VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO BP741/2015

CATCHWORDS

DOMESTIC BUILDING – Assessment of damages – reasonable costs of completing building works following termination of the builder's employment – whether owners allowed a reasonable discretion in undertaking rectification and completion of the works – mitigation of loss.

FIRST APPLICANT	Matthew Marchant Clark
SECOND APPLICANT	Janelle Robyn Clark
RESPONDENT	Steven John Boehm t/as Domain Homes and Developments
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Hearing
DATE OF HEARING	11 November 2015
LAST DATE FOR FILING SUBMISSIONS	24 November 2015
DATE OF ORDER	27 November 2015
CITATION	Clark v Boehm (Building and Property) [2015] VCAT 1879

ORDER

1. The Respondent must pay the Applicants $104,617.95 plus interest in the amount of $4,874.05, making a total of $109,492.

2. The Respondent must pay the Applicants' costs of this proceeding to be agreed between the parties, failing which to be assessed by the Victorian Costs Court in accordance with the *County Court Scale of Costs* on a *Standard* basis.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicants	Mr Sedal of counsel
For the Respondent	Mr S Boehm in person

REASONS

1. The Applicants are the owners of a property located in Buninyong, Victoria (**'the Owners'**). They entered into a contract with the Respondent dated 26 November 2012, under which he agreed to construct a residential dwelling on their property.

2. The building works commenced on 15 January 2013 and progressed to *Lock-up Stage*, at which point the Builder ran into financial difficulties and was unable to further progress the building works.

3. In accordance with the relevant clauses of the contract, on 21 October 2013 the Owners gave notice to the Respondent that he was in substantial breach of the contract. The breach of contract was not remedied within the period stated in that notice and as a consequence, by further notice dated 22 November 2013, the Owners terminated the contract.

4. Following termination of the contract, the Owners successfully applied for a building permit to complete the building works as owner-builders. To that end, they engaged another builder to assist them in undertaking some of the work and in supervising separate contractors to complete and rectify the works under the contract.

5. On 13 May 2014, an occupancy permit was issued by the relevant building surveyor, following which the Owners occupied their newly constructed dwelling. At that stage all of the works under the building contract had been completed, except for the pergola and the carport. These two items of work are yet to be completed.

6. On 19 November 2014, the Owners sent a written demand to the Respondent that he pay them the cost overrun in completing the building works, which at that time was thought to be $128,047.61. The demand was not answered by the Respondent and as a consequence, the Owners issued this proceeding on 1 June 2015.

7. On 9 July 2015, the Tribunal convened a directions hearing. Mr Sedal of counsel appeared on behalf of the Owners and the Respondent appeared in person. Orders were made requiring the Owners to file and serve *Amended Points of Claim* by 23 July 2015 and for the Respondent to file and serve his *Points of Defence* by 31 August 2015. A further order was made that the proceeding be listed for a compulsory conference to be conducted on 22 September 2015.

8. The Owners filed and served their *Amended Points of Claim* on 29 July 2015. However, the Respondent failed to file or serve his *Points of Defence*. Moreover, the Respondent failed to attend or have anyone appear on his behalf at the compulsory conference on 22 September 2015. As a consequence, the following orders were made by the Tribunal on 22 September 2015:

1. The date by which the Respondent must file with the Tribunal and serve on the Applicants his *Points of Defence* is extended to **12 October 2015**.

2, **In the event that the Respondent fails to comply with Order 1 of these orders, then pursuant to s 78(2)(b) of the *Victorian Civil and Administrative Tribunal Act 1998* orders will be made without further notice that the proceeding is summarily determined in favour of the Applicants as against the Respondent on the question of liability with quantum, costs and interest to be assessed.**

3. I direct the Principal Registrar to serve the Respondent with a copy of this order together with a copy of s 78 of the *Victorian Civil and Administrative Tribunal Act 1998*.

4. **This proceeding is listed for final hearing on 11 November 2015 commencing at 10.00 am at 55 King Street, Melbourne with an estimated hearing time of one half day. Costs may be ordered if the hearing is adjourned or delayed because of a failure to comply with directions**.

9. The Respondent failed to file or serve his *Points of Defence* by 12 October 2015 or at all. Consequently, the Tribunal ordered that:

> Having regard to the orders made 22 September 2015, and the failure of the Respondent to file Points of Defence by 12 October 2015 or at all, the Tribunal orders:
>
> 1. The proceeding is, pursuant to s 78(2)(b) of the *Victorian Civil and Administrative Tribunal Act* 1998, determined in favour of the Applicants on the question of liability, with quantum, costs and interest to be assessed.
>
> 2. **The hearing listed for 11 November 2015 commencing at 10.00 am at 55 King Street, Melbourne is confirmed. The hearing will proceed only for the purpose of assessing the quantum of the Applicants' claim, interest and costs**.

10. The proceeding, insofar as it concerned quantum, costs and interest, was heard on 11 November 2015. The Respondent appeared on that day, as did Mr Sedal of counsel, who appeared on behalf of the Owners.

THE CLAIM

11. By order dated 22 September 2015, leave was given to the parties to adduce evidence by affidavit at the hearing, on condition that any deponent of an affidavit was to be made available for cross-examination. In accordance with those orders, the Owners filed an affidavit of Matthew Clark sworn on 10 November 2015. That affidavit set out the historical chronology of the dispute and detailed what expenses the Owners incurred in completing and rectifying the building works following termination of the contract.

12. Exhibit MC-14 to Mr Clarke's affidavit is a spreadsheet which sets out all of the costs which he said had been incurred in completing and rectifying the works, together with the amounts the Owners had paid to the Respondent under the contract. These amounts were reconciled against an adjusted contract price, having regard to various variations which were conceded by the Owners, to arrive at a net figure representing the cost over-run in completing and rectifying the works. In addition, the spreadsheet sets out what the Owners claimed by way of liquidated damages under the contract up to the date of termination of the contract and general damages from that date until the date they occupied the property.

13. During the latter part of the hearing, the Owners filed a revised spreadsheet, which amended aspects of Exhibit MC-14 to take into account concessions made by the Owners after having heard the Respondent's evidence. According to that revised spreadsheet, the Owners' claim is as follows:

    (a) Actual cost to complete: $210,251.76

    (b) Pending costs to complete: $23,132.88

    (c) Costs to rectify: $18,765.67

    (d) Liquidated damages for delay: $3,035

    (e) General delay damages: 9,828.57

    (f) Subtotal: $266,311.78

    (g) Less amount left to be paid: $125,553.54

    (h) Agreed extras (variations): $9,442.70

    (i) Subtotal: $134,996.24

    (j) Cost over-run/claim: $130,017.64

14. In addition to the above amounts, the Owners claim interest on the claimed amount, to be calculated from the date of the letter of demand; namely 19 November 2014 or alternatively, the date when this proceeding was issued. They also claim their costs of this proceeding.

15. As indicated above, the question of liability has been summarily determined in favour of the Owners. The Respondent did not seek to agitate that question further at the hearing before me. However, the Respondent submitted that there are aspects of the Owners' claim for completion costs that he felt were unreasonable. Moreover, he argued that the adjusted contract price was higher than what the Owners contended. At the commencement of the hearing, the Respondent filed a written outline of his position, which summarised the Owners' claim somewhat differently to the spreadsheet referred to above. In particular, the Respondent estimated that the total cost to complete the works was $164,838.34. Moreover, he said that agreed variations increased the contract price by $19,963.88.

16. Although the Respondent gave evidence that he had made a claim to extend time under the contract, he did not ultimately dispute the Owners' claim for liquidated damages for delay or general damages for delay. Further, the Respondent did not dispute what had already been paid under the contract. However, the Respondent argued that interest and costs should not be awarded in favour of the Owners. In that regard, he submitted that he was unaware that these two heads of damage were being claimed against him.

17. In order to afford procedural fairness, I gave the Respondent leave to file and serve written submissions on the question of costs and interest by 24 November 2015; and indicated that I would not determine that issue until I had considered any such submissions or if no submissions were filed, the time for filing those submissions had expired. No written submissions have been filed by the Respondent in relation to the Owners' claim for costs and interest. Accordingly, I will determine that issue based on the oral submissions made by the parties during the hearing on 11 November 2015.

COST TO COMPLETE

ACTUAL COSTS INCURRED

18. The revised spreadsheet filed by the Owners is linked to the affidavit of Mr Clarke. It amends an earlier spreadsheet, which is exhibited to that affidavit. That spreadsheet details all expenditure incurred by the Owners in completing and rectifying the works, save and except for completion of the pergola and the carport. Quotations to undertake those two items of work have, however, been exhibited or tendered in evidence. In addition to detailing all expenditure, copies of all invoices relating to that expenditure have also been exhibited to Mr Clarke's affidavit.

19. Although the Respondent does not take issue with most of the items of expenditure set out in the schedule, there are some items which he submits are overpriced and therefore unreasonable or related to work that was not within the scope of work contemplated by the contract.

20. The general rule relating to damages for breach of contract, as stated by Park B in *Robinson v Harman*,[1] is:

> … that where a party sustained 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.[2]

21. However, the rule in *Robinson v Harman* is subject to limitation. In *Belgrove v Eldridge*,[3] the High Court considered a situation where a house was constructed with insufficient foundations. The owner sued the builder claiming the cost of demolition and rebuilding. In considering the question of damages, their Honours stated:

[1] [1848] 154 ER 363.
[2] Ibid at 365.
[3] [1954] 90 CLR 613.

> 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 …

22. As the above authorities illustrate, in contract, damages are wholly compensatory. The fundamental purpose is to put the person whose rights have been violated, in the same position, so far as money can do, as if those rights had been observed. In building cases, where a builder repudiates a contract and that repudiation is accepted by an owner, the owner is entitled to damages flowing from the breach. That would include the cost over-run of completing the works and rectifying any defects in it, provided the cost of completing and rectifying the works is reasonable. Obviously, that would not include the cost of undertaking work which was not part of the original agreement. However, in the case where an owner lawfully terminates a building contract and then engages others to complete or rectify the works, the courts and this Tribunal have generally accepted that some discretion should be afforded to the owner in undertaking that task.

23. In particular, Mr Sedal referred me to *Serong v Dependable Developments Pty Ltd*,[4] which he submitted was on all fours with the present proceeding. In *Serong*, the Tribunal found that the owners had determined the building contract following the builder's repudiation. As is the case in the present proceeding, the owners in *Serong* then undertook completion and rectification of the building works themselves with the assistance of a supervisor or clerk of works. There were some aspects of the work undertaken by the owners which the builder contended was unreasonable or overpriced. In that regard, Deputy President Macnamara (as he then was) stated:

> 311. Describing the situation in which the Serongs found themselves following termination, the learned editor of *Hudsons Building and Engineering Contracts* (11th Edition) (I.N. Duncan Wallace, QC) said:
>
> > An owner completing the contract after a determination, whether at common law or under a contractual clause, is not in the position of a mortgagee in possession whose actions are jealously scrutinised. Subject to the principles of mitigation of damage, whereby any obviously unreasonable conduct will serve to reduce the damages otherwise recoverable by an innocent party for breach of contract, the owner, though naturally bound to account to the contractor and those claiming under him (as, for example, assignees of the sums due under

[4] [2009] VCAT 760.

> the contract) in computing the cost of completion and also in making any necessary allowances for differences between the final work and the originally contemplated contract work, will be allowed a reasonable discretion in the way in which he completes, whether his determination results from a decision at common law or under the contractual termination clause condition on default.[5]

24. In *Serong*, Deputy President Macnamara referred to the judgment of Williams J, of the Supreme Court of New Zealand, in *Fulton v Dornwell*,[6] where his Honour stated:

> Now when a contractor gets into difficulties … and the employer in consequence put to the extreme inconvenience and annoyance of having himself to complete the work I think the employer should be allowed a large discretion in the way in which he completes it, and that the contractor, in the absence of fraud or extreme negligence, cannot complain if the work be carried out in an uneconomical manner.
>
> … every allowance should be made in considering the conduct of the employer for the position in which the default of the contractor has placed them.

25. As was the case in *Serong*, I also adopt the reasoning of Williams J in *Fulton v Dornwell*. In my view, it is not unreasonable to expect that the cost of having to engage an alternative builder to complete and rectify work of the original builder will attract a cost higher than what would be the case had the original builder completed the works itself. No doubt there are risks which a completing builder will need to take into account when undertaking such work, given that the completing work may be underpinned by or rely upon the integrity of work already done by the original builder and which may be covered over. Moreover, as highlighted by the Respondent in the present case, completing trades may exploit the vulnerability of a home owner by increasing their hourly rates to what they would otherwise charge if tendering for new work. Finally, one must not discount that when the original contract price was formulated, the cost of building may have been less than the cost of building at the time when completion works were undertaken. All these factors make it likely that the cost of completing will inevitably be more expensive in the hands of an owner builder attempting to procure trades to finish work, than would otherwise be the case had the original builder continued with the works.

26. With these observations in mind, I make the following findings in relation to the expenditure items that the Respondent contests.

[5] Ibid at paragraph [311].
[6] (1885) 4 NZLR 207.

Completion of the veranda

27. The Respondent referred to a number of invoices which related to the work of completing the veranda. According to the Respondent, half that work had been completed by him before the contract was terminated. He said that most of the materials were already on site and that the reasonable cost of completing the veranda should have been in the vicinity of $4,500. However, the invoices exhibited to Mr Clarke's affidavit, and referred to in the schedule, add up to approximately $15,000 for that work. Further scrutiny of the invoices, however, revealed that the aggregate sum of those invoices included the iron roof cladding, which was not taken into account by the Respondent in his $4,500 estimate of completion costs. Although I accept that it is feasible that the cost of completing the veranda, including the roof cladding, may have been less had the Respondent undertaken that work himself, there is insufficient evidence for me to be satisfied that the amount paid by the Owners is unreasonably excessive.

Completion of subfloor foam insulation

28. Similarly, the Respondent submitted that the cost of installing insulation in the subfloor was excessive. Again, he said that the materials were already on site and that his labourer would have been able to complete that work at a fraction of the cost which has been charged to the Owners. I accept that the Respondent would have been able to have completed that work at a cost significantly less than what was charged to the Owners. However, for the reasons which follow, I do not consider this factor, of itself, militates against the Owners being able to successfully claim the actual cost of this work.

29. In relation to the installation of the foam insulation, the higher cost to the Owners stems from the fact that the work, which involved cutting foam and inserting it between floor joists, was undertaken or organised by the Owners' carpenter/supervisor, Andrew Haley, at a hourly rate of $30 per hour, as opposed to the $20 per hour rate, which the Respondent said his labourers would have charged him. Moreover, the amount charged comprised 53 hours of labour. Given that the work required accessing the subfloor of the dwelling and effectively retro-fitting the foam insulation, with two tradespersons working together (one cutting and one fitting), I do not consider that the amount charged was unreasonable.

Timber decking

30. The respondent further contended that there were aspects of the work which were not part of his contract. In particular, there are two items in the schedule, which are described as *decking for entry into the back (laundry) door of house and outside meals area*, which are contested by the Respondent. The Respondent said that there was no decking required under the contract. He referred to sections of the written contract and the specifications, together with the approved drawings, which all indicated that there was no decking to be provided to the outside of the dwelling. The total amount said to be attributed to that work is $14,896.69.

31. I accept the Respondent's evidence in this regard. Both the contract and the specification are silent as to any decking to be undertaken as part of the contract works. The structural engineering drawings specify concrete paving under the veranda and a non-structural infill slab in the courtyard outside the rear door. There is no decking depicted on the drawing and indeed, no flooring or paving depicted outside the meals area. In my view, the work of providing decking for the entry into the rear door of the house and outside the meals area is not work that was contemplated under the contract. Accordingly, the amount of $14,896.69 is to be deducted from the Owners' claim for the cost to complete.

Floor and wall tiles

32. The Respondent also referred to the cost of supplying floor and wall tiles. He said that under the contract, the cost of floor and wall tiles was a prime cost item of $3,698. Therefore any amount over and above that allowance was not a cost over-run because it would have resulted in the original contract price increasing in any event.

33. The Owners conceded this point and now accept that the tiles purchased by them exceeded the prime cost allowance by $1,297.90. Consequently, this amount was deducted from the original amount claimed and is now reflected in the revised amount of $210,251.76, attributed to the actual cost to complete the works.

PENDING COSTS OF COMPLETION

34. As indicated above, there are two items of work yet to be completed and which, nevertheless form part of the original work under the contract. Those items are the construction of the pergola and carport.

35. The Owners have tendered copies of two quotations relating to each of these components of work. In relation to the carport, a quotation from *Haley Building & Construction* dated 22 July 2014 prices that work at $18,282.88. The Respondent initially challenged this price, on the basis that the roof trusses for the carport were already on site. However, the Respondent conceded under cross-examination that, given the period of time since those materials were delivered to site, it was likely that they were damaged through weathering and would need to be replaced. He conceded that in those circumstances, the price was reasonable.

36. In relation to the pergola, the Owners tendered a quotation in the amount of $4,850. The Respondent conceded that this price was reasonable.

37. Accordingly, I find that the reasonable costs of completing the carport and the pergola are $18,282.88 and $4,850 respectively.

Other items which differ to the Respondent's costs of completion

38. Although there are other minor components of the completion work undertaken by the Owners, which the Respondent contends are excessive, I am of the view that, save for the decking work and the additional wall and floor tiles, the actual costs of completion are, nevertheless, reasonable.

39. In that regard, I note that the Respondent's estimate of the total cost to complete is $164,838.34 inclusive of GST but excluding any builder's margin.[7] That amount also excludes any allowance for the decking, which I have found not to be part of the scope of the works under the contract. That compares to the Owners' actual and pending costs of $233,384.64, of which $14,896.90 spent on the decking is to be deducted, making a revised total of $218,487.74, inclusive of GST and builder's margin.

40. Under the contract, the Respondent had specified that 20% was to be added to any additional work, by way of builder's margin. If 20% is assumed to be a reasonable margin, the Respondent's estimate of the total cost to complete ($164,838.34) plus builder's margin of 20% would increase the Respondent's estimate of the cost to complete to $197,806.

41. In my view, the difference of approximately $20,000 is explained by the factors which I have referred to above. Indeed, simply increasing the builder's margin by 10% to 30% to account for those factors effectively eliminates the difference. This rudimentary check comparison reinforces my finding that the actual and pending costs of construction are reasonable.

DELAY DAMAGES

42. Clause 40.0 of the contract provides that:

> 40.0 If the Building Works have not reached Completion by the end of the Building Period the Owner is entitled to agreed damages in the sum set out in Item 9 of Schedule 1 for each week after the end of the Building Period to and including the earlier of:
>
> - the date the Building Works breach Completion;
> - the date of this Contract is ended; and
> - the date the Owner takes Possession of the Land or any part of the Land.

43. Item 9 of Schedule 1 states that if no amount is stated, then the default amount is $250 per week. The Owners contend that the contract completion date was 29 August 2013 and that the contract was terminated by notice dated 22 November 2013. Therefore, they claim to be entitled to liquidated damages over that period at $250 per week, amounting to $3,035.

44. Although the Respondent gave evidence that he had sought a 28 day extension of time during the course of the building project, very little detail of that extension of time claim was provided. In particular, no documents were produced to verify that the extension of time claim was made or even if

[7] Builder's margin represents a percentage uplift to account for supervision, administration and profit.

made, whether the delay was critical to the Respondent's construction program.

45. Apart from the Respondent's general contention that an extension of time was sought, nothing else was advanced to contest that the Owners were entitled to liquidated damages amounting to $3,035. In the absence of any details or documentary evidence corroborating that time was extended under the contract, I find that time was not extended under the contract. Consequently, I will allow the amount claimed.

46. The Owners also claim damages at common law for the period from the date of termination until the date that they occupied the Property. In that respect, they claim 24 weeks and four days at $400 per week, from the period 22 November 2013 until 13 May 2014, the date when the occupancy permit issued. The amount of $400 per week is calculated by reference to the rent paid by the Owners to occupy alternative premises. Documentation was produced to verify that expenditure. Again, the Respondent did not contest that element of the Owners' claim. Accordingly, I will allow the amount of $9,828.57 claimed.

RECTIFICATION COSTS

47. The total amount claimed by the Owners in respect of rectification work is $18,765.67. This amount represents two elements of work; namely, repair of the front door and repair of the weatherboards, which had to be removed and reinstated because they had been incorrectly fixed.

48. As liability has been summarily determined against the Respondent, the question as to whether the front door or the weatherboards were defectively installed is no longer in dispute. However, the Respondent argued that it should have been given an opportunity to repair the weatherboards rather than having to bear the cost of a third party undertaking the work. In that regard, the Respondent said that he could have arranged for the subcontracting carpenters who fitted the weatherboards to return to the site and undertake rectification work at their own cost. This would have meant that the Owners would not have incurred any expense.

49. As I understand the Respondent's argument, the Owners' failure to seek his assistance in carrying out rectification work amounts to a failure to mitigate their loss and damage. In *Tuncel v Renown Plate Co Pty Ltd*,[8] the Full Court of the Supreme Court of Victoria, citing the three rules of mitigation set out in *Mayne and McGregor on Damages* (12th ed.), stated:

> … The first and most important rule is that the plaintiff must take all reasonable steps to mitigate the loss to him consequent upon the defendant's wrong and cannot recover damages for any such loss which he could thus have avoided but has failed, through unreasonable action or

[8] [1976] VR 501.

inaction, to avoid. Put shortly, the plaintiff cannot recover for avoidable loss.[9]

50. In my view, the fact that the Owners did not approach the Respondent carry out remedial work does not amount to unreasonable action or inaction on their part. I have formed this view for a number of reasons. First, following termination of the contract, future performance of each party's obligations under the contract was discharged. Therefore, even if there had been a right to repair (for example, a right to repair during a defects liability period), that right extinguished upon termination. Therefore, the Owners would have had to contract anew with the Respondent. However, in cases of personal service the courts have been reluctant to find that a claimant has acted unreasonably in failing to consider an offer from the defaulting party to contract anew.[10]

51. Second, having regard to the Respondent's failure to progress the works at the relevant time, I am not persuaded that the Respondent was actually in a position to carry out remedial work at the time when the Owners engaged another builder to undertake the work.

52. Third, although the onus of proving loss rests with the Owners, the burden of calling evidence establishing that they acted unreasonably in failing to mitigate their loss rests with the Respondent.[11] In the present case, the only evidence before the Tribunal is a general statement from the Respondent that he would have required his subcontractors to return to site and re-do their work at their own cost. Those tradespeople were not identified nor were they called to verify that they were willing to undertake that work at their own cost.

53. Consequently, I do not accept that the Owners have failed to mitigate their loss in engaging a third party to undertake rectification work.

54. As to the costs of the rectification work, the Respondent conceded that the amount charged was reasonable, having regard to the scope of the remedial work. He did not take issue with the quantum claimed. Accordingly, I find in favour of the Owners in respect of the rectification work in the amount of $18,765.67, which includes repair of the front door ($175) and construction insurance ($165.58).

ADJUSTMENT TO CONTRACT PRICE (EXTRAS)

55. The Respondent gave evidence that there were a number of additional items of work undertaken by him which were extra to the scope of work under the contract. Regrettably, no variation notices were produced by the Respondent. Nevertheless, a number of the items which the Respondent contended were

[9] Ibid at 504.

[10] *British Westinghouse Electric & Manufacturing Co v Underground Electric Roll Ways Company of London Ltd* [1912] AC 673, [1919] 2 KB 581 at 589 per Scrutton LJ.

[11] *TC Industrial Plant Pty Ltd v Roberts Queensland Pty Ltd* (1963) 37 ALJJ 289 at 292; *Sacher Investments Pty Ltd v Former Stereo Consultants Pty Ltd* [1976] 1 NSWLR 5 at 9.

variations, have been conceded by the Owners, such that the difference between the parties is as set out in the following table:

No	Description	Respondent	Owners	Difference
1	Laundry refit	$396	$396	0
2	Laundry refit; drying cupboard	$435.60	$435.60	0
3	Laundry refit; plumber	$330	$330	0
4	Extra sink	$345.84	$345.84	0
5	Extra tap to fridge	$158.40	$158.40	0
6	Dig trench from shed to tank	$578.70	$578.70	0
7	Frame out for extra cupboard	$1,267.20	$1,267.20	0
8	Refit nib walls in lounge	$726	$726	0
9	Uplift floorboards and refit	$4,353.36	0	$4,353.36
10	Spoon drain	$1,188	$1,188	0
11	Extra concrete footings	$4,197.60	$2,400	$1,797.60
12	Excavation machine	$824	$400	$424
13	Extra Electrical and Telstra cable	$1,323.96	$1,323.96	0
14	Two temporary water tanks	$396	$396	0
15	Materials left on site	$3,443.22	0	$3,443.22
TOTALS		**$19,963.88**	**$9,945.70**[12]	**$10,018.18**

Raising the height of the timber flooring

56. The most significant variation claimed by the Respondent concerned the work of raising the height of the timber floor-boards so that there was a smooth transition onto the carpeted areas of the dwelling. Mr Sedal submitted that this was a requirement of the Owners in order to assist a handicapped person residing in the dwelling to move from one room to another.

57. The Respondent said that the work of raising the height of the timber floor-boards was the subject of a written variation notice, which also included a claim in respect of refitting the nib walls in the lounge-room and additional framing for extra cupboards in the bedroom. He conceded that the variation notice was not signed by the Owners because a dispute arose as to whether raising the height of the timber floor-boards was part of the contract.

58. The Respondent conceded that there may have been miscommunication between him and the Owners when the contract was negotiated, in that their

[12] There is a slight difference in the aggregate sum stated in the Owners' schedule, which I attribute to rounding down.

requirement to have a smooth transition between the timber flooring and the carpeted areas was ultimately not documented in the final contract documents prepared by him. Accordingly, that necessitated uplifting the timber floor-boards and inserting 12 mm packers in order to raise the height of that section of floor and provide a smooth transition onto the carpeted areas of the dwelling. The Respondent said that he had offered to do the work at half price but could not ultimately reach agreement over this issue.

59. The Respondent's evidence is somewhat equivocal, in that I am unable to discern whether the requirement for a smooth transition between the timber and carpet flooring was or was not something which had been agreed prior to the parties executing the contract and associated documents. Ultimately, I am not satisfied that there is sufficient evidence before me to find that the parties had agreed to increase the contract price by the cost of re-doing that part of the timber floor. Consequently, I find that the contract price was not increased under this claim item.

Cost of materials left on site

60. Similarly, the Respondent claims for materials which he purchased to assist him in the construction of the works but which remained on site after termination. These materials included form ply, star pickets and boxing timber, which he estimated had a value of $3,443.22. During cross-examination, however, the Respondent was asked whether he made any attempt to retrieve those materials. He answered that he did not think there was any utility in pursuing that course as the contract had already been terminated. In my view, the contract price was not increased by reason of materials left on site following termination of the contract. There is no evidence to suggest that this item increases the contract price even in circumstances where it could be shown that the Respondent was denied access to retrieve those goods. Consequently, I find that the contract price was not increased under this claim item.

CONCLUSION OF LOSS AND DAMAGE

61. Having regard to my findings set out above, I determine that the Owners' loss and damage is $104,617.95, calculated as follows:

(a)	Costs incurred to complete:	$195,355.07
(b)	Costs to be incurred to complete:	$23,132.88
(c)	Costs of rectification:	$18,765.67
(d)	Liquidated damages under the contact:	$3,035
(e)	General damages for delay:	$9,828.57
(f)	Total costs:	$240,117.19
(g)	Less balance of contract price left to be paid:	($125,553.54)
(h)	Less extras (variations):	($9,945.70)

(i) **TOTAL: $104,617.95**

CLAIM FOR INTEREST

62. The Owners claim interest on the sum which I have determined to be their loss and damage, such interest to be calculated in accordance with the prevailing rate specified from time to time under s 2 of the *Penalty Interest Rates Act 1983*, from the date of their letter of demand dated 19 November 2014 to date, or alternatively, from the date that they issued this proceeding on 1 June 2015. Section 53 of the *Domestic Building Contracts Act 1995* empowers the Tribunal to make an order that one party pay another party damages in the nature of interest.

63. In the present case, Mr Sedal submitted that it would be fair to make an order that the Respondent pay the Owners interest on the judgment sum, given that the Owners have been out of pocket well before the demand for payment was made.

64. As I have already indicated, leave was given to the Respondent to file written submissions as to why interest should not be awarded on the judgment sum. No written submissions were filed despite the liberty given to the Respondent.

65. In my view, apart from the pending costs of completing the pergola and the carport, the other expenditure was incurred progressively up until the date that the letter of demand was sent and continues to remain unpaid despite that letter of demand. However, the letter of demand specifies a sum which is greater than the judgment sum found by me. That is not unusual where damages are being sought rather than recovery of a debt certain.

66. As reflected in the *Supreme Court (General Civil Procedure) Rules*, interest is usually calculated from the date proceedings are issued, unless the amount claimed is for recovery of a debt certain. In my view, it is fair that interest on the amounts expended by the Owners, as at the date that they commenced this proceeding, be awarded in accordance with s 2 of the *Penalty Interest Rates Act 1983* and that such interest be calculated from the date this proceeding was issued. Therefore, I will award interest on the sum of $81,485.07, being the gross amount of loss and damage found proven ($104,617.95) less the costs which are yet to be incurred ($23,132.88). The amount of interest calculated to this day is $3,817.52, calculated as follows:

Start Date	End Date	Days	Rate	Amount Per Day	Total
01/Jun/2015	27/Nov/2015	180	9.5%	$21.2084	$3,817.52

COSTS

67. The Owners further claim that the Respondent pay their costs of the proceeding. Although liberty was given to the Respondent to file written submissions on the question of costs, no submissions have been filed by him.

68. In the often cited passage of Gillard J in *Vero Insurance Ltd v The Gombac Group Ltd*,[13] his Honour stated:

> [20] In approaching the question of any application for costs pursuant to s.109 in any proceeding in VCAT, the Tribunal should approach the question on a step by step basis as follows:
>
> (i) The prima facie rule is that each party should bear their own costs of the proceeding.
>
> (ii) The Tribunal may make an order awarding costs, being all or a specified part of costs, only if it is satisfied that it is fair to do so. That is a finding essential to making an order.
>
> (iii) In determining whether it is fair to do so, that is, to award costs, the Tribunal must have regard to the matters stated in s.109(3). The Tribunal must have regard to the specified matters in determining the question, and by reason of paragraph (e) the Tribunal may also take into account any other matter that it considers relevant to the question.

69. In *Fasham Johnson Pty Ltd v Ware*,[14] the Tribunal stated:

> [12] Costs are discretionary and it is in the nature of an exercise of discretion that its exercise one way or another cannot be compelled. And under s 109 success in a proceeding does not by itself justify an order for costs. Something further must be shown.

70. Mr Sedal submitted that it would be fair to order costs pursuant to s 109 of the *Victorian Civil and Administrative Tribunal Act 1998*. In that respect, he relied upon ss 109(3)(a)(i) and (vi) and s 109(3)(c) of that Act. In particular, Mr Sedal pointed to the fact that no defence was ever filed by the Respondent, despite being ordered to do so. He submitted that the Owners had been put to enormous expense in having to prosecute their claim in circumstances where it would have been open for the Respondent to admit their claim at an early stage in the proceeding and thereby limit the amount of costs ultimately incurred. Mr Sedal further pointed to the failure on the part of the Respondent to attend the compulsory conference listed by the Tribunal, which further exacerbated the costs wasted by the Owners.

71. In my view, there is merit in Mr Sedal's submission. Although the question of liability was ultimately determined summarily, ample opportunity was given to the Respondent to contest or admit the claims made. His silence and failure to comply with orders of the Tribunal has unquestionably resulted in him conducting the proceeding in a manner that has unnecessarily disadvantaged the Owners.

72. In my view, the circumstances of this case make it fair that costs be awarded against the Respondent. As is often the case, costs in the Tribunal are to be assessed in accordance with the *County Court Scale of Costs* on a standard basis. I will order costs in that manner.

[13] [2007] VSC 117.
[14] [2004] VCAT 1708.

SENIOR MEMBER E. RIEGLER