

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D868/2008

**CATCHWORDS**

Client-architect agreement, opinion of probable cost, tender price exceeding opinion of probable cost

<b>FIRST APPLICANT</b>	Matthew Cook
<b>SECOND APPLICANT</b>	Trudy Cook
<b>RESPONDENT</b>	Neil Architecture Pty Ltd
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Member L. Rowland
<b>DATE OF HEARING</b>	18, 19 & 20 August 2009
<b>DATE OF ORDER</b>	17 November 2009
<b>CITATION</b>	Cook v Neil Architecture Pty Ltd (Domestic Building) [2009] VCAT 2401

**ORDERS**

- 1 The application is dismissed.
- 2 The applicants to pay to the respondent \$27,546.82.
- 3 Costs and interest are reserved with liberty to apply. Any application for costs and interest is to be heard before Member Rowland.

**MEMBER L. ROWLAND**

**APPEARANCES:**

For the Applicants	Mr Hanson of counsel, instructed by Wisewould Mahony, lawyers
For the Respondent	Mr Truong of counsel

## REASONS

### Background

1. In early 2007 the applicants, Matthew and Trudy Cook, decided to renovate their home in Elsternwick by adding a modern extension. In May 2007 they engaged the respondent, Neil Architecture Pty Ltd to provide architectural services.
2. The extension/renovation design by Neil Architecture went to tender, but did not proceed to building contract and was not built. The Cooks claim that the design was not built because the cost of the works was well in excess of the agreed budget of \$600,000 to \$650,000. The applicants claim that the services rendered by Neil Architecture are of no value and therefore they are not obliged to pay Neil Architecture for its services. The Cooks claim a refund of approximately \$47,000 paid to Neil Architecture. Neil Architecture counterclaims for the balance of outstanding invoices for architectural services provided in the sum of \$27,546.82.

### The client-architect agreement

3. On 17 May 2007 Mr David Neil met with the Cooks at their home to discuss the re-development of their home. It is a substantial four bedroom Edwardian house on 9,500 square feet of land. The Cooks were referred to Mr Neil by a friend. At that first meeting, the Cooks provided Mr Neil with a briefing document which excluded a wish list of requirements. The Cooks showed Mr Neil some photographs of two very expensive extensions to houses to indicate the type of addition to their house they were looking to achieve. At this stage, the Cooks advised that their budget was \$250,000 to \$400,000.
4. Immediately following the meeting on 17 May 2007 Mr Neil sent a letter to the Cooks which relevantly read as follows:

As tabled at our initial meeting, we would offer to prepare a master plan addressing your proposed requirements in line with the briefing document. This would be offered at a cost of \$1800 + GST, and would exclude a detailed plan and an assumption of probable costs in line with current market rates. An additional fee of \$800 + GST would be necessary to complete a detailed existing conditions survey. Should you choose to proceed with Neil Architecture P/L beyond this point, the initial \$1800+GST would be absorbed into our overall fee which would be based on a percentage being 12% of the retail cost of building works + GST for core services. We have attached a draft short form fee agreement which would become the basis of our client architect agreement which outlines in detail the services we offer.
5. By email dated 22 May 2007 Mr Cook proposed an 11% fee with a further 1% being paid upon successful completion of the project. Mr Neil responded on 22 May 2007 as follows:

Thank you for your thoughts, I have discussed this in detail with my Partner Cameron Neil, and we feel that entering into a conditional performance based contract, is not a desirable outcome for our office.

It is in our interest and yours for our fee to be set at a level which will allow us to produce a quality outcome, that adds value to your property, and enables us to maintain a sound long term relationship, and competency of service.

The renovating and building of a custom home is a very important decision, as the relationship and trust you develop with the architect is extremely critical in informing a successful outcome. The procurement of our services, is done in accordance with strict quality control developed over years of experience in these types of projects in our office. We are well aware of the pitfalls of these types of projects and the importance of managing client expectations. For the most part we have an extremely loyal and committed client base with the majority of our work being via referral as well as many repeat commissions. Notwithstanding this due to the unconventional nature of producing a prototype product, and the intensity of the process, it is not uncommon for us to go thru a few hoops and roundabouts in order to reach our destination.

This in mind we feel the proposed arrangement as tabled exposes us unduly, as in the unlikely event of reaching an impasse we feel the preferred course of action should be thru dispute resolution as proposed in “responsibilities and entitlements” architect client agreement 1.17 and 2.13.

In relation to the issues raised we believe that these could be mitigated in the following ways.

**Timeliness of core services:** We can provide a programme of outlining critical paths, milestones that have to be met in order that we manage client expectations. This process becomes very much a joint effort, as the client decision making process is integral to the timeline.

**Completion of construction on time and on Budget.**

In relation to this we would draw from our depth of experience in similar projects and rely on our professional judgment, regarding budget and construction time. As a large part of our work is alterations and additions between 300k-2 million we are regularly assessing market conditions thru tenders, and keeping up to speed in this sector of the market. We also feel that the marriage between the builder and the architect is most important. In order that we can recommend a builder with a proven track record in terms of financial robustness, resource management and quality control, we need to have prior experience to how they operate. Our office has a number of proven builders on our books, enabling us to achieve successful tender prices representative of market value, with the

personal knowledge that we are comparing apples with apples and the lowest tenderer has proven ability to procure the works within the terms of the contract.

#### Effective communication

The building contract is administered by the architect but is in fact between the builder and the proprietor. In short, the architect is the conduit between the parties in the contract. All communication therefore both ways must go thru the architect/contract administrator. As architects, it is our obligation within this role to use our professional judgment to act fairly and impartially between the builder and the proprietor. Refer 5.5 architect client agreement for further scope within this phrase of service.

As mentioned in our original correspondence I genuinely enjoyed meeting you both and would be very excited about the prospect of being involved in your project, and we hope that following explanation can become the basis of a mutually beneficial and successful working relationship into the future.

Regards

David

6. The Cooks rely upon this 22 May email as evidencing, in part, the obligations Neil Architecture undertook, particularly in relation to managing client expectations. Following this email, Mr Cook advised Neil Architecture they wished to proceed.
7. A masterplan was prepared in June. The masterplan set out the initial scope of the renovation and additions. It excluded minimal alterations to the existing home with the exception of a new bathroom, it added 145 square metres of additions, a swimming pool and car garage.

#### **Opinion of Probable Cost –July 2007**

8. On 5 July 2007 Neil Architecture sent the Cooks the opinion of probable costs (“OPC”) based on the masterplan. The letter read as follows:

Re Assumption of probable costs, for alteration and addition works

m2 rates are taken from BMT and Associates Quantity Surveyors [www.bmtqs.com.au](http://www.bmtqs.com.au) assuming a level of finish appropriate to this quality suburb. We also use historical job data from similar projects tendered in our office over the past 12 months to establish the following results.

Assuming minimal works to the front of the house with the exception of new bathroom and demolition of old kitchen.

Ground Floor internal new areas

145@2700m2 = \$391 500

Re fit to new bathroom at front \$35 000

Demo patch old kitchen	\$4 000
GF Decking 70m2@\$400/02	\$28 000
Pool and fence	\$55 000
Carport 34m2 @ 900/m2	\$30 600
Total Project Value	\$544 100 + GST
Regards	
Cameron Neil	

9. On 7 July 2007 Mr David Neil showed the Cooks his home to demonstrate the type of work he does and the level and quality of finishes the Cooks could expect. Mr Neil described the level of finish in his home as moderate to a high level of finish. He said that his home is fitted with Ilve cooking appliances, reconstituted stone bench tops, single vanity basins, vinyl wrap and laminate joinery, minimal joinery, narrow decking boards, utility grade flooring throughout and ceramic tiles.
10. Following the OPC and visit to the Mr Neil's house Mr Cook sent an email on 8 July 2007 which relevantly read as follows:

Thanks for taking the time to show us your home on Saturday- it's a fantastic home with some excellent features.

We need to catch up this week and have a further chat about:

The Budget:

-We were perhaps optimistic with our initial budget of \$250-\$400k

-With respect to your proposed costs, some matters to discuss excludingude:

How accurate is the \$2700 psm, is there an opportunity to bring this cost down at all?

The assumption of probable costs is based on 145sqm, this would appear to excludingude the double counting of the bathroom? The total cost would be \$67,000.

The carport is a garage, I assume made of brick with a proper roof and the like and a feature wall facing the pool, is \$900psm too cheap for this?

Proposed cost should also excludingude Neil Architecture's fee, painting the front of the house and landscaping-we have probably missed a number of others.

We have attached our best guess at costs.

At this stage is it would seem sensible to not proceed with the garage and pool and leave this as a project for a later date – they would appear to be relative simple things to do at a later date?

The size of the extension:

One way to reduce costs would be to compromise on the size of the extension, is this possible?, is it too much of a compromise?

11. In response to the queries raised, Mr Cook was informed by Mr Neil that the bathroom was not double counted and was not part of the 145 metre calculation. The Cooks were advised to proceed with the whole of the works rather than leave the pool and garage for a later date because in Mr Neil's experience, it is always much more expensive to proceed later.

12. Mr Cook's email of 8 July 2007 attached a schedule which allowed sums as follows:

Painting old part of the house	\$30,000
Carpentry old part of the house	\$10,000
Landscaping	\$5,000
Paving	\$28,000
Pool	\$55,000
Garage	\$51,000

13. Mr Cook's schedule calculated the per square metre rate through a range from \$2,000 per square metre to \$3,000 per square metre indicating the range within which he expected building costs at that time. It is evident that Mr Cook was aware that the OPC of 5 July did not allow for all the possible works or landscaping beyond \$28,000 of decking.

14. In a meeting on or around 10 July 2007 Mr Neil confirmed that his estimate of probable cost was accurate. Mr Cook said in evidence that he considered the figure of \$2,700 per square metre rate was an accurate figure at the time. He does not allege that Mr Neil ought to have used a different figure for the per square metre rate. Instead, he relied on the expert evidence of Mr Permewan that the elemental cost method should have been adopted.

15. In July, Neil Architecture was engaged to provide the full architectural service. Throughout July and August design development stage was underway. On 21 August 2007, Mr Neil noticed that a completed client-architect agreement had not been signed by the Cooks and a completed agreement was sent to the Cooks for signing.

16. The agreement provided for Neil Architecture to be paid a fee calculated as 12% of the cost of works. Cost of works is defined in the client-architect agreement as:

Cost of works is excluding GST and is defined as the final cost of all works designed by the architect.

The cost of works as herein defined shall be adjusted during project progress in accordance with any advice obtained from the client's cost consultant, tenders received for the construction of the works

and/or any other adjustments required to determine the final cost of works.

17. On 24 August 2007 Mr Cook signed the agreement. The agreement provided for an estimate of the cost of works at \$544 000, again confirming that the OPC of 5 July 2007 was accurate, even after 2 months of design and development. The agreement did not provide a figure for the Cooks' total project budget.

#### **Design – Development stage July 2007 – April 2008**

18. The design-development stage continued until April 2008. The construction documentation stage commenced in or about December 2007, so that the design development and construction documentation ran concurrently. Ideally, the stages would be distinct and at the end of design development a revised OPC would typically be provided to the client. In this case, due to a number of operational factors the stages ran concurrently.
19. The substance of the evidence led by the Neil Architecture, was that as the project progressed the design became more and more elaborate. The Cooks consistently selected high end finishes and fittings and the design incorporated a high level of specification. Mr Neil gave evidence that the Cooks were passionate about their home and showed strong commitment to the design and were constantly coming up with new ideas.
20. The substance of the Cooks evidence is that they were led to believe that their selections were possible within the OPC by reason of the designs displayed on the Neil Architecture website and Mr Neil's own home and because they were never told that their selections would increase the OPC.
21. The 3 witnesses called by Neil Architecture said that at every point, the price or relative price of selections was discussed and the Cooks were told that their selections were the most expensive and would have an impact on cost. The Cooks said that notwithstanding that prices of specific items were discussed they did not understand that their selections of high priced items would affect the OPC.
22. A copy of the photographs of Voshege house displayed on the Neil Architecture website in 2007 was tendered in evidence by the Cooks to indicate the level of finish they expected to achieve. Mr Neil said that the finishes and fittings selected by the Cooks exceeded both the level of finishes and fittings in his home and the Voshege home. It is to be noted that the level of finishes and fittings to the Voshege house could not be observed from the website. For example, Mr Neil said the tiling around the pool in the Voshege house was a ceramic tile and not a bluestone tile.
23. The Cooks contended that Neil Architecture never made it clear as to what finishes and fittings could be selected in the \$2,700 per square metre price. The OPC of 5 July 2007 "assumes a level of finish appropriate to this quality suburb." This statement does not set out what can and cannot be

selected within the \$2,700 metre rate. The level of finish could have been better described if the elemental cost method of calculating the OPC was used because everything would have been quantified with a price allowance.

### **Increase in scope of works**

24. Mr Neil gave evidence that the following decisions by the Cooks had the effect of increasing the \$2,700 per metre rate. He said the decisions were made during the course of the development-design and are more expensive than what was reasonably allowed for in the OPC and by comparison with what is in Mr Neil's home. They are as follows:
- a. Double hand basins in the bathrooms instead of single basins;
  - b. Two pack factory paint finishes on joinery instead of vinyl wrap, laminate and painted MDF;
  - c. Sophisticated joinery units throughout instead of minimal joinery;
  - d. Bathroom joinery units with drawers instead of simple cupboards;
  - e. Laser cut panels to walk in robe units instead of laminate or painted MDF;
  - f. Top end Miele cooking appliances instead of Ilve appliances;
  - g. Matt stone italiano bench tops at (30% higher cost) instead of Caesar stone or other reconstituted stone;
  - h. Wide decking boards alternatively with narrow boards instead of simple narrow decking boards;
  - i. High quality flooring instead of utility grade flooring;
  - j. Floor to ceiling sliding doors in aluminium frames instead of 2.4 metre windows in timber frames;
  - k. High quality powder room with sky light and seratone walls instead of the toilet off the laundry as set out in Masterplan 2;
  - l. Expensive hand cut terracotta tiles as a feature wrap around internal - external wall (not discussed at the time of Masterplan 2);
  - m. Inset timber slotted floor grills to both showers (not discussed at time of Masterplan 2 but requested by the Cooks during the design phase).
25. Mr Neil said that whilst some of the selections may have been incorporated into the \$2,700 per square metre rate, the collective decisions were well and above what would reasonably be allowed in a \$2,700 per square metre rate.
26. Mr Neil said that in addition to those decisions which had the impact increasing the per square metre rate the following decisions had the impact



of increasing the separately priced items in the OPC or were never allowed for in the OPC:

- Fully tiled pool with both solar and gas heating and infloor cleaning system instead of water line tiled pool with solar heating;
- Bluestone tiles in place of timber decking and remaining decking with wide boards
- Bluestone tiles instead of ceramic tiles
- Increase in garage from 34m<sup>2</sup> to 50m<sup>2</sup>
- Bedroom joinery unit excluding upholstered bed head, side tables and light fittings
- Timber veneer joinery unit for Bedroom
- Water tanks
- Polished concrete BBQ bench with refrigerator
- Feature Timber battens to rear garage wall instead of rendered wall
- Additional hot water service requested in April 2008
- Fireplace surround to bedroom in old part of the house
- Painting existing part of house excluding fences
- Lead light window in bathroom
- New carpets to two existing rooms
- Timber screen between pool and courtyard
- Increase floor height in bedroom 1

27. Some of the above items might reasonably be allowed in Mr Neil's original OPC as minimal works to the front part of the house. However, taken together, the works are more than minimal and having regard to the items discussed and identified in the OPC it was unreasonable for the Cooks to conclude that these significant additional works would be allowed for in the OPC.
28. The Cooks said that they were not aware that these decisions were not allowed for in the original OPC.
29. The Cooks said that they were not aware that the price quoted for the pool did not include both solar and gas heating, fully tiled and infloor cleaning system. They assumed that the OPC for the pool did come with all of those features. The OPC does not state what features are or are not included in the price, and needed clarification.
30. The Cooks also gave evidence that they were of the understanding that the Hot Water Service, BBQ bench, feature timber battens, water tanks and

bluestone tiles were priced in the OPC even though these items were not discussed until some time after the Masterplan and OPC.

31. Mrs Cook said she thought the water tanks were allowed for in the OPC. She said that because they were having a pool the architect should have known that they would be needing water tanks and they should have been allowed for in the original OPC. The water tanks were requested for the first time after the tender had gone out to the builders. In relation to the Hot Water Service, the Cooks claimed that Mr Neil ought to have known that the old water service was inadequate and should have allowed for a new hot water service in the price.
32. The OPC and the Masterplan did not allow for landscaping beyond 70m<sup>2</sup> of decking. Mr Cook in his own estimate of costs on 8 July 2007 acknowledged no allowance had been made for landscaping. It is clear that anything over and above the 70m<sup>2</sup> of decking, excluding the BBQ unit, bluestone tiles and timber screening would be at an additional cost. If the Cooks assumed otherwise, it was unreasonable to do so.
33. Mrs Cook said she thought the joinery units to the main bedroom excluding the feature veneer drawers, custom designed upholstered bedhead side drawers and laser cut panels to the walk in robe would be excluded in the \$2,700 per metre price. These joinery units were discussed for the first time after the masterplan and OPC and were going into the existing part of the house. The OPC specifically said that it assumed minimum works to the existing part of the house. The Cooks had no reasonable basis upon which to make the assumption that these joinery items would be allowed for in the OPC.
34. I find that during the design development stage, the Cooks had requested additional works and a higher level of finish than was reasonably allowed for in the original OPC. I accept the evidence of the Neils that the Cooks were told during the design –development phase that their selections were at the high end and would have an impact on cost. I find that the Cooks should have understood that the collective decisions made about design, finishes and fittings were beyond the scope and allowance made in the original OPC.

### **Background to Revised Opinion of Probable Cost**

35. In early 2008, Mr Neil and Mr Tuer, the architect assisting Mr Neil told the Cooks that the OPC needed to be reviewed to take into account the changes to the cost of works. At this point, no revised opinion of probable cost had been put to the Cooks.
36. In March 2008 Neil Architecture received a tender for another job which came in unexpectedly high. This was the catalyst for revising the Cooks' OPC. On 1 April, Mr Tuer, emailed the Cooks as follows:

Just to bring you up to date, our drawings set is almost complete however we have been kept waiting by the engineer who is sending

through his first draft of drawings today. We expect to be ready to go to tender early to mid next week.

We however, think it would be prudent to do an OPC (Opinion of cost) given recent tenders which indicate that there has been an upward shift in building rates. Specifically we received a tender last week which alarmed us for a house of a similar size and level of specification to yours. It may therefore be worth reassessing where we expect the building cost is prior to tender and perhaps taking some action, if required, to reduce costs?

37. Mr Cook replied on 2 April

Guys, I am in Richmond today around 1.30pm if you need to catch up on anything – seeing that guy from Encel.

38. Mr Tuer replied:

Hi Matt, sorry David and I have both been in meetings for most of the afternoon. It may be more beneficial for you to come in mid next week if you some time? This will allow us to wrap things up and do a revised OPC to discuss it.

39. Mr Cook replied

Okay - I am in Melb mon to wed only next week. How much was that other place a square metre you mentioned?

40. Mr Tuer replied:

How about Wednesday then, perhaps around lunch time?

It varied largely between tenders the two lowest which were quite close were about \$600m<sup>2</sup> more than expected. We are now negotiating with these two lowest builders on how to reduce costs and believe we can bring it back to within 10% of their budget figure but the tenders were a real shock. One builder is telling us that material costs have been going up by 10-20%. We don't want to alarm you but at the same time we want to make sure we are being realistic with the scope of works and level of finishes.

41. Mr Cook replied:

Wednesday 12pm would be great.

We have been working around \$2,500 to \$3,000 is that still the case or are you suggesting \$3,600?

Cost is what it is, not a lot that can be done about it really.

42. Mr Tuer replied

We had given a cost estimate on that job at \$2700m<sup>2</sup> and it has come in at about \$3,300/m<sup>2</sup>.

### **Pre tender OPC**

43. On 8 April 2008 Mr Neil prepared a pre tender OPC in preparation for the meeting the following day as follows:

New	\$525
Bath	\$40
Pool	\$55
Garage	\$35
Paving	\$25
Deck	\$15
Pool fence/screens	\$12
BBQ	\$5
External blind	\$3
Additional joinery to main bed	\$5

\$750k - \$800K inc GST.

This translates to an OPC of \$682,000 to \$728,000 (excluding GST). The water tanks (at \$12,650 excluding GST) were not included in the revised OPC as they were not requested until after the tenders documents had gone out.

#### **The meeting of 9 April 2008**

44. A meeting was held on 9 April 2008 with the Cooks, Mr Neil and Mr Tuer. The primary purpose of the meeting was to inform the Cooks about the pre tender OPC. Mr Neil admitted that ideally a revised OPC would have been provided at an earlier stage but due to staff shortages the design development stage ran with the construction documentation stage, so it did not occur earlier. Mr Neil said that the Cooks' demeanour throughout the whole process had been one where they had been unconcerned about price with Mr Cook commenting that "these are happy happy times." Mr Cook had discussed the option of purchasing the property next door. Mr Neil said that throughout the design development process Mr Cook did not give any indication that price was critical, but to the contrary gave the indication that "price is what it is," as evidenced by his email of 2 April 2007.
45. Mr Neil, Mr Tuer and Mr Cameron Neil all gave evidence that the pre tender OPC was tabled at the meeting and discussed and there was no visible upset or shock by the Cooks to the pre tender OPC at \$750,000 - \$800,000 exclusive of GST. The evidence by the Neils was that the Cooks accepted the increase in the OPC and wished to proceed to tender.
46. The Cooks on the other hand deny that the pre tender OPC was tabled or that any figure in vicinity of \$750,000-\$800,000 was discussed. The Cooks said that a figure of \$600,000 - \$650,000 was agreed at the meeting representing the increase of \$600 per square metre on the square metre rate. I cannot accept that evidence.
47. Mr Cook is the managing director of a large international recruitment firm. He has an economics and law degree and previously worked for a large accounting firm. Mr Cook has high level executive skills excluding

accounting skills and he has a high level of financial literacy. His business makes him acutely aware of the economic climate.

48. The Cooks attended the meeting aware that the estimated square metre rate had increased from \$2,700 to \$3,300 per square metre. Mrs Cook said that before the meeting Mr Cook had calculated an increase of \$90,000 (being 150 square metres by \$600) just on the per square metre rate to the new part of the building. On its own that brought the OPC up to \$634,000 excluding GST. To that, the Cooks should have been aware of the price escalation on the other items and the items which were not included in the original OPC, such as the increase in garage size, bluestone paving, BBQ, painting, bedroom joinery and new carpet. The cost of these items had to be added to the OPC bringing the OPC well over \$634,000 (excluding GST).
49. There is no calculation which supports the figure of \$650,000 (excluding GST) as being the pre tender OPC proposed by Mr Neil. I accept Mr Neil's evidence that he did not propose or agree to a pre tender budget of \$650,000 (excluding GST). He did agree to adjust his fees against an interim figure of \$650,000 pending receipt of the tender prices.
50. I accept the evidence of the Neils that the pre tender OPC was tabled at the meeting and the figure of \$750,000- \$800,000 (excluding GST) was discussed and agreed with the Cooks. Mr Neil and Mr Tuer, said that the Cooks had shown no adverse reaction to the increase in the OPC. I accept that evidence. At no point during the design-development phase had the Cooks shown any real concern with cost. They did show a commitment to achieving a unique design selecting very high quality finishes and fittings. The figure of \$750,000 - \$800,000 was reasonable given the increase in the per square metre rate to \$634,000 (excluding GST), the price escalation on the separately priced works and the addition of new works not accounted for in the original OPC.

### **Tender process and results**

51. On 30 April, 2008 the tender documents were sent out to 3 builders. There was some email exchange over the range of builders agreeing to submit a tender. The building industry was experiencing a boom and significant price rises, particularly for steel and other materials. Mr Cook was concerned and reasonably so, that none of Neil Architecture's preferred builders was on the tender list. He was concerned this may have the impact of skewing prices upwards. His displeasure was made perfectly clear in an email dated 2 May 2008 which was as follows:

This is not good enough and reflects very poorly on your firm. I expect a meeting with David immediately. Thanks.
52. Shortly thereafter TCM Builders and Malbec, preferred builders on the Neil Architecture and the Cooks' "A" list, agreed to submit a tender.

53. Nine amendments were made to the tender documents during May and June excluding the addition of water tanks at the request of the Cooks.

### **Neil Architecture Adjusted Invoice**

54. On 21 May 2008 Neil Architecture invoiced the Cooks for fees based on the agreed interim adjusted figure of \$650,000. The account summary stated "Adjusted Project Budget: (adjusted at meeting) \$650,000. I accept the evidence of Mr David Neil and Mr Cameron Neil that the \$650,000 on the May Account Summary was a half way adjustment to their accounts pending receipt of the tender prices. The reason for stepping up the account in stages was to give the Cooks a reasonable time to pay the account. To avoid any misunderstanding, it would have been prudent for Neil Architecture to accompany this account with a letter explaining the basis upon which the \$650,000 was calculated and clarifying that this figure was not an agreed project budget as stated on the pro forma account summary but an interim figure. The May invoice remains unpaid.

### **Tender results**

55. Tenders closed on Friday 13 June. The tenders came in as follows:
- |    |                       |                             |
|----|-----------------------|-----------------------------|
| a. | TCM Builders          | \$772,272 (excluding GST)   |
| b. | C & J Irving Builders | \$988,996 (excluding GST)   |
| c. | Malbac                | \$1,229,909 (excluding GST) |
| d. | Funkton Enterprises   | \$1,086,909 (excluding GST) |
56. The Cooks were in France at the time the tenders came in. Mr Neil advised the Cooks of the tender prices by telephone. Malbac, one of the preferred builders, did not submit an itemised schedule of prices but simply a lump sum so its response to tender was immediately disregarded. Mr Neil informed the Cooks that apart from the TCM tender price, the tenders were overpriced. He said that he thought that they were not hungry for the work and were not pricing competitively, confirming Mr Cook's initial concern with the limited range of builders who agreed to tender. At this point, the only tender to be given serious consideration was the TCM tender, which was also one of the two preferred builders.

### **Correspondence post tender prices**

57. On Tuesday 17 June 2008, at 10.23am Mr Neil reported to Mr Cook on the TCM tender as follows:

Hi Matt,

I have spent some time going through the quote from TCM and have come up with the

New garage	\$37K exc GST
Pool	\$69K exc GST

Water tank \$11.5 exc GST

Timber decks and screens \$35K exc GST

New Bathroom \$40K exc GST

Paving and BBQ \$40K exc GST

Works to existing areas excluding  
new joinery, painting, carpets . \$45 exc GST

Tender price from TCM \$772K exc GST

Minus \$277.5 exc GST

Equals \$494.5 exc GST

Divide by 150 square meters = \$3.29 exc GST per square metre  
(approx \$3,600 inc)

I have not done a comparison with similar project as yet but will do so  
this afternoon.

Regards

58. Mr Neil had already qualified TCM builders as a reputable builder. Mr Neil told Mr Cook, that TCM had successfully completed six high quality projects for Neil Architecture, that TCM price competitively and fairly, and that TCM price variations fairly.

59. At 10.31am Mr Cook responded as follows:

Excellent thanks, is the 150sqm correct?

60. On Monday 23 June 2008 at 8.31am Mr Cook emailed Mr Neil and Mr Neil responded in *italics* as follows:

As discussed on Friday;

-look forward to seeing you on Thursday at 12 pm to see the TCM work;

-those photos from Arte Domus are for the small terracotta tiles, I thought we were going for the bigger ones (like 40cm x 20cm?) with a sawn pattern?-(*I did mention to Arte Domus that we were using a 250 x 500 tile. I will call again to find out if they have a sample panel of this size.*)

-Could you scan and send through all tender responses to this email address today for bank valuation purposes; (*will do shortly*)

-Let me know if there is any change in price from TCM should we move out of the house; (*I have spoken with Tony and there would be no change in price should you move out.*)

-Look forward to getting exact sizings of the pool equipment to confirm garage size is correct; (*will provide information to you when we receive from pool company*)

-We never finally discussed the water tank issue, what are planning to do here inground or down the side of the house? (*We will get TCM to*

*give us some quotes for in ground and above ground and make a decision.)*

-There are a number of minor changes to the tender document:

Ironing board in laundry is wrong one, I have sent Brett an email with the current one to go in the laundry

Bins in kitchen are not we had planned, they appear too small but happy to go and look at a sample

One of the toilets is different, connected to the ground while one of them is above ground

*(Will check these things out with Brett – he returns late this week)*

61. On Monday 23 June at 9.27 am Mr Neil provided Mr Cook with a PDF document enclosing the tender responses as requested by Mr Cook.

62. On Monday 23 June at 2.46pm Mr Cook attached an analysis of the tender prices and replies as follows:

Did Malbac have a schedule of works?

Also, per attached analysis TCM is 28%, 41% and 45% cheaper than other tenderers, being \$240k, \$345k and \$380k respectively. We can chat about this on Thursday and want to make sure you are comfortable with what they have proposed.

63. On Monday 23 June at 10.46pm Mr Cook emailed Mr Neil as follows:

David,

TCM tender does not excluding addendum No. 8 and No. 9- what are these with respect to?

Are you comfortable with the “Builder would like to make the following comments” section on TCM’s tender, have we avoided any future costs from their questions? Question 12 is only related to labour? And given we have specified the tiles should the builder be able to price this appropriately?

64. The queries raised by Mr Cook show a detailed examination of the tenders and no concern about the price.

65. On Monday 24 June 2008 at 9.44am Mr Neil responds as follows:

TCM had finished their tender before they realized addendum 8 & 9 had come in.

Addenda 8 relates to the asset protection bond and building permit fees – both are to be paid by the client. It also clarifies that PC and provisional sums nominated excluding GST and builder’s margin – This is the case breakdown.

Addenda 9 relates to a backing shadow line detail to the mirrors – Tony said that the detail is fine and would (sic)

In the comments, Tony also makes the following notes:



-TCM have not allowed for a ceiling to the Garage- I would imagine you would want a ceiling in the garage

-The allowance for tile laying is \$60 + GST per metre which would cover the laying of porcelain tiles 129 bluestone tiling which would cost an additional \$10 per metre to lay say.

66. Mr Cook replied

David,

Not sure what this really means. What is the final fully excluding price from TCM?

67. Mr Neil responded on Wednesday 25 June as follows:

Hi Matt,

I have asked Tony for his price amended to excluding the laying of the stone – I'm not sure why he (has not done as) specified. As discussed for the laying of the bluestone it is an additional \$10 per square metre.

I have also asked for a price to install a villa board ceiling to the Garage, so you have the option of adding this.

68. On Thursday 26 June 2008 the Cooks went to see a Neil Architecture-TCM project in East Melbourne which was nearing completion. Mr Cook said it was a beautiful job and apart from one minor matter on a joinery unit, had no criticism of the TCM's work.

### **Reducing scope of works**

69. Mr Cook said that Mr Neil had told him that the maximum that could be cut back on the TCM tender price was \$50,000. Mr Neil denies the statement. Mr Neil agrees that he did say to Mr Cook that \$50,000 could be trimmed from the price by reducing finishes and fittings but because Mr Cook did not seem interested in pursuing a reduction in the finishes or the building price he did not pursue it.

70. Mr Neil said that there were a number of things which could have been done to reduce cost, which could have been cut back by more than \$50,000 if the Cooks required it. Mr Neil said that in about 40% of projects, he goes through the exercise of reducing costs after a tender comes in.

71. In this case, numerous things could have been trimmed from the design and specification without reducing the size of the project. He said that whilst some of the items were small, they all added up. Mr Neil suggested in evidence that some of the following items could have been changed or deleted to save costs: deleting the cantilevered BBQ at \$10-\$15,000, deleting the bluestone paving at \$20 to \$25,000, reducing the tiling to the pool, deleting the water tanks at \$11,500, deleting the gas heating for the pool, reducing the basins to single basins instead of double basins in the bathrooms, selecting vinyl wrap cupboards instead of factory paint finishes, deleting the custom made bed and drawers at \$12,000, deleting

the \$3,000 worth of soft close hinges on the joinery drawers, replacing the \$8,500 Miele oven with a mid range oven, changing the bench tops to caesar stone, deleting the laser cut panels at \$3,600, deleting the wine cellar, deleting the shower grids “and so the list goes on.” Mr Neil said he was not given the opportunity to reduce the costs. He believed that the Cooks were no longer committed to the project. The scaling back of the plans would not have attracted an additional charge to the Cooks.

### **Project put on hold**

72. In late July 2008 Mr Cook put the project on hold. Mr Cook told Mr Neil that he may proceed in February 2009. He asked Mr Neil to confirm that TCM would hold its price. Mr Neil made enquires with TCM. TCM said it would hold its price, subject to a maximum price escalation of \$25,000.

### **Decision not to proceed with building contract**

73. In his affidavit and in his evidence Mr Cook said after considering the responses to tender he decided not to go ahead with the project because he had the following concerns:

- a About the gap between the TCM response to tender and the other responses, both in dollar and percentage terms. We were concerned as to what may have been left out or not considered, and at the prospect of being left with a half-finished project or cost escalation.
- b That even on the TCM response to tender, and before or allowing for a 10% overrun on the tender price as suggested by David and increased architect’s fees, the Project would be around \$134,000 more expensive than the “top end” figure of \$650,000 plus GST agreed to in the April Meeting;
- c That even should TCM come in “on budget”:
  - i. The cost of the Project would over-capitalise the Property;
  - ii. The cost of the Project was simply not worth either the disruption of the renovation and extension or the risk of being left with a half-finished project or cost escalation, and that it would be better to simply purchase a different property offering the same level of accommodation and finish as would be achieved by the Project.”

74. In short the main issue for the Cooks was the total cost of project. Mr Cook said that “had the tenders come in at \$650,000 there is no doubt we would have proceeded.”

75. Mr Cook did express concern that the TCM tender was considerably lower than the other tenders and queried whether it was an all excluding price. It was a fair and reasonable concern in the circumstances. Other than for two minor matters, there is no evidence that the TCM quotation was not an all excluding tender. There was no evidence that TCM underquoted. TCM had confirmed the tender price and said it would hold the price subject to a maximum price escalation of \$25,000 if the project

proceeded in February 2009. All the evidence supported TCM as a reputable builder, fair and competitive on pricing and had successfully completed six jobs for the Neil architecture at very high quality. Mr Maraffa from TCM attended to give evidence for Neil Architecture. He was not cross examined on any of these matters. The concern that TCM had underpriced or was not an all exclusives tender was not substantiated.

### **Neil Architecture Invoice for works**

76. On 14 August 2008 Mr Cameron Neil forwarded the Cooks an invoice based on \$773,400 adjusting their fees against the lowest tender received in accordance with the terms and conditions of the client-architect agreement. The August invoice was sent under covering letter as follows:

Re account for services to date

As I'm sure you are aware our percentage fee is based on the retail cost of works for works designed and documented as per our architect client agreement.

Should we have started construction by now this account would have been sent out with the adjustment reflecting the contract value of works established through a competitive tender process.

We appreciate that his job has now gone on hold until early next year but in the interim it is necessary for us to continue with this adjustment reflecting the appropriate remuneration for the works completed by our office to date.

We have found it a pleasure working with you both to date, and very much look forward to the next stage and ultimately the successful completion of this project.

Please do not hesitate to call should you wish to discuss this further.

Regards

Cameron Neil – Director

77. Mr Cook responded by email on 27 August 2008 as follows:

David, Cameron

I trust you are both well.

Following on from your invoice for \$13k outstanding, I am not excluding to pay this amount for the moment.

We initially engaged you with a budget for \$250-\$450, accepted the revised expectation of \$605k (excluding GST) and the final tenders were well above this. The cheapest tender was \$850k (excluding GST) and the most expensive was \$1.3.

I assume there has to be a degree of responsibility taken by your firm for working within a client's budget. In this instance the variance from budget to actual construction cost is a material amount, circa 40%.

Should we go ahead in February I understand this amount is payable. Should we not go ahead in February we have invested thousands on plans we are not proceeding with which are effectively worthless – we have already agreed we can only trim \$50k off any tender in finishing savings.

Kind regards

Matthew Cook

78. This was the first complaint about the cost of the works. In the emails immediately following the tender, Mr Cook did not express concern about the TCM price.
79. Mr Cameron Neil responded on August 28 with Mr Cook's reply in *italics* on 11 September 2008 as follows;

Thanks for your response Matt we are both well.

Responding to your email, as stated in our original letter we understand that it is a bit of a bitter pill to swallow, should you not wish to proceed.

Notwithstanding we have to run a business and rely on payment of fees for work completed as I'm sure you are aware our overheads are fixed in relation to this work, and our margins on work of this scale aren't massive.

From our point of view, you acknowledge the amount tabled being payable in Feb if you choose to proceed. This would suggest that you agree that the work has been done (which it has). How then in the current circumstances could it be justified that your decision post tender to put this job on hold should act as a penalty to us, with the potential to affect the running of our business?

We understand and appreciate that you have invested heavily in the process to date, and should you not proceed, the value of this is potentially lost. This is the risk you take on board embarking on a project, and not one that we are able to share with you. (*I concur with your comments here*).

Our firm has taken responsibility to manage your expectations in relation to the project budget, our correspondence would suggest that we have been up front and clear with this throughout the project to date. (*This is the issue in doubt as I don't believe our expectations have been managed well at all as highlighted below*)

Our initial OPC on 5/7/07 was \$598,400 inc GST. This was agreed and formed the basis of our client architect agreement dated 21/8/07 and would be considered our preliminary budget.

As the process proceeded and we delved deeper into the design development we felt it necessary to again inform you (meeting 9/4/08) as to where we felt the probable cost of the project was heading. Our OPC produced at this time was \$750-\$800 inc GST following this our email on 1/4/08 suggests that if you are uncomfortable with OPC "It

may be worth reassessing where we expect the building cost is prior to tender and perhaps taking some action if required to reduce costs?"

*A couple of matters arise here;*

*1) 800k was never mentioned in email or in a meeting. Trudy and I are both very clear on this matter.*

*2) The meeting and email occurred in April 2008 when the "drawing set was almost complete". I may be mistaken on architect industry practice but I don't consider going to a client 8 months into a project and at such a late stage in the process immediately before tender, satisfies your view that "Our firm has taken responsibility to manage your expectations in relation to the project budget" As we have already discussed, the only way to materially reduce costs (50k or more) in this project is to cut back the scale, this would have involved a complete redesign of the project which would have been undesirable at such a late stage for both parties.*

*3) Accordingly, our view is that the budget variance is conservatively 42% being OPC of 600k to 850k.*

We proceeded to tender with the final tender as you are aware being \$850k within 10% of our final OPC range.

As you are probably aware, we have all enjoyed working with you both to date and feel that we have had an honest and mutually respectful rapport, which we would hope will ultimately result in an exciting and mutual beneficial outcome.

We hope that you can take the time to consider our position, and respond in the way you see fit.

Sincerely,

Cameron and David

80. Mr Cameron Neil sent an email on 25 September 2008 as follows:

Dear Matt and Trudy

We have attached a statement and ask that you could forward the amount that you are not disputing immediately to our office, this is having a crippling effect on our cash flow.

In response to your email Sep 11.

We again reiterate that we understand it is difficult to come to terms with additional payments as you have chosen to put the project on hold. Notwithstanding we stand by our account.

We acknowledge your acceptance that you are willing to pay our account in full should you proceed with works in February as planned, and believe that the acceptance of this is acknowledgement that the work has been completed and should be paid. (The timing of this job is your decision)

We were surprised to hear your comments regarding the budget, as the meeting in April's primary function was to discuss the budget figure

which was consequently put on the table before both yourself and Trudy \$750-\$800k. There were subsequent discussions stating that you were not concerned about where the tender came out, rather that you were most concerned with getting a competitive price in the market place. We believe our email was very clear in giving you the opportunity to tone things down, post this meeting, and your response to this, as was documented clearly on your email was "it is what it is."

You have acknowledged that the tender price is acceptable, and that the job has not gone on hold as a result of the price being too high (rather you are waiting to see how things are going with the economy) and consequently we have advised TCM that we understand you will most likely proceed in February dependent upon the overall economic situation. We have also verbally advised you that this may result in further cost escalation by the builder.

The monies owing are considerable, and have a considerable impact on the continued smooth running of our business. Although it is not our preference, and despite the fact that we have had a successful relationship to date we feel if this can't be resolved, you give us little choice but to put the facts before a judge in a VCAT forum.

We look forward to your response

Regards

Cameron

81. On 1 September 2008, Mr Cook responded as follows:

Please proceed as you deem appropriate in the circumstances.

82. On 15 October 2008 Neil Architecture wrote to the Cooks as follows:

Re: "action on overdue accounts"

Please find attached pre-tender budget update as tabled before both of you Matt and Trudy Cook at the meeting held at 12.00pm at the office of Neil Architecture on April 9<sup>th</sup> 2008.

This meeting was convened with the primary purpose of discussing the budget figures, and your comfort with them, prior to completing contract documentation and embarking on the tender process, as reiterated in subsequent emails.

David Neil and Brett Tuer were present at this meeting and will be verifying by affidavit their clear recollection that this document was tabled and discussed at length before all parties with acknowledgment and acceptance of this (by both Matt and Trudy) as the basis for proceeding to the completion of documentation and running a formal tender.

In accordance with our architect client agreement 21/8/07 to which you have acknowledged by successful payment of previous accounts No's 364, 404, 423, 441, 464 and 499 we exercise the following-

We are formally serving you with notice of dispute or difference based on non payment of professional fees for services and will be

following this matter through our lawyers excluding costs, should full payment of fees owing not be resolved within five working days.

We are giving you notice.

We are exercising our entitlement to revoke the licence (1.5) for non payment of fees

We are exercising our entitlement to charge interest at the rate stated in our agreement commencing 10 working days from overdue accounts. (find new account reflecting this).

Sincerely,

Cameron Neil

83. Mr Cook replied on the same day as follows:

Cameron,

I think you will find that the attached document was never tabled as you have advised – you may wish to double check with David and Brett if they remember discussing this document with us.

Once again, proceed as you deem appropriate in the circumstances.

Cheers

Matthew Cook.

84. The response from Mr Cameron Neil is as follows:

Matt and Trudy,

If you read on you will find that both David and Brett are happy to provide affidavit to the effect that this was tabled as they are both crystal clear on this fact. As stated in our letter tabling of this document was the primary objective of this meeting, as we wanted to be sure you were both absolutely comfortable, prior to us completing documentation and proceeding to Tender.

Regards

Cameron.

85. The response by Mr Cook on 17 October 2008 is as follows:

Cameron

I am sorry that is not our recollection at all.

I have done some research into this matter through the Australian Institute of Architects and our solicitor and I am confident that it is not architectural industry practice that has been followed.

Giving you the benefit of the doubt on the matter of a revised OPC to \$750K, for the purpose of this email only: Our client meeting was on 9 April 2008, 9 months into the project, at which point contractual documentation was at the very minimum 85% complete and we were ready for tender per your email of 1/4/08 and your invoice of 8/4/08. To suggest to a client at this stage that a budget is to be moved from

\$550 plus GST to \$750-\$800k plus GST (36% increase) is very poor. It is worth considering what may have been the case had the budget remained at \$550 plus GST? The drawing set would have had to be re-done and if the previous time frame was used this could have taken months. We proceeded logically to tender as the best course of action open to us at that point.

Unfortunately, as you advised earlier we expect to have this matter addressed through VCAT.

Cheers.

86. And, finally, the reply from Neil Architecture:

Dear Matt and Trudy

We are confident that we have followed due process and that this is demonstrated robustly in our email exchange.

We believe that 85% through documentation is an appropriate time to have a budget update meeting, and provide to you as we did the opportunity to entertain cost savings prior to going out to tender. The simple deletion of items such as swimming pool, and associated decks, garage, built in bbq and a rationalisation of some high end fixtures and finishes could have easily been addressed in order to achieve a lesser tender price.

Notwithstanding this you gave us clear instructions to push forward advising us in regards to the potential budget outcome "it is what it is."

As you would be aware from our architect client agreement our fees are based on cost of works 7.1 and have been charged accordingly.

As it appears your response email does not offer any acknowledgement of your responsibility to pay \$27 000 thousand odd of professional fees. We naturally have no choice but to continue along the lines of our previous letter.

Regards

Cameron

87. On 18 November 2008 the Cooks issued proceedings in VCAT seeking a refund of monies paid to Neil Architecture.

### **Expert Evidence of Mr John Permewan**

88. Mr John Permewan, consultant architect filed an expert report and gave evidence at the hearing for the Cooks. The evidence of Mr Permewan, was on the whole uncontentious.
89. His first point was that he was of the opinion that the OPC of 5 July 2007 was low (\$544,000 excluding GST) compared with the lowest tender price of \$772,000 excluding GST) given in June 2008 even allowing for price escalation. Mr Permewan considered that the July OPC might reasonably have been \$750,000 to \$790,000 having regard to the end tender price. In



arriving at that opinion Mr Permewan assumed that there was no significant change in the design or scope of works. Mr Neil contended that there were significant changes in the design which accounted for the increase in cost.

90. Mr Permewan found that there was price escalation of 5.6% from July 2007 and June 2008.
91. Mr Permewan was of the opinion that the per square metre rate is not an accurate way of estimating building costs. He said that the elemental method should be used. He agreed that this was typically done by a quantity surveyor rather than an architect. Mr Neil said that his work is highly customized and unless the quantity surveyor had a working knowledge of the type of work he did, the quantity surveyor could not accurately give an estimation of cost at the masterplan stage. Mr Neil said that it is his experience that his price estimates are more accurate than a quantity surveyor. Mr David Neil, Mr Cameron Neil and Mr Brett Tuer said that in their experience of high end domestic alteration work it is the practice of architects to use the per square metre rate to calculate estimated costs. On occasions, where the jobs are outside their field of expertise they would engage a quantity surveyor.
92. Mr Permewan said that an elemental cost estimation could have been made on the Masterplan and this would have provided a more accurate OPC. Mr Permewan did not prepare a cost estimation on the Masterplan so no comparison can be made with Mr Neil's method and Mr Permewan's method in this instance. Mr Permewan did not give an opinion on whether the \$2,700 was a correct or incorrect figure to use. He was not able to say that the OPC of 5 July was incorrect or unreasonable. His opinion is that having regard to the final tender, the OPC of 5 July is low. In arriving at his opinion Mr Permewan assumed there was no major change to the Masterplan.
93. Mr Permewan said the plans that went to tender were highly specified with high quality fittings. He said the specifications were well above average with a complicated design with very high-end finishes, fittings and quality.
94. With regard to the value of the drawings, Mr Permewan said in his report that:

If the basic design concept is still acceptable to the clients they may adapt the design by altering the scope of works and more particularly, the quality, before re-tendering the work to achieve a result in their monetary budget.

### **Summary of findings**

95. I find that the July 2007 OPC at \$544,000 (excluding GST) was reasonable and accurate given the scope of works and level of finish anticipated at that time. The level of finish anticipated by the parties at that time was the same as the Voshege house or Mr Neil's own home. An

elemental costing may have provided a more accurate estimation of cost but there was no evidence to establish that an elemental costing would have produced a different figure.

96. I find that that the Cooks agreed to an increase in the scope of works and level of finishes as the design progressed. I find that the design and level of finish decided upon by the Cooks exceeded both the Voshege house and Mr Neil's home. I find that the increase in scope of works and level finish was not allowed for in the original OPC and it was unreasonable for the Cooks to assume it would be allowed for in the original OPC.
97. I find that Neil Architecture did present the Cooks with the pre tender OPC of \$750-\$800,000 excluding GST at the meeting on 9 April 2008 and that the Cooks agreed to proceed to tender with the revised OPC.
98. The tenders came in over the maximum pre tender OPC of \$800,000 excluding GST. The lowest tender was \$849,500 excluding GST with the highest at \$1,301,803 excluding GST. The lowest tender was a genuine tender and there was no evidence to suggest it was not an all inclusive price.
99. I find that Neil Architecture did design the works reasonably close to the pre tender OPC. I find that there was significant potential to reduce the cost of the project to the pre tender OPC and quite possibly even back to \$650,000 (excluding GST). Neil Architecture was not given the opportunity to reduce the cost of the project if required by the Cooks.
100. I do not accept that the Cooks did not proceed with the works because the cost of the project was too high. If the cost of works was the reason for not proceeding the Cooks could have and still can reduce the cost of works. They did not request Neil Architecture to reduce costs. There was plenty of scope to do so. If there was a concern over the gap in the TCM tender price compared with other tenders this should have been raised with Neil Architecture rather than requesting TCM to hold its price until February 2009. The concern for over-capitalizing the property was not substantiated. No evidence was led in relation to it. I note that Mrs Cook gave evidence that the house across the road was worth \$3 million dollars.

### **The Applicants' claim**

101. The Applicant's claim is put on 4 bases:
  1. Breach of contract;
  2. Negligence;
  3. Misleading or deceptive conduct in breach of S9 of the *Fair Trading Act 1999*;
  4. Estoppel.
102. In short, the Cooks allege that Neil Architecture failed to design the works in accordance with the OPC, and failed to revise the OPC in a timely

fashion and therefore they should not have to pay Neil Architecture for any of their services.

103. The client-architect agreement contains the following provisions concerning budget and cost of works:

Responsibilities and Entitlements of the Client

The client shall:

- 2.2 provide the architect with a realistic budget for the anticipated Cost of Works and the Total Project Budget in consideration of the Scope of Works together with all relevant information required by the architect to complete the services described in the agreement.
- 2.3 recognize that their requirements may alter as the design develops through the design process.

Core Services (to be provided by architect)

Design Stage

- co-ordinate the cost consultant in the preparation of the preliminary estimate of the Cost of Works

Design Development

- review the final design against the budget established by the cost consultant and co-ordinate the cost consultant in the preparation of the updated estimate of the Cost of Works

Construction Documentation

- co-ordinate the cost consultant in the preparation of a pre-tender estimate of the Cost of Works.

Tendering

- negotiate with the preferred tenderer to obtain offer acceptable to client

104. In addition to the matters set out in the client-architect agreement, the Cooks rely upon the master plan, the OPC and initial briefing document and Mr Neil's email of 22 May 2007 in which he promised to manage their expectations.

105. The Applicants allege the respondent breached the client-architect agreement in three substantial ways. In the alternative, the Applicants allege negligence, misleading and deceptive conduct and estoppel based on the same allegations. I will deal with the three alleged breaches:

106. Firstly, it is alleged that the Respondent failed to provide architectural services to prepare a design for a cost of works less than the OPC. The agreed revised OPC was \$800,000 exclusive of GST. The lowest tender came in at \$849,000 GST. The cost of works could have been reduced by \$50,000 to bring the tender within the revised OPC. The allegation is not proved.

107. Secondly, the Respondent breached the client- architect agreement by not giving the applicants an accurate OPC on 5 July 2007. I am not persuaded that the evidence of Mr Permewan establishes that the OPC of 5 July was inaccurate. No other calculation was put in evidence to establish that the OPC was incorrect. I find that there was an increase in the scope and quality of the works and a general building price escalation which accounts for the variation in the OPC of 5 July to the revised OPC in April 2008. The allegation is not proved.
108. Thirdly, the Respondents breached the contract by not providing the Applicants with a timely revised OPC or advising the Applicants that the project could not be built within the cost of the OPC. The latter part of the claim fails as I have already found that the project could have been built within the revised OPC as agreed with the applicants. The client-architect agreement provided that the respondent provide the applicants with a revised OPC at the end of the design development stage. However, the design-development stage ran concurrently with the construction documentation stage, so a revised OPC was not provided until April 2008. I find that the Respondent has complied with its contractual obligations to provide the applicants with a revised OPC. It is to be noted that the OPC is indicative of the probable cost, and at any time until a building contract is signed, the applicants are at liberty to reduce costs. That position is still available to the Cooks, as stated by their own expert. The claim is not proved.

#### **Respondent's counter claim**

109. The respondent counter claims as follows:

- A. The May account \$14,446.08 based on an adjusted price of \$650,000 (excluding GST)
- B. The August account \$13,100.74 reflecting the lowest tender price of \$773,400 (excluding GST)
- C. Interest

110. I find the Respondent has proved its claim for architectural fees. I allow \$27,546.82 as follows:

- \$14,446.08 on the May invoice
- \$13,100.74 on the August invoice.

**MEMBER L. ROWLAND**