ordered will actually be spent on rectification. Obviously, a successful plaintiff can spend his damages as he sees fit but this may be a useful indicator of whether the amount sought is greater than the real loss suffered.

Quite obviously, this list is by no means exhaustive. Other matters might be relevant according to the facts of the particular case. For example, the innocent party might have elected to accept the non-conforming work, whether by taking the benefit of it or otherwise; the owner might have waived the breach or so acted after becoming aware of the breach as to create an estoppel or to make rectification impracticable. There might also be many circumstances in which it could be argued that an award of rectification cost would give the innocent party an uncovenanted profit *(Radford)*.

(e) If it would be unreasonable in the circumstances to award rectification cost, what damages will compensate the owner for the breach? Matters to be taken into account might include:

(i) the magnitude of the breach;

(ii) the significance of the breach to the owner;

(iii) whether the owner, after becoming aware of the breach, has acted unreasonably so as to make rectification more expensive;

(iv) whether and to what extent an owner might have accepted a benefit from the non-conforming work that should be taken into account;

(v) since the breach is not to be rectified, the reasonable cost of mitigating the effect of it;

(vi) compensation for any lesser appearance or functionality;

(vii) loss of amenity;

(viii) if it appeared likely that less than complete rectification would be undertaken, the cost of that.

Again, this is not intended to be an exhaustive list. It must not be forgotten that the object is to fully compensate the innocent party for the breach but not provide him with an "uncovenanted profit".

Conclusion

166. It is not necessary to consider many of the matters argued, such as whether there was misrepresentation or a collateral contract.

167. I informed the parties that, once I had made my findings of fact and the relevant principles to be applied I would have the matter re-listed in order to receive further submissions as to damages. That will include liquidated damages for delay and the date to which they should be calculated. I therefore make no final determination at the moment as to what relief will be granted.

168. I direct the Principal Registrar to re-list this matter for further submissions as soon as practicable.

Rohan Walker

Senior Member