

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D505/2014

BUILDING AND PROPERTY LIST

CATCHWORDS

Domestic building – air conditioning and heating system – contract to install system not recommended by contractor – by accepting work contractor to make it work as well as possible -whether system supplied was as contracted – alleged deficiencies of system - opinion evidence – *Evidence Act 2008 s.76* – expert evidence - whether witness qualified by training, study or experience – question of fact - whether workmanship defective

APPLICANT	Eco Pacific Pty Ltd (ACN 117 653 924)
RESPONDENT	Mr Liyakat Ali
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	27 – 29 May 2015
DATE OF ORDER	10 July 2015
CITATION	Eco Pacific Pty Ltd v Ali (Building and Property) [2015] VCAT 1026

ORDER

1. Order that the Respondent pay to the Applicant \$11,900.00.
2. The counterclaim is struck out.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant Mr J. and Mr S. Kaudinya, Directors

For the Respondent Mr J. Selimi of Counsel

REASONS

Background

1. The Applicant is and was at all material times a manufacturer, supplier and installer of heating and cooling equipment. Its principal director is Mr Jai Kaudinya, (“Jai”) who is a qualified heating and cooling engineer. He is assisted in the business by his son, Mr Sam Kaudinya (“Sam”) who is a mechanical services engineer.
2. The Respondent Mr Ali (“the Owner”) is the owner of a large House in Caroline Springs (“the House”).
3. The House was constructed between 2011 and 2013 by the Owner as an owner-builder. It has three storeys. The bottom storey is the principal residence of the Owner and his wife. It also contains the garage and a swimming pool.
4. The middle storey is divided into two parts. Approximately two thirds of the floor area is an apartment occupied by the Owner’s elder son, Mr Irfan Ali (“Irfan”) and his wife and child. There is also a shared theatre room.
5. The rest of the second floor and the whole of the third floor, which is much smaller, is a two storey apartment occupied by the Owner’s second son.
6. During construction the Owner was, and he continues to be, in very poor health, suffering from a variety of serious medical complaints. Consequently, although he was the owner/builder, a considerable amount of the work involved in supervising the construction of the House was undertaken by Irfan, who is a lawyer.

The quotations

7. In September 2011 and before the frame stage of the construction of the House had been completed, the Owner contacted the Applicant and requested a quotation for heating and air conditioning. A meeting took place at the House and subsequently three quotations were provided.
8. The first quotation was dated 9 September 2011. It stated that the heating requirement for the House would be 75 kilowatts and the cooling requirement 50 kilowatts with part zoning through motorised dampers for cost saving. The number of vents to be provided with add-on refrigerated cooling was 35. The quoted price was \$46,530 plus GST. There is no mention of refrigerative air conditioning units in the quotation. It appears that it was for heating and evaporative cooling only, with provision to add refrigerative cooling.
9. According to the Owner, after he received this quotation he spoke to Jai and asked him if he could do better.
10. Floor plans were provided to the Applicant. There is a dispute as to whether these were provided before or after this first quotation. The date on the email sending the plans is 9 September, which is the same date as the email

sending the first quotation to the Owner. The times of day appearing in the two emails are only one minute apart, the email sending the quotation being the first in time. Although that would seem to indicate that the first quotation was prepared without the floor plan, I think it is more probable than not that the Applicant had some floor plan in order to be able to calculate the heating and cooling requirement mentioned in the first quotation. However, since the first quotation was not accepted, nothing turns on that.

11. On 12 September 2011 after Sam had inspected the building site, a second quotation was provided. This said that the heating requirement was 90 kilowatts and the cooling requirement 65 kilowatts, again with part zoning through motorised dampers for cost saving. The number of vents for heating with add-on refrigerated cooling was to be 26.
12. The quotation includes the words:

”..we took extra time to work out the best strategy to do gas heating with add-on cooling in absence of provisions of ducting for evaporative cooling in the house design”. (sic.)

Details of the zoning proposed were given and the following note was added:

“Note:

Evap cooling is not recommended in the House as there is no provision for ducting.”

The price in this quotation was \$52,850 plus GST.

13. It would seem from this that, after having inspected the partially completed house, which was then at frame stage, Jai and Sam were of the view that evaporative air conditioning would be impracticable because of the lack of provision to run the necessary ductwork. However the Owner nonetheless wanted evaporative air conditioning to be included.
14. On 16 September, Jai sent an email to the architect asking for ducting layout drawings:

“,,to enable us to install evap cooling to the rear section of the house on all the floors including Ali’s master bedroom on the ground floor.”(sic.)
15. On the same day he sent an email to Irfan to say that he was still waiting on drawings from the architect. He said that layout drawings for ductwork were never received.
16. On 23 September the third quotation was given. This stated that the heating requirement was 75 kilowatts and the cooling requirement 50 kilowatts, again with part zoning through motorised dampers for cost saving. The number of vents to be provided was 35 and details of the zone motor and ducting dampers were given. The quoted price was \$43,000 plus GST. It was this quotation that the Owner accepted.

What was the agreement?

17. The contract arises from the acceptance of the quotation. Accordingly, the terms of the agreement are as set out in the quotation that has been accepted, unless I find that those terms have been varied by a later agreement by the parties. Anyone asserting a later agreement bears the burden of proving it.
18. The agreement as set out in the quotation was as follows:
 - (a) Three gas heaters as described were to be supplied and installed;
 - (b) There was to be “add on refrigerated cooling”. The refrigerative air conditioning units are not identified but I think that it would be an implied term that those to be supplied would be suitable for the purpose;
 - (c) Each of the three gas heaters was to be programmable for week days and weekend programming and for automatic heating and refrigerative cooling;
 - (d) There were to be five motorized zone motors, three on the ground floor, two on the second floor and the top floor was to be “open all the time”;
 - (e) Three evaporative units as described were to be supplied and installed;
 - (f) The cooling units were to be supplied with temperature, flow and time controls;
 - (g) Refrigeration piping, heater and evaporative coolers were to have “R1” ducting and five zone motor ducting dampers, three on the ground floor and two on the first floor;
 - (h) Thirty five duct vents were to be supplied and there were to be vents in all rooms and living areas;
 - (i) The price to be paid was \$43,000.00 plus GST, payable as to 80% on order and the balance upon commissioning.

The installation

19. A deposit of \$34,400 was paid on 28 September 2011, leaving a balance of \$12,900.00 (incl. GST) to be paid upon completion.
20. Construction then proceeded over the next two years. Although the Owner blames the Applicant for delay the Applicant claims that it was delayed by the failure of the tradesmen constructing the House to provide electricity and gas.
21. There is insufficient evidence for me to be able to make any finding as to any fault on the part of the Applicant for the delay in the construction of the House.

Complaints

22. By August 2013 the House had been completed but the Owner was dissatisfied with the performance of the air conditioning supplied. During the hearing he said that he was also dissatisfied with the heating.
23. On 25 August 2013 the Applicant sent the Owner its final invoice for the balance of the contract price, being \$12,900. Complaints continued to be made by the Owner and the Applicant attended the House and attempted to address them. In particular, its sub-contractor, Mr Rozycki, who is a qualified air conditioning mechanic, did a considerable amount of work in order to try and balance the system and get it operating to the Owner's satisfaction.
24. In the course of this process the Applicant provided and installed a split level air conditioning system in the Owner's bedroom and another one in his sitting room on the ground floor. These were to address a perceived cooling deficit in these areas.
25. In October 2013 the Applicant sought to obtain the Owner's agreement to a variation to take account of the extra costs that it had incurred over the quoted price. The Owner did not agree and no such variation was signed.
26. Jai said that, since the commissioning of the system, the Applicant has received no service call or complaint from the Owner.
27. Notwithstanding the provision of these split systems and the attempts by the Applicant to address the Owner's concerns, he remains dissatisfied and has refused to pay the balance of the contract price.
28. There are numerous emails that I have read and considered passing between the parties, culminating in a final invoice dated 5 March 2014 claiming the balance of the earlier invoice for the balance of the contract price of \$12,900 plus the further sum of \$6,405.60 with respect to the supply and installation of the two split systems on the ground floor. No payment was made and so the Applicant brought these proceedings.

The hearing

29. The matter came before me for hearing on 27 May 2015 with three days allocated. The Applicant was represented by Jai and Sam Kaudinya. I also heard evidence from Mr Rozycki, an air conditioning mechanic.
30. The Respondent was represented by Mr J. Selimi of Counsel and I heard evidence from the Owner, Irfan and from a Mr Debrincat, an electrician who provided a report and has quoted to replace the system.

Expert evidence

31. Both sides sought to rely upon expert opinion evidence. An issue was taken concerning the qualification of Mr Debrincat to give expert evidence.

32. By s.76 of the *Evidence Act* 2008, opinion evidence, is not admissible. However expert opinion evidence is admissible under s.79, which provides (where relevant) an exception to the general rule as follows:
- “79 (1) If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.”
- Whether a witness has specialized knowledge based upon training, study or experience is a question of fact.
33. Jai is a qualified heating and cooling engineer. He has a PhD in engineering in heating and a Masters degree in Technology. He said that his PhD thesis was on heat and mass transfer in absorption cooling. He said that he had 30 years experience as a designer of heating and cooling systems. Sam is a qualified mechanical services engineer, having completed a five year degree course at Swinburne. They are both qualified by training, study or experience to give expert evidence within their spheres of expertise.
34. Mr Rozycki is a qualified air conditioning mechanic, having served an apprenticeship. He has been in the industry for eight years. He said that he did most of the refrigerative work and ductwork, including redesigning some of it. He changed some zones and added a booster fan to push more air into the living room on the ground floor.
35. Mr Debrincat said that he was an electrician who had worked in heating and cooling for 28 years together with a heating and cooling contractor. He acknowledged he had no formal qualifications in heating and cooling but said that he had been designing and installing systems for 28 years. His formal training is as an electrician. Although he said that he had designed systems, when questioned he did not know what the design temperature in Victoria was, nor did he know what the supply temperature to the Brivis system that he was proposing to supply was.
36. In terms of training, he is qualified to give expert evidence about the electrical components of the work but since his experience in heating and cooling has been gained while working with a heating and cooling contractor I do not accept that he has specialised knowledge in heating and cooling. He is able to give expert opinion evidence about the electrical aspects of the work but not in regard to technical heating and cooling matters. Consequently, I do not accept that his report is an expert's report except on electrical matters.
37. Much of what Mr Debrincat says in his report is by way of observation and he can certainly give evidence about what he has observed. At times it is difficult to distinguish observation from assumption in his report. For example, he said that the electricity supply for the split system in the bedroom was taken from the power point that runs the Owner's dialysis machine. That turned out not to be the case and as an electrician he should have been able to establish that. I conclude that he made the statements

without first investigating whether they were soundly based which is concerning.

38. He said that it was “obvious” from the weak airflow that some of the ducts were either badly damaged or restricted but he did not investigate whether or not that was the case and gave no evidence that he observed any damaged or restricted duct work.
39. He took no measurements of airflow from the vents. The Applicant did and the figures were produced, although not gone into in any detail. Those figures showed that there was air flow through all vents except the two on the ground floor where the two split systems were installed.
40. Both Jai and Sam, although experts, are directors of the Applicant and so they are not independent. Mr Debrincat’s independence is compromised because he has quoted to replace the whole system. His quotation includes the cost of supplying new units, which was not satisfactorily explained because he acknowledged in his report that those installed by the Applicant were adequate.
41. I deal further with the criticisms that Mr Debrincat makes below.

The site visit

42. On the morning of the second day of the hearing I visited the site in company with the parties to see the system in operation.
43. The House is said to be over 80 squares. It is certainly very large. Over a period of approximately two hours I felt the flow of air coming from every one of the vents from the heating and air conditioning, both evaporative and refrigerative.
44. As a general observation there was an air conditioning vent in all bedrooms and in most of the other rooms.
45. In the kitchen / living area on the ground floor there were three vents quite close together in a straight line but not producing a great deal of air flow. The Owner’s bedroom was adjacent to this area and that had very little air flow. It was in this room that one of the split systems had been installed. The other is installed in the adjacent living area which is also serviced by the three vents with low air flow.
46. In another of the downstairs bedrooms I felt very little in the way of air flow but elsewhere the air flow was present. The only vent for evaporative air conditioning on the ground floor was at the front of the House near the front door and that seemed to operate satisfactorily. The other vents on the ground floor were all for heating and refrigerated air conditioning.
47. There were more evaporative air conditioning vents upstairs.
48. While I was in the House with the air conditioning switched on the temperature became quite cold, but it was a cold day and so I do not draw any conclusions from that.

49. The Applicant maintains that it has supplied the system ordered by the Owner and that it is entitled to be paid. The Owner complains that it is not operating correctly and that the job has not been finished. He has counterclaimed for the cost of removing the whole system and replacing it, at a total cost of over \$100,000.00. He has also claimed some consequential losses.

Performance requirements

50. There is a dispute as to whether there was an agreement about the performance the system was to have. The Owner said that he told Jai that he expected the system to be able to reduce the temperature to between 16-18 degrees Celsius. Jai denied this allegation and asserted that the Owner did not say that room temperature was important to him. Mr Debrincat said that he was told of this requirement of 16 – 18 degrees after he prepared his report. When he quoted to replace the system, he told the Owner that his replacement system, which was considerably more expensive than that supplied by the Applicant, would not achieve that level of performance.
51. Quite obviously there would have been something said during the discussion between Jai and the Owner about cooling but there is nothing in the quotation about any particular level performance to be achieved and there is no other documentary support for the Owner's allegation, despite all the emails that have passed between the parties.
52. According to both Jai and Sam, the system could not possibly have achieved such a low temperature and no such requirement was made known to them. I am not satisfied that any particular performance requirement was specified or agreed to.
53. It was suggested that a multi-head system ought to have been used. Mr Rozycki said that they were very expensive, costing over \$100,000.00. He said that they are also very expensive to use and mentioned problems of overheating, icing up and also the weight of the units. In any case, that was not what the parties contracted for.

Promise of payment

54. Apart from the two split system air conditioners provided, Mr Rozycki put in a booster fan to increase the flow of air to the living room.
55. According to Jai, when the two split systems were installed, the Owner agreed to pay him and said that he would send a cheque but that it never arrived. The Owner denies that he made any such promise of payment but, whether or not he did so, the real issue is whether the Applicant is entitled to be paid.

Ductwork

56. Although the Owner said in evidence that the Architect told him that he had allowed space in the plans for evaporative cooling there is no provision in the floor plans for service ducts. Indeed, when one looks at the floor plans,

the positioning of the walls from floor to floor are different and, with the placing of doors and windows, it is difficult to see how ducting could have been accommodated. No evidence was given about how it could have been done differently from what the way the Applicant has done it.

57. The Applicant had asked the architect for plans for the ductwork but none were provided. There was no mechanical services engineer engaged by the Owner to advise on how such a system might be accommodated. Nevertheless, the Applicant, having taken on the job, had to do the best that it could.
58. The spacing between the floors is only 300mm and so the spaces between the webs of the posi-struts were even smaller. The ability to run any duct work between the floors was therefore severely limited, not only by the posi-struts but also the steel work that supported the structure. As a result, no ducting of adequate size could have been run between the floors. To run ducting of any size would have required bulkheads and service ducts and the evidence is that duct work for evaporative air conditioning is larger than for refrigerative air conditioning.
59. Irfan said that he told the Applicant's employees that he would construct boxing for ducts anywhere they liked in order to accommodate the duct work that was required. It was a term of the contract that the Owner was to install all boxing for the duct work as suggested by the architect but the evidence is that the architect made no suggestions.
60. The boxing that I was able to identify on the site visit amounted to some lowered ceilings and a plenum on the first floor that has been created by a false wall which connects the top floor with the bottom floor. This appears to have been done to accommodate the three vents that are in a straight line in the living room and kitchen on the ground floor that have been supplied. It is unknown where the other ducts run because there is no plan of the duct work. The original person engaged by the Applicant to run the duct work left the job through ill health and Mr Rozycki took over.
61. Mr Debrincat said that he observed a large number of bulkheads and seems to have assumed that these were to accommodate ducts. However he did not see inside these bulkheads, he is not a building expert and from the size of the bulkheads in the living area on the ground floor, they look to be too small to accommodate ducts of the size the evidence shows was required. They looked to me to be an architectural feature to accommodate the downlights that have been installed in them
62. Mr Debrincat said that the return air vent for the ground floor is on the first floor and said that was a design fault. He did not say why, nor did he say where, given the design constraints of the House, it should have been placed. I do not think that he is qualified to give that opinion but in any case, there is no service duct in the House and given the necessary size of the duct work from the return air vent back up to the roof space, I cannot see where it could have been located on the ground floor.

63. Mr Debrincat said that there were a number of ducts that “do not go anywhere” or are “not connected to any vents” but they are not identified in his report. There were no photographs of any such ducts provided. I had a look in the roof space and saw a great many ducts but none were pointed out to me that were not connected or went nowhere.
64. Since there was no mechanical engineering plans or architectural plans the Applicant appears to have put in ducts where it thought it could and the Owner’s plasterer has then plastered around them.

Evaporative vents “in each room”

65. One of the disputes was whether there was to be an evaporative air conditioning vent in each room.
66. The purpose of the evaporative air conditioning was to provide humidified cool air. That was important to Irfan whose son suffers from eczema. It was also important to the Owner because he preferred that form of cooling.
67. Jai said that he attempted to persuade the Owner against having evaporative air conditioning at all, because it was inconsistent with the refrigerated air conditioning and the ducts required for evaporative air conditioning were larger. The warning in the second quotation that evaporative air conditioning was unsuitable for the House is consistent with this evidence.
68. It was common ground that one cannot operate refrigerative air conditioning and evaporative air conditioning at the same time. The former requires the windows of the House to be open so as to allow the moist air to escape. The latter requires the windows to be closed. The other complication is that the evaporative air conditioning ducts vent directly to the outside and are a source of heat loss.
69. When Mr Debrincat quoted to replace the system, he did not include evaporative air conditioning in his quotation because, he said, it would be impractical to install it now that the House is built. I accept that is his opinion and it is quite clear from the evidence that it was impractical to have installed it in the first place. However, that is what the Owner wanted and asked for, despite the warning he had been given, and having agreed to supply it the Applicant had to do the best that it could to make it work.
70. Irfan said in his evidence that an evaporative air conditioning duct was to be provided in every room of the House and that Sam had assured him that that would be done during construction. That was denied. He also alleged that the agreement required ducts for all three services, that is, heating, evaporative cooling and refrigerative cooling to be provided to every room and said in an email to Jai on 11 July 2013 that the Owner would not pay the balance until that was done.
71. I do not accept that the contract required heating, evaporative cooling and refrigerative cooling vents to be provided to every room. I think that the Owner has mistaken what was intended and what was agreed upon. The contract required only 35 ducts to be provided which is a little over 1 per

room. If an evaporative air conditioning duct was to be provided to every room in the House there would not be a refrigerated and heating duct in every bedroom of the House, much less one of each in each room. There would necessarily have to be a duct for the heating and refrigerative air conditioning but that would leave only a few remaining ducts for the evaporative air conditioning which would necessarily have to be shared by the rooms of the House. It was not suggested that 35 vents were not provided. According to Jai, there were 37 vents installed.

Location of Vents

72. The location of vents is said to be illogical. Particular complaint was made of the three vents in a line on the ground floor ceiling. The position of these appears to have been driven by the location of the plenum in the floor above that carried the ductwork to them from the top floor. Mr Debrincat said that they should have been placed above the windows but did not say how that could have been achieved.
73. The location of the single evaporative vent on the ground floor, which is near the front door as also criticized. Being for evaporative cooling it is better in a common area than in a single room because there could not be evaporative cooling in each room. It also had to be in a place to which ducting of the required size could be brought and it was not demonstrated where else it could and should have been located on the ground floor.

Location of controls

74. Mr Debrincat contends that the controls are in the wrong places: He says:
 - (a) the thermostat for Section 2 is services only two of the four evaporative vents in that section and it is on the landing. He did not say what was wrong with that. I see no difficulty with it being on the landing;
 - (b) the control for the evaporative vents in the living areas and the master bedroom of Section 2 are on the next floor. He did not explain why that was wrong. The agreement was to provide a zoned system;
 - (c) the thermostat for the refrigerative and heating vents for the whole of Section 2 is on the landing. Again, he did not say what was wrong with that and I see no difficulty with it being on the landing;
 - (d) there were two controllers for Section 3, one on the First floor and the other on the Second floor. He said that the control unit on the Second floor operates the Master bedroom and kitchen area of Section 2 so that they will all be either on or off. It is unclear whether he suggests that that is a problem.

The split systems

75. The split systems were installed by the Applicant in order to provide adequate cooling to the master bedroom and living room on the ground floor of the House. Although installed in October 2012 and early February

2013, it was not until March 2013 that the Applicant invoiced the Owner for the cost of the units and their installation.

76. For the first unit, the Applicant has produced its purchase invoice, dated 8 October 2013 for the cost of the 3.5 kw Samsung split system, which was \$850.00 incl GST, and an invoice for installation from “Installation Australian Airconditioning Distributors”, dated 11 October 2013, for \$759.00. The cost was invoiced to the Owner as \$890.00 for the unit and \$1,972.73 labour and “electrical costs”. A margin and GST were then added. Since GST figures were used in the first place it appears that GST has been charged twice.
77. For the second unit, the Applicant has produced its purchase invoice, dated 3 February 2014 for the cost of the 7.5 kw Samsung split system, which was \$1,100.00 incl GST, and an invoice for installation from Installation Australian Airconditioning Distributors, dated 31 January 2014, for \$1,309.00. The cost was invoiced to the Owner as \$1,190.00 for the unit and \$1,000.00 labour. A margin and GST were then added. Again, since GST figures were used in the first place it appears that GST has been charged twice.
78. In response to my questions Jai did not allege that the Owner had requested that these units be installed, nor did he claim that there was any agreement that the Owner would pay for them. They were installed by the Applicant on its own initiative in an effort to improve the cooling in the area of the bottom floor where it was otherwise inadequate. The Owner was not consulted about what was to be supplied or what it would cost.
79. Generally, a person cannot confer a benefit on a person and then make him pay for it against his will (see *Halsbury, Laws of England* 4th Ed. Vol 9 para 697) unless the circumstances are such as to make it unconscionable for the person to retain the benefit without paying for it so as to give rise to a right of restitution. There are no such circumstances in this case. These air conditioners have now been installed as part of an air conditioning system and if they are removed the system will be deficient.
80. The Owner is therefore under no legal obligation, whether in contract or otherwise, to pay for what the Applicant has provided voluntarily in an effort to make the air conditioning system work. Quite apart from the questionable nature of some of the figures, this part of the claim is not maintainable and will be dismissed.

Conclusion as to performance

81. In regard to performance, Mr Debrincat’s criticism seems to be that areas within the same section cannot be operated separately but it does not appear to me that that was what was required. He complains that controllers and return air vents are in common areas but does not say why. It seems to me to be appropriate, given the unusual layout of the House.

82. His approach in his report was to look at the evaporative and refrigerative systems independently and ask whether one on its own was sufficient to cool the House. The reasoning behind that is that both cannot operate at the same time. That is common ground, but the contract was that the cooling requirement was to be met by two systems, not one. Such an arrangement will necessarily be difficult to operate but that is what was contracted for.

Performance

83. Jai said that they had done the best they could in view of the physical limitations of the House and the requirements of the Owner to have both refrigerated and evaporative air conditioning. He said that the duct work was performing as well as could be expected, given these difficulties.
84. He also said that the system would work if zoned and operated correctly. He said in his “Expert’s Report”:
- “The system heating cooling outputs have been discharged as per accepted quote with minor airflow drops in two vents on the ground floor, which is not uncommon in such a large house, and should not be the basis to hold a large amount of money. A reasonable financial discount or further air balancing is the remedy of the complaint.”
85. Mr Rozycki said that due to the long distances of the duct work the system cannot be any more effective than it is but he said that it is now as good as it can be for the price paid. The areas affected by the long distance, which are the ground floor living area and master bedroom have now been supplemented with split systems at the Applicant’s expense.

Conclusion

86. The Applicant contends that the Owner “...was doing everything possible to save money...” and preferred cost over what he thought his cooling requirement was. An owner cannot be blamed for seeking a lower price but he must be very careful to see that what he gets for the lower price suits his requirements.
87. The second quotation, which was given after the partially completed house had been inspected, was to provide 65kw of cooling via refrigerated air conditioning, for a price of \$52,850.00 plus GST. The quotation contains a warning that evaporative air conditioning was unsuitable.
88. The third quotation, which was accepted, was to provide 50kw of cooling which, according to Jai, was only sufficient if the system was zoned, that is, if the House was cooled section by section. Further, the reduced cooling output was to be supplied partly through refrigerated and partly through evaporative air conditioning. The advantage to the Owner was that the price was reduced to \$43,000.00 plus GST. That was what the Owner wanted.
89. Since the cooling, which was less, was then divided between two systems that could not be run simultaneously, it was obvious that he would have to

run them separately and zone by zone. For both of these reasons the cooling of the House was to be done in stages.

90. On balance, I think that the evidence establishes that the Applicant has supplied the system contracted for. I am satisfied that it is operable, given the restraints of the House in which it was installed and the unusual combination of cooling that the Owner requested.
91. Although I think it has been established that what was supplied was what was ordered, I am satisfied that the system requires some further adjustment and that some "...reasonable financial discount..." to allow for "...further air balancing..." the system is warranted. Having regard to what Mr Rozycki has charged the Applicant in the past for balancing and adjusting the system, which was relatively modest, and taking into account the fact that the precise scope of the work that will be required is unknown, I will allow \$1,000.00 off the balance of the contract price of \$12,900.00..
92. There will be an order that the Respondent pay to the Applicant \$11,900.00. Since this takes account of the extent to which the counterclaim might be said to have succeeded, the counterclaim will be struck out.

SENIOR MEMBER R. WALKER