VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. BP1514/2016

BUILDING AND PROPERTY LIST

CATCHWORDS

Building – claim for payment by sub-contractor - plans altered after Contract - additional work a variation – claims to be made monthly – no agreed for claims – Builder not entitled to demand claims in a particular form if not specified in the contract – manner in which claims to be assessed not provided in contract – sub-contractor entitled to reasonable value of work done but taking into account balance of work to be done – evidence as to value of work done – no evidence to support assessments made by builder.

APPLICANT	DK Air Pty Ltd (ACN 973 809 713)
RESPONDENT	Bayside Construct Pty Ltd (ACN 894 220 327)
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	15-16 March 2018
DATE OF ORDER	22 May 2018
CITATION	DK Air Pty Ltd v Bayside Construct Pty Ltd (Building and Property) [2018] VCAT 789

ORDERS

1. Order the Respondent to pay to the Applicant $287,429.27.
2. The claim for interest is reserved for further argument.
3. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Mr D. McDonald of counsel
For the Respondent	Mr N.J. Phillpott of counsel

REASONS FOR DECISION

Background

1. In this proceeding, the Applicant is a mechanical services contractor carrying on business installing heating and cooling systems in buildings. The Respondent is a builder.

2. The Applicant seeks to recover from the Respondent an amount of $296,384.14 plus interest with respect to work done and materials supplied to a large multi-unit development in Mitcham ("the Project").

3. The Respondent denies that it is indebted to the Applicant and contends that the Applicant was in breach of the Contract in suspending work and then purporting to terminate the Contract. It said that it had to engage another contractor to complete the work at an increased cost but no counterclaim has been brought against the Applicant.

The hearing

4. The matter came before me for hearing on 15 March 2018 with two days allocated. Mr D. McDonald of counsel appeared on behalf of the Applicant and Mr N.J. Philpott of counsel appeared on behalf of the Respondent.

5. At the commencement of the hearing, Mr McDonald sought to amend the Points of Claim in accordance with a document that he produced. After hearing from counsel I ordered that the Points of Claim be amended in accordance with that document.

6. The hearing proceeded over two days and after hearing submissions from counsel I informed the parties that I would provide a written decision.

The Witnesses

7. There were two witnesses. Mr Karavani gave evidence on behalf of the Applicant and Mr Cifali gave evidence on behalf of the Respondent.

8. Mr Karavani is a licensed plumber and the director of the Applicant. He said that he has been in the business for 18 years. He did not carry out the work himself. The Applicant had a team of employees under a site supervisor but Mr Karavani said that he was there every day between 7 am and 9 am and was sometimes on site for up to 4 hours.

9. Mr Cifali has a degree in construction but no trade qualifications. He became the Project Manager for the Project from 11 February 2016 and remained so until the Applicant purported to determine the Contract in October that year. His knowledge concerning what occurred with the Project before 11 February was gained from reviewing the Respondent's file.

The Contract

10. On 29 October 2015 an employee of the Respondent, Mr Koh, contacted Mr Karavani and requested him to provide a quotation for the supply and installation of air conditioning units, ventilation other mechanical components for the Project. A set of plans was provided.

11. Pursuant to this request, on 1 November 2015, the Applicant provided a quotation to do the work for a price of $461,006.50 inclusive of GST. The quotation set out details of the work to be done and a description of the air conditioning units and other materials to be supplied under six headings, with a price for each and the total for the whole job.

12. After being requested by telephone for a reduction in the price, Mr Karavani produced a further quotation for the lesser price of $398,150.50 inclusive of GST. A comparison of these two quotations shows that some of the saving was made by reducing the size of the outdoor air conditioning units from 8 kilowatts to 7 kilowatts and from 10 kilowatts to 6.8 kilowatts and reducing the indoor units from 6.8 kilowatts to 5 kilowatts.

13. Both quotations were prepared in reliance upon the plans the Respondent had supplied. Mr Karavani said that no fire engineer's report or acoustic report was provided to him until after the Contract was entered into and the Applicant had started work. He had also not visited the site at the time the quotations were given.

14. On 11 November the Respondent requested specifications for the condensers to be used. Mr Karavani said that he sent them.

15. On 26 November the new Contract administrator, Mr Berriman, sent an email to Mr Karavani asking that the indoor unit capacities be selected to match the capacities on the drawings. Mr Karavani replied that the units would be satisfactory and that the mechanical services would fit.

16. The second quotation was accepted and on, 15 December 2015, Mr Karavani signed a sub-contracting agreement prepared by the Respondent ("the Contract"). The Contract was not signed on behalf of the Respondent until 19 February 2016.

Relevant terms of the Contract

17. The Contract comprises seven typewritten pages and a signing page. Although it refers to a document register, no plans, specifications or other documents were attached to the Contract. There is a written description of the work to be carried out and the following words, which are relied upon by the Respondent, appear:

> "All requirements of the acoustic and fire reports are to be adhered to."

18. On page 2, immediately under the heading "General Requirements", are the following two paragraphs:

> "All works are to be carried out and completed according to the drawings and specification documents provided, to our reasonable satisfaction and at the time agreed upon.
>
> Materials to be used and required finishes are to be as per the specification documents provided."

19. Under the heading "Variations" on page 5, are the words:

> "The Contractor must not make any changes to the Works; carry out any work of (sic.) leave any details of the works unfinished, unless directed in writing by Bayside Construct Pty Ltd.
>
> Bayside Construct Pty Ltd may, by giving a written direction, require the Contractor to carry out a variation.
>
> The price of a variation is that agreed by the parties or an amount reasonably decided by Bayside Construct Pty Ltd.
>
> The Contract price is to be adjusted by the price of a variation at the next payment."

20. The provision for progress claims and payment is on page 5 of the Contract and is in the following terms:

> "Progress claims must be submitted by the 25th of each month and will be paid on 30 days from end of month terms. Any claims submitted after this date will be processed in the following payment cycle.
>
> If required, the trade contractor must give Bayside Construct Pty Ltd, as a precondition to payment, a signed statutory declaration that all its subcontractors and employees have been paid all amounts then due for work under this Contract.
>
> Any payment, other than a final payment by Bayside Construct Pty Ltd to the contractors is payment on account only."

21. On page 6 of the Contract there is a provision for 10% be deducted from each progress claim as a retention until 5% of the Contract value is reached. One half of the sum so retained is to be released to the Applicant at practical completion and the other half at the end of the defects liability period.

22. Also on page 7 of the Contract, there is a provision that if a party is in substantial breach of the Contract and remains in default three working days after the other party has given it a notice requiring the default to be remedied, then, without prejudice to its other remedies, the other party may end the Contract.

23. Since the only documents given to the Applicant were those upon which the quotation was based, those are the "drawings and specification documents provided" for the purpose of the Contract and so all works were to be carried out and completed according to those documents.

24. In his witness statement, Mr Cifali pointed out that all requirements of the acoustic and fire reports were to be adhered to. That is so, but the

requirements were those that would have been applicable to the design set out in the plans that were given to the Applicant because they were the Contract documents.

The acoustic and fire reports

25. The Fire Report is dated April 2015. The executive summary of that report states that the Project comprises a three-storey apartment building with a basement carpark. It says that the carpark is separated from the residential areas by a two-hour fire rated reinforced concrete floor slab with the balance of the building incorporating lightweight construction. There are some plans which form part of the report but, because the size of the lettering is so small and the quality of the reproduction is so faint, I was unable to read them. I am therefore not able to make any finding as to the extent of the "lightweight construction" in the design upon which the Fire Report was based.

26. The Fire Report required the building to comply with the deemed-to-satisfy provisions of the Building Code of Australia with specified variations. Precisely what was required to be done in order to satisfy those provisions is not stated so far as I can see. I can find no mention of fire dampers, which is what appears to be in dispute in this context in the present case.

27. The Acoustic Report is dated 19 October 2015. The overview on page 4 of that report, states:

> "The acoustic requirements of the BCA are directed towards the provision of sound isolation between residential units of a separate occupancy. The overall objective is to acoustically isolate noise sources within one occupancy and prevent them from intruding upon an adjoining occupancy. As such, the requirements cover following:
>
> - Sound isolation requirements for party walls.
> - Sound isolation through the floor/ceiling of one apartment to apartments located directly above and below.
> - Acoustic separation of waste soil pipes, where they pass from one apartment over or through the spaces of any other apartment of separate occupancy.
> - Impact sound isolation of wet areas (bathrooms, kitchens) where they adjoin living spaces (bedrooms, living rooms etc.) of an adjoining apartment.
> - Sound separation of apartments from public corridors plant rooms public stairwells, etc."

28. The provision for sound insulation of services in Clause 6.4 of the report is to do with (inter-alia) ducts which serve or pass through more than one sole occupancy unit. I can find nothing in the report that says how much noise fans must emit or that requires the fans to be insulated for sound from the unit they are servicing. There are numerous illustrations detailing construction methods appended to the report but none of them requires the

sound attenuation work that the Respondent later requested the Applicant to carry out.

Construction

29. Immediately following the signing of the Contract, Mr Karavani went to the site and observed that, whereas the plans that he had been given showed that the building was to be constructed of reinforced concrete, only the basement had been constructed of reinforced concrete. The rest of the building was being built on a timber frame.

30. On or about 21 January 2016 the Applicant was sent a chain of emails passing between the Respondent and the designer concerning the change in construction from concrete to timber and a reduction of ceiling heights. The substance of the emails was that the original mechanical drawings did not take into account the structural elements of the building and their location. In most cases the mechanical ducts were to exit the building through a structural beam which could not have any penetrations. Mr Karavani said that he was asked to suggest ways of avoiding penetrating the structural members and to this end, he attended the site with Mr Lombardi, the Respondent's site manager and marked up some plans.

31. Work then proceeded. Regular contact and instructions were between Mr Karavani and various people on behalf of the Respondent. At first the Project manager was a Mr Koh, then a Mr Berriman and then Mr Cifali. There were also instructions received from a Mr Walsh and Mr Lombardi.

32. Organization on the part of the Respondent's part seems to have been lacking. The plans were still being revised in late January, well after the Contract was signed by the Applicant. Mr Karavani said that the work in the basement was changed three times but that the Applicant did not charge for that.

33. Invoices were submitted by the Applicant but Mr Cifali objected to the form of these and required them to be resubmitted in accordance with a form that he prescribed. This was done, although the Applicant continued to submit its invoices in its own form.

34. Mr Cifali disputed the Applicant's claims and although some payments were made, these were for considerably less than the amounts the Applicant had claimed.

35. Eventually, on 4 October, the Applicant made a "Final Demand" for an amount of $279,573.56 which was said to be outstanding. In an accompanying email, Mr Karavani requested a meeting to discuss the matter and stated that no further work would be done until an outcome was decided at the meeting. Mr Cifali responded by email, alleging that the amount demanded was "not valid", suggesting that the Applicant was acting fraudulently and demanding that the Applicant continue working. A detailed letter from the Applicant's accountant followed repeating that the money was owed.

36. The dispute was not resolved and, by notice sent on 13 October 2016, the Applicant purported to determine the Contract.

The Contractual scope of works

37. It is common ground that the Applicant purported to terminate the Contract and left the site before the works were completed. The Applicant claims that it was entitled to terminate the Contract and is now entitled to be paid the amount it had claimed for the work that it did, plus the value of the unfixed materials on site that the Respondent refused to allow it to remove.

38. There was direct evidence from Mr Karavani as to the extent of the work done. However, the evidence on the Respondent's side was:

    (a) the percentages of the various areas into which Mr Cifali had divided the work for his own purposes which, he said, were not done to the extent claimed by the Applicant; and
    (b) after the Applicant left the site the Respondent engaged alternate contractors at a cost of $280,742.00, inclusive of GST, to complete the work.

39. As to the first of these, for the reasons given below, I prefer Mr Karavani's assessment of the stage the work had reached over what Mr Cifali described in his witness statement as his "deemed" assessments.

40. The Respondent produced a report from a firm of consulting engineers, NJN Design, dated 17 November 2016, who inspected the Applicant's work after it left the site. In that document the author says that the objective of the inspection undertaken was to:

    (a) inspect and assess the scope and mechanical works completed to date.
    (b) report quantum of pending mechanical works.
    (c) assess the workmanship of mechanical Contractor.

41. The author of the report goes on to state that some ductwork, fans and grilles were missing, some components were not installed and testing and commissioning was pending. In regard to the air-conditioning systems, he states that all the outdoor air-conditioning condensing units were not installed but that the refrigeration piping between the indoor and outdoor units was installed.

42. A list was provided in the report of the indoor fan coil units that were said to be not installed. Mr Karavani agreed with most of the list but disputed some items and it appears that the author of the report, who was not called to give evidence, might have confused what was in one unit with what was in another. Nevertheless, there is little difference in the assessments of the number of units that had been installed and I find, on Mr Karavani's evidence, which is supported by invoices and photographs, that 77 indoor units had been installed.

43. The author states that the workmanship of the completed mechanical works was found to be acceptable and said that the mechanical contractor should

submit all as-installed drawings, operation and maintenance manuals, or test reports, electrical safety certificates and plumbing certificates.

44. It is clear from the NJN Design report and from Mr Karavani's evidence that the work was incomplete. The air-conditioning units and the missing cowls were on-site although not installed. Unfortunately, no assessment was made by the author of the report of the reasonable cost of completing the work which is what I would need to determine if I were to reduce the Applicant's claim on that account.

The claims for the Contractual scope of works

45. Progress claims were submitted by the Applicant with respect to the Contract scope of works as follows:

Date	**Invoice number**	**Amount** (GST inclusive)
10 January	10799	$ 4,180.00
22 January	10805	$ 5,678.61
24 February	10826	$ 19,683.95
24 March	10845	$ 65,049.61
22 April	10858	$ 72,392.58
25 July	10898	$ 20,319.59
23 September	10944	$123,083.22
14 October	10943	$ 9,805.94
Total		$320,193.40

The final invoice (No. 10943) is because, following the termination of the Contract, the Respondent refused to allow the Applicant to remove the un-installed air-conditioning units and other materials brought onto site and it retained them. These have been charged to the Respondent by that invoice.

46. The Contract provided that the Applicant would submit its progress claims by the 25th of the month and that the claim would be paid by the end of the following month. Much of the dispute appears to have arisen around the form and content of the Applicant's claims for payment.

47. The Contract did not require the Applicant's claims to be in any particular form, nor was there any provision that the work must reach a particular stage of construction before a payment would become due. From the terms of the Contract, the intention appears to have been that the Contractor would claim a payment according to the progress that it had made in the work that was to be carried out up to the time the claim was made.

48. The Applicant had quoted a fixed price to carry out the whole of the work and so it would be reasonable in assessing any claim for the Respondent to ensure that, if the claim were to be paid, there would be sufficient of the Contract price left to ensure that the job would be able to be completed.

However the Contract did not require the Applicant, when submitting a claim, to make any assessment of the cost of carrying out the remaining work.

49. The Contract also made no provision as to how claims made by the Applicant were to be assessed. Although the intention appears to have been that the Applicant was to receive the value of the work done which was the subject of a claim, there is no mechanism set out in the Contract for assessment of that by a quantity surveyor, architect or any third party. There is no provision for the issue of certificates or a review procedure if a party should be dissatisfied with an assessment. Clearly, the Respondent would not be bound to pay automatically whatever amount was claimed. I think the amount to be paid in each case would be the actual value, to be assessed objectively, less the agreed retention, if applicable, and if there should be disagreement, then presumably the only means of resolving that would be by negotiation or, ultimately, litigation.

50. Mr Cifali complained that, when he took over the Project he found the Applicant's invoices difficult to decipher and so he set up his own system in order to "bring the claims into order". He did this on a spreadsheet where he set out the six items on the Applicant's quotation and required the Applicant to relate each amount sought in a claim to a particular item in his spreadsheet and submit its claims in accordance with his system.

51. Mr Karavani said he had great difficulty with this but was told that, unless he did it, the Applicant would not be paid. He brought his computer to the Respondent's office where one of the Respondent's staff, a Miss Butterley, downloaded Mr Cifali's program onto it. Thereafter, Mr Karavani attended the Respondent's office each month and Miss Butterley would input details into his laptop computer and then email the claim from the computer to Mr Cifali and to the Respondent's accounts office. These claims, appear to have been prepared by Miss Butterley. At the same time, the Applicant sent its own invoices in its own form to the Respondent "…as a normal part of its business".

52. Mr Cifali criticised the manner in which, he said, Mr Karavani completed these spreadsheets. Mr Karavani said that the documents that Mr Cifali criticised were not prepared by him but by Miss Butterley, but in any case, that is not to the point. The Contract did not require the Applicant to prepare its claims in any particular way and it did not require the Respondent to assess those claims in any particular way. The Applicant simply had to submit its claim by the 25th day of each month and it was then for the Respondent to pay what was due, less the retention, if applicable, within the time provided.

53. Apart from the form of the claims, Mr Cifali's substantial criticisms were that:

    (a) the degree of completion claimed by the Applicant had not been achieved in each instance; and

(b) several of the variations that were claimed "were not valid"; and
(c) the Respondent paid another Contractor, Sagecon, $253,220.00 plus GST to complete the work. It also paid a further amount to a plasterer, Diangel Plastering $2,000.00 plus GST for plastering work.

The first two of these were the reasons given for not paying the claims that were made. The third is raised in the Points of Defence.

The degree of completion

54. The evidence given by Mr Karavani was in regard to what had been done and the value of the work and materials supplied which was the subject of the claim. He did not base the Applicant's claims according to the degree of completion reached in regard to any particular part of the work, which is what Mr Cifali wanted him to do.

55. In paragraph 16 (c)(i) of his witness statement Mr Cifali describes the parts of the Project to which he has allocated the Contract price as being "deemed" to be 90% complete in regard to his item: "the Basement Carpark", 56% complete in regard to his item: "Mechanical all the apartments" and 15% complete in regard to his item: "A/C Samsung or Toshiba…7kw outdoor unit and 2kw and 5kw indoor units".

56. He does not say directly in his witness statements how these percentages came to be "deemed". Since, he refers to assessing the Applicant's claims, one might infer that these percentages were his assessment, but for the difficulties expressed below.

57. Mr Karavani denied that he had claimed that the basement was 100% complete. He said that it was 90% complete. That agrees with Mr Cifali's assertion and also with Invoice 10944 rendered to the Respondent on 23 September.

58. There is no evidence that Mr Cifali's qualification, which is "a degree in construction", extends to assessing the value of building work. Further:

(a) he did not say that, upon receipt of a claim from the Applicant, he went to the site and assessed the value of what had been done or assessed it in some other way;
(b) in an email dated 15 July to Miss Butterly he asked her to assess the progress of the work "…with the site team and issue Dani *[Mr Karavani]* with our assessment for his record by the 25th". This would suggest that, if any of the assessments were made by Mr Cifali, at least some of them were not;
(c) he said in the witness box that he did an assessment with the site manager and foreman. I have no evidence as to how this was done, what the input of any of these three persons was in making the assessment or even whether they were all of the same opinion;
(d) there is no evidence of the qualifications of either the site manager or foreman and whether this extended to assessing the value of building work;

(e) neither the site manager nor the foreman nor any other member of this "site team" was called to give evidence;
(f) it is concerning that, in an email dated 3 October, Mr Cifali substantially understated the number of air conditioning head units that had been supplied and installed. I do not accept that what he said in that email resulted from any considered assessment on his part of the degree of completion reached at that time.

59. Findings must be based upon evidence rather than mere assertion. Even if I were to find that Mr Cifali was of the opinion that the work had progressed only to the extent that he said, it is impossible to know what weight to put on that evidence. As against that, I have the evidence of Mr Karavani, who:

(a) is a licensed plumber;
(b) has been carrying out this sort of work for 18 years;
(c) ordered and paid for the materials and the workmen on the job;
(d) was on site every day directing the Applicant's workmen;
(e) has given a detailed account of the labour and materials supplied.

60. I think that Mr Karavani would be more likely to have an accurate knowledge of the value of the work done and consequently I should prefer his evidence on that issue to that of Mr Cifali.

Variations

61. Mr Cifali said in his witness statement that the Applicant was required by the Contract to "…design and deliver a final system that would accord with the fire engineering report and acoustic engineer respectively." He said that the Applicant "…ignored their contractual obligation and proceeded to install works that would ultimately fail on Fire and Acoustic performance." He said that the Applicant "…was not entitled to variations for additional work carried out as a result of unsatisfactory base work." He said that the Respondent did, however, determine some variations "…as a goodwill gesture".

62. The Contract, by its express terms, was not a design and construct contract; it was a supply and install contract. It was to supply what was described in the Contract "…in accordance with the drawings and specification documents provided." Mr Karavani said that the Applicant did that.

63. Mr Karavani said that all of the variations that he did were requested in writing by the Respondent. He claimed that anything that was not in the Contract was a variation and that he made no changes without the Respondent's approval. The following variations to the work are claimed.

Site toilet

64. The Applicant supplied materials for a site toilet at a cost of $423.50. This does not appear to be disputed.

65. The Invoice in regard to this variation is said to be:

Date	Invoice number	Amount (GST inclusive)
10 January	10799	$423.50

Variation to the rough-in

66. Mr Karavani said that, after the rough-in had been approved, the supervisor, Mr Lombardi, requested a variation to the rough-in involving several apartments. These were for apartments 7, 16, and 30 to 34.

67. The amount of this variation is claimed as part of the following Invoice:

Date	Invoice number	Amount (GST inclusive)
24 February	10826	$1,900.82

although most of this invoice relates to Contract works.

Fire dampers

68. Mr Karavani said that, because the building was to be constructed above basement level on a timber frame, this meant that he had to change the scope of works at rough-in so as to include fire dampers. Mr Karavani said that these are boxes with plates inside designed to stop the spread of fire. He said that they would not have been required for a concrete ceiling and so they were not allowed for in his price.

69. On 9 March 2016, Mr Cifali sent the following email to the Respondent:

> "Please proceed with the supply and installation of the following:
>
> - Fire dampers for exhaust fans where required.
> - Damper/collar where we penetrate fire rated walls.
>
> Please mark up a plan/keep a record of the locations and quantities for final variation substantiation."

70. By a later email dated 6 April 2016, Mr Cifali confirmed that the variation was endorsed to proceed and by a further email said that approval was given to go ahead with the work but that "…substantiation / justification of the supply cost…" would be required.

71. It is apparently pursuant to this last email that, on 4 May 2016, the Applicant provided a quotation for the provision of fire dampers for a price of $66,540.50 plus GST, making a total invoice of $73,194.55.

72. In his evidence, Mr Cifali said that the variation for the fire dampers was approved but that the amount of the claim was not approved. However, he made no objection to the price in the Applicant's quotation that was sent to him at his request and he was content to allow the work to proceed. This variation is established.

73. The amount of this variation is claimed in the following Invoices:

Date	Invoice number	Amount (GST inclusive)
22 April	10857	$44,823.90
22 April	10858	$ 4,851.00
14 October	10943	$ 4,548.03

Most of Invoice 10858 relates to Contract works. Invoice 10943 is for unfitted materials that were retained by the Respondent following termination. For this item, the amount is for range hood fire dampers.

Modification of the fan installations

74. On 2 May 2016 the Applicant was requested by Mr Cifali by email to modify the fan installations by fitting lagging to reduce noise and also fit blue rubber mounts to the fans in order to reduce noise. The Respondent then requested the Applicant to remove the fans and replace them with quieter ones. A credit of $5,150.00 plus GST was allowed for the fans that were removed.

75. I do not accept Mr Cifali's suggestion that the fans "did not comply with the acoustic report". So far as I can see from the acoustic report, no fans, or performance details for fans, are specified. It is not suggested that the fans that were replaced were not those specified in the Contract. I am satisfied that this was a variation.

76. The amount of this variation is claimed in the following Invoice:

Date	Invoice number	Amount (GST inclusive)
25 May	10873	$76,207.10
1 June	10874	$5,940.00
11 June	10878	$7,715.48
25 June	10884	$2,516.80

Repairs and re-installation of the Applicant's work

77. It appears that in May 2016, ceilings in the apartments had to be pulled down and re-installed correctly and as a consequence, by an email dated 30 May, Mr Lombardi asked Mr Karavani to remove and re-install the fire dampers.

78. In June 2016 there was a fire on site that damaged some of the electrical cables, copper pipes and drains. The Applicant was requested to repair the damage.

79. On 4 July 2016 Mr Lombardi contacted Mr Karavani with a list of damage that had been done by the Respondent's plasterers to the air-conditioning pipes which required repair. A purchase order was given to the Applicant by the Respondent for repair of the pipes on 8 July.

80. I accept Mr Karavani's evidence that, in each case, the work was requested and done and that it was additional work.

81. These variations are claimed in the following Invoices:

Date	**Invoice number**	**Amount** (GST inclusive)
7 June	10875	$ 429.00
25 July	10900	$3,960.00
27 July	10902	$1,386.00

The charges for the variations

82. Apart from saying that insufficient information had been supplied, and a very few calculations in a spreadsheet on some minor matters, Mr Cifali's evidence did not deal with the calculation of the amounts charged for the variations. Mr Cifali also claimed that some they were not variations.

83. Some variations were eventually accepted by the Respondent on 15 November 2017, long after the Contract had been terminated. Even then, the item in regard to the fans was adjusted in some way and then discounted by 50% because of a warning that Mr Cifali said he gave to Mr Karavani about the fans having to be quiet. I am not able to find that any reasonable decision was made by the Respondent's staff in regard to the amount to be allowed for any variation.

84. Mr Karavani said that the value of each of these variations was the amounts charged and that insofar as the Respondent assessed them at any lesser value, he disputed those assessments. Some were assessed at a lesser value. Some do not appear to have been assessed at all. For the reasons given I prefer Mr Karavani's evidence to that of Mr Cifali in regard to the value of the work and materials supplied. I thought that Mr Cifali's evidence concerning the amount to be paid for anything was more in the nature of assertion than evidence.

85. I am not satisfied that the amounts suggested by the Respondent for variations were "reasonably decided" by the Respondent as contemplated by the Contract and I accept that the amounts charged by the Applicant for the variations were fair and reasonable.

Payments

86. The first payment made to the Applicant was on 31 March 2016. The whole amount claimed was allowed, less the variation of $1,728.00 in Invoice 10826. In the Respondent's payment schedule there is a note to the effect that the reason for the difference was that the Applicant was to provide "backup" to allow the Respondent "…to determine if this is a variation, as agreed on site". It does not appear why, if it had already been agreed that this was a variation, the Respondent was seeking further proof, months after the event. Usually, a variation is discussed and agreed upon at the time the additional work is done. It is obviously important to the tradesman to know before he undertakes extra work whether or not he is going to be paid for it.

87. I found the assessment schedules the Respondent prepared hard to follow. Mr Cifali appears to have attempted to split up each claim in order to fit it into his own system. That was not justified by the terms of the Contract.

88. The payments the Applicant claims that it received, totalling $187,465.76, are set out in a spreadsheet on page 301 and 302 of the Tribunal Book and these do not appear to be disputed. In the table they are allocated by the Applicant between the various invoices rendered. Mr Cifali did not approach it in that way and made payments according to what he "certified". As stated above, no process of certification is contemplated in the Contract.

The payments to Sagecon and Diangel

89. The amount paid to Sagecon was said in the Points of Defence to be for "completion of the Applicant's scope of works and rectification of defects".

90. The Applicant's work was incomplete but there is no evidence that it was defective. Indeed, the report from NJN Design described the work as "acceptable" and did not identify any defects. The invoices from Sagecon were Exhibit "MC 10" to Mr Cifali's witness statement. No one from Sagecon was called to give evidence to prove that any of this work was required because the Applicant's work was defective, or say how much of the work that they did was the same scope of works as that required to be undertaken by the Applicant. I cannot make any findings about these matters simply by looking at the invoices and Mr Cifali's evidence as to the scope of the Applicant's works was unreliable.

91. The invoices from Diangel are, on their face, for plastering up holes left by electricians. It is not apparent how that relates to the Applicant.

92. There is no basis for reducing the amount payable to the Applicant on account of the payments made by the Applicant to either of these entities.

Termination

93. On 10 October 2016 the Applicant sent a notice to the Respondent saying that it was in default under the Contract by failing to pay an amount of $254,157.78, particulars of which were said to have been provided, and requiring the Respondent to remedy the default.

94. On 13 October 2016 the Applicant served a further letter on the Respondent referring to the early notice and stating that, since the Respondent had failed to remedy the default, the Applicant thereby ended the Contract.

95. I find that the Respondent, by not paying the Applicant as required by the Contract, was in substantial breach and so the Applicant was entitled to serve these notices and terminate the Contract.

Conclusion

96. Since I am satisfied that the work invoiced by the Applicant was done and the variations were requested and I accept Mr Karavani's evidence as to the

reasonableness of the charges, I find the claim is established. The amounts invoiced will therefore be allowed less the payments that have been made.

97. There will be an order that the Respondent pay to the Applicant the sum of $287,429.27, calculated as follows:

Claims for the Contractual scope of works	$320,193.40
Variations:	
Site toilet	$ 423.50
Variation to rough-in	$ 1,900.82
Fire dampers	$ 54,222.93
Modification of the fans	$ 92,379.38
Repairs and re-installation	$ 5,775.00
Total charges	$474,895.03
Less: Payments	$187,465.76
	$287,429.27

Interest and costs

98. Interest "pursuant to statute" is sought by the Applicant in the prayer for relief. The "statute" that confers the power to allow interest in a domestic building dispute is s.53 of the *Domestic Building Contracts Act* 1995 which, where relevant, is as follows:

> "(1) The Tribunal may make any order it considers fair to resolve a domestic building dispute.
>
> (2) Without limiting this power, the Tribunal may ...
>
> (b) ...order the payment of a sum of money-
>
> ...
>
> (ii) by way of damages (including ... damages in the nature of interest);
>
> ...
>
> (3) In awarding damages in the nature of interest, the Tribunal may base the amount awarded on the interest rate fixed from time to time under section 2 of the *Penalty Interest Rates Act 1*983 or on any lesser rate it thinks appropriate."

99. Since I have not heard submissions as to whether it would be "fair" in the circumstances of this case to award interest or, if interest is to be awarded, what an "appropriate" rate would be, I will reserve the question of interest for further argument.
100. Costs will also be reserved.

SENIOR MEMBER R. WALKER