VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D584/2004

CATCHWORDS

Domestic Building Contracts Act 1995 – Major domestic building contract – drawn up by builder – no provision for statutory insurance – effect of breaches of *Building Act* 1993 – contract void against builder.

APPLICANT:	Geftine Pty Ltd
RESPONDENTS:	Dover Beach Pty Ltd (T/as Stone Constructions) & Ors
WHERE HELD:	Melbourne
BEFORE:	His Honour Judge Dove
DATE OFHEARING:	12, 13, 14, 17, 18, 19, 20, 21, 24, 25, & 26 October 2005
DATE OF REASONS:	4 October 2006
	Geftine Pty Ltd v Dover Beach Pty Ltd (Domestic Building) [2006] VCAT 1972

ORDERS

1. That the respondents pay damages to the applicant in the sum of $29,950.00, including $4,000.00 damages in the nature of interest.

HIS HONOUR JUDGE DOVE

APPEARANCES:

For the Applicant:	Mr P Baker of Counsel, instructed by Rigby Cooke Lawyers
For the Respondents:	Mr G Hellyer of Counsel, instructed by Hoeys,

Lawyers

REASONS FOR DECISION

1 Before the Tribunal are claims and counter claims arising out of the construction of a private dwelling above commercial premises at 475 Balcombe Road, Beaumaris ("the premises"). The applicant is the owner of the premises. The first respondent is a building company with which the applicant entered into an agreement for the construction of the dwelling. The third respondent is a director of, and shareholder in, the first respondent.

2 The second respondent, which carried on business as a building surveyor, issued the building permit for the premises. In essence, the applicant asserted that the building permit was issued by the second respondent, in breach of its obligations to the applicant. Prior to trial, the applicant discontinued proceedings against the second respondent.

3 The hearing, which included a view of the premises, commenced on 12th October 2005. The hearing ran for eleven sitting days. It was a protracted and expensive hearing, bearing in mind that the amounts in dispute were small.

4 In essence, the dispute has three main elements:

(i) a dispute over the quality of certain aspects of the work;

(ii) a dispute about the necessity for, and costs of, variations claimed; and

(iii) a dispute whether, by virtue of provisions of the *Domestic Building Contracts Act* 1995 ("the Act"), the first and third respondents were estopped from recovering any allegedly outstanding amounts claimed by them.

5 The points of claim and defence underwent several amendments even up to the hearing. In its final form, the applicant alleged that there was an

agreement between it and the first respondent for the performance by the first respondent of building works at the premises, the works being expressed to be "new dwelling over exist (*sic*) shop." The applicant alleges that it entered into the agreement by reason of representations concerning the works made for, and on behalf of, the first respondent, which representations were false. The applicant further pleads that the agreement was required to be a major domestic building contract pursuant to the Act, and that the agreement entered into was in breach of that *Act*. Substantial breaches of the *Act*, to which later detailed reference will be made, are alleged. Accordingly, the applicant alleges that the agreement is *void ab initio* or voidable at the option of the applicant, which option is purported to be exercised by the pleading. Further, it is alleged that, by reason of the above, the first respondent is not entitled to recover variation payments sought, nor is it entitled to recover the final payment sought. Breaches of the *Trade Practices Act* 1974 (Commonwealth) and the *Fair Trading Act* 1999 are alleged against the first and third respondents.

6 In its final form, the Defence and Counter Claim has these principal points. It denies that the first respondent held itself out to be a builder of domestic works as the term was understood in the *Act*, and the applicant was so advised. The respondents admit that the first respondent entered into a building contract, dated 28th July, 2002, with the applicant to carry out alterations to the commercial premises and to construct a new addition above them for $330,000 plus GST. The respondents deny that they made the representations alleged against them. Further, they allege that, if the contract did not comply with the *Act*, such failure occurred in reliance upon the applicant's agent, the second respondent, and the applicant bears responsibility therefore. Whatever, they rely upon s.133 of the *Act* and assert that the contract remains enforceable. They deny that they stand in breach of either the *Trade Practices Act* or the *Fair Trading Act*. In relation

to the former Act, they say the Tribunal lacks jurisdiction to hear any claim referrable thereto. By way of counterclaim, it is said that the respondents are entitled – to be paid for variations, to have extensions of time, to interest on overdue payments and to receive progress payments. Further, conduct by the applicant is pleaded as a repudiation, accepted by the respondents, of the applicant's obligations under the agreement.

7 I set out hereunder a number of matters in chronological order:

1978 - Premises at 475 Balcombe Road purchased by the applicant as trustee of Fraser Family Fund. The premises then were single storey commercial premises. Geoffrey Fraser commenced practice as a chiropractor at the premises in 1976. Fraser is a director of, and shareholder in, the applicant.

1991 – Ownership of property transferred to applicant as trustee of Fraser Superannuation Trust.

2001 – Applicant determined to have residence built above the existing commercial premises. It was proposed that Fraser, and his partner Toni Kettle, would purchase the residential premises and live in them.

Late 2002 – An architect, William Barlow, was retained to prepare plans and specifications.

Early 2003 – Second respondent retained as building surveyor.

April, 2003 – A quotation was received from Rodney Wallace, builder. He was unable to perform the works.

May, 2003 – Third respondent asked to quote.

13th June, 2003 – Quote received from third respondent, a director of, and shareholder in, first respondent, which was accepted subsequently.

31st July, 2003 – Agreement for construction of premises entered into between applicant and first respondent. Applicant asserts that there was an assurance from third respondent that works would be completed by December 2003.

25th August, 2003 – Respondents commenced building works.

25th August, 2003 – Progress claim made.

1st September, 2003 – Building Permit issued.

September, 2003 – Concern raised about the availability of specified panels for external walls.

25th September, 2003 – Progress claim made – paid.

25th October, 2003 – Progress claim made – paid.

27th November, 2003 – Progress claim made – paid.

24th December, 2003 – Progress claim made – paid.

January 2004 – Builder on holidays – work suspended.

3rd February, 2004 – Fraser, having sold his former residence, gave possession thereof as required by terms of sale. He and Kettle found temporary accommodation with friends.

23rd February, 2004 – Residence unfinished but Fraser and Kettle went into possession. That day, third respondent handed Fraser a letter in which he reserved the right to evict them asserting that a breach of the contract had arisen by their occupation prior to the issuing of a final certificate.

24th February, 2004 – Further (sixth) progress payment claim.

15th March, 2004 – Part payment of sixth progress payment claim $20,000

paid.

17th March, 2004 – Conference attended by Fraser, Stone and Walter.

April, 2004 – Fraser seeks legal advice.

21st May, 2004 – Lees (building consultant) reports to applicant.

31st May, 2004 – Seventh progress payment claim.

1st June, 2004 – Letter applicant's solicitors to respondents.

7th June, 2004 – Third respondent replies.

10th June, 2004 – Further letter applicant's solicitors to respondents.

10th June, 2004 – Letter third respondent to applicant.

17th June, 2004 – Applicant's solicitor, Fraser and Stone meet. Agreement that applicant pay $30,000 immediately and further $30,000 with occupancy certificate.

18th June, 2004 – Applicant paid $30,000.

June, 2004 – Fraser signed off on certain variations.

29th July, 2004 – Occupancy permit.

September, 2004 – Application issued.

LEGISLATIVE REQUIREMENTS

8 Three Acts have application to this proceeding. They are *Domestic Building Contracts Act* 1995, *Building Act* 1993, and the *Fair Trading Act* 1999. The applicant sought also to rely upon provisions of the *Trade Practices Act* (Commonwealth), but ultimately conceded that that Act did not invest jurisdiction in the Tribunal.

9 I am satisfied, and the respondents have conceded ultimately, that this construction, insofar as it relates to the residence, is domestic building work to which the Act applies. Section 5(1) states that:-

> "This Act applies to the following work –
>
> (a) the erection or construction of a home, …"

10 None of the exclusions set out in s.6 of the Act has any application. The definition in s.3 defines home thus:-

> "'home' means any residential premises and includes any part of a commercial or industrial premises that is used as a residential premises …"

Certain exclusions are set out, but none has application here.

11 It should also be noted that "domestic building work" is described as any work referred to in s.5 which is not excluded by s.6.

12 A major domestic building contract is one where the contract is for work costing more than $5,000.00. In the present case, the contract provides for work to be carried out both on the residence and on the commercial premises. In breach of s.12, the contract does not identify separately the value of the domestic work and the commercial work. Breaches of ss.15, 21, 22, 23, 31, 32 and 40 have occurred also.

13 Section 132 of the Act is in these terms:-

> "***Contracting out of this Act prohibited***
>
> (1) Subject to any contrary intention set out in this Act—
>
> (a) any term in a domestic building contract that is contrary to this Act, or that purports to annul, vary or exclude any provision of this Act, is void; and
>
> (b) any term of any other agreement that seeks to exclude, modify or restrict any right conferred by this Act in relation to a domestic building contract is void.
>
> (2) However, the parties to a domestic building contract may include terms in the contract that impose greater or more onerous obligations on a builder than are imposed by this Act."

14 Further s.133 of the Act states:-

> "A failure by a builder to comply with any requirement in this Act in relation to a domestic building contract does not make the contract illegal, void or unenforceable, unless the contrary intention appears in the Act."

15 Section 31 of the Act sets out a considerable number of matters relating to the formation of the contract with which, by and large, the builder has not complied. The express sanction for non-compliance is the imposition of a pecuniary penalty. It is to be noted that s.53 gives the Tribunal extensive declaratory and other powers, including the power to declare void a term under s.132 or one which is unjust (s.s 2(d) and (e)).

16 Section 37 establishes a regime in the event that the builder intends a variation of the plans or specifications. In the present case, there appears to have been, in relation to a considerable number of variations, no attempt at compliance with the requirements of the section, a matter I shall need to consider in greater detail. The sanction imposed here is that the builder, who has not complied with the section and who cannot establish the variation is necessary because of circumstances which could not have been reasonably foreseen when the contract was entered into, is not entitled to recover any money in respect of the variation unless the Tribunal is satisfied that there are exceptional circumstances, or that the builder would suffer a significant or exceptional hardship by the above requirements and that it would not be unfair to the building owner for the builder to recover the money.

17 The Oxford English Dictionary provides the following definitions:-

> 'exceptional' – out of the ordinary course, unusual, special.
>
> 'significant' – important, notable.

18 Section 38, which deals with variations proposed by a building owner, imposes obligations and sanctions upon a builder which are similar to those to be found in s.37.

19 Section 42 prevents a builder demanding final payment until the work has been completed in accordance with the plans and specifications and a copy of the occupancy permit or certificate of final inspection is given to the owner.

20 I point out that s.31(2) of the Act states that a major domestic building contract is of no effect unless signed by the parties thereto. I raised for consideration the question whether this contract had been signed by the parties, and, in its final submissions, the applicant put it that the contract was of no effect because it had not been signed by the parties. There is a simple answer to this submission. By its pleading, which stood until a very late amendment, the applicant asserted that the applicant and the first respondent executed the document on the 28th July, 2003, which assertion was admitted by the respondents. Apart from the admissions, each of Fraser and Stone gave evidence that he had signed the document on behalf of the applicant and the respondents respectively. I am satisfied that each, being a director, was authorised to sign the document. Accordingly, for both the above reasons, I do not accept that submission.

21 In relation to a domestic building contract, s.135 of the *Building Act* empowers the responsible Minister to publish certain orders concerning insurance for such works. Such a Ministerial Order has been published, a copy of which is to be found in Exhibit 25. In relation to work for more than $12,000.00, the order requires that the builder have, inter alia, a policy complying with the order which covers the building work to be carried out. Stone admitted that the respondents did not have such a policy. Accordingly, the contract could not, and did not, comply with the requirement of s.31(1)(b) of the Act that details of the insurance be set out in the contract. The importance attached by Parliament to appropriate insurance cover is reflected in the penalties imposed by s.136 of the *Building Act*, namely 100 penalty units (or $10,000.00 approximately) for an individual and 500 penalty units for a corporation.

22 The respondents have admitted that neither the first nor the third respondent had registration as a domestic builder as required by the *Building Act* and the regulations made thereunder. In the Act, 'builder' is defined in this way:-

> "'Builder' means a person who, or a partnership which:
>
> (a) carries out domestic building work; or
>
> (b) manages or arranges the carrying out of domestic building work; …"

23 Clearly the first and third respondent were required to have registration as domestic builders, but neither respondent was so registered, in breach of requirements in the *Building Act* and regulations made thereunder and the *Domestic Building Contracts Act*. In particular, the respondents could not, and did not, set out in the contract the registration number required by s.31(1)(f).

24 As the works set out in the contract included work on the ground floor commercial premises, the applicant submitted that the Tribunal had no jurisdiction to hear and determine any matter in relation to those works. Clearly, neither the Act nor the *Building Act* gives jurisdiction. However, the applicant has pleaded breaches of the *Fair Trading Act* by the respondents and has thereby created a fair trading dispute. By way of relief, the applicant seeks orders pursuant to s.158 of the *Fair Trading Act*. It is an unintended consequence to the applicant that, by alleging breaches of the *Fair Trading Act*, breaches which go to the entire contract and relate to the commercial work, the applicant has provided the respondents with the source of jurisdiction which is critical to its counterclaim. Accordingly, I am satisfied that the Tribunal has jurisdiction to hear and determine all matters arising out of this contract.

25 As I have recited, the applicant has sought to rely upon provisions of the *Fair Trading Act*. It alleges that in breach of s.11 and s.12 the respondents have engaged in misleading conduct and made false representations in relation to

matters pleaded, in contravention of ss.11, 11A, 12, 16 and 17 of the *Fair Trading Act*, by reason of representations allegedly made by the third respondent to the applicant. The applicant asserts that by reason of these breaches the Tribunal should declare the contract void.

THE CONTRACT

26 The contractual document was prepared by Stone and presented to Fraser for execution. It was the product of the acceptance by Fraser of a single page quotation for the building works (both commercial and domestic) given by Stone to Fraser on 4th July, 2003.

27 The quotation is in these terms:-

> "**Re: New Dwelling Over Shop at 475 Balcombe Rd Beaumaris**
>
> We have pleasure in providing you our quotation for the above works fore (sic) the sum of $330.000.00 plus GST.
>
> We have included PC sums for the following:
>
> | | |
> |---|---|
> | Plumbing fixtures | $4,000.00 |
> | Carpet | $12,000.00 |
> | Central heating | $6,000.00 |
> | Works to existing mechanical | $2,000.00 |
> | Granite bench tops | $6,000.00 |
> | Appliances as per B22 | $8,000.00 |
>
> Please note my Building Registration No is CB – U 4453. Should a Domestic Registration number be required, this will be by negotiation.
>
> **Further to your request I can advise the following:**
>
> *Works to the existing commercial area is valued at $95,700.00.*
> *To utilize window profiles by All Weather Aluminium there is a $12,864.00 saving.*
> *To use sliding doors in lieu of Bi – Fold doors there is a saving of $3,050.00.*
> *Builders allowance for Building permit is $3,900.00.*"

28 It is relevant to note that insofar as registration is concerned, Stone has provided a commercial registration number, followed by the words – "Should a Domestic Registration number be required this will be by negotiation". Taken with evidence given by Stone, e.g. his statement that he let his domestic building registration lapse because insurance companies wanted

him to put his house on the line (T. 506/7), the above stated elliptical comment satisfies me that Stone was, at the least, well aware that this class of building work required a domestic builder's registration. Stone made no attempt to obtain it. I do not accept he made the enquiries he said he had made. It is also stated that "work to the existing commercial area is valued at $95,700.00". This statement requires the inference that Stone was well aware that the work to be undertaken had both commercial and domestic aspects and serves to reinforce the comment I have made above.

29 As has now been conceded, building of the proposed dwelling above the ground floor commercial premises, was building work to which the provisions of the Act applied. The *Building Act* required the builder to have registration as a domestic builder, and made it an offence for a builder to carry out domestic building work without such registration (s.176(2A)). More importantly, the *Building Act* required a builder, where the relevant Ministerial Order had been made, to be covered by insurance in relation to the carrying out of domestic building work. Section 135 provided for the making of a Ministerial Order relating to insurance. Relevantly, such a Ministerial Order became effective on the 1st July, 2003. It specified the insurance for which a builder required cover. It applied to the present building work. It required a builder, either before entering into a building contract to have a policy of insurance complying with the order which covered the building work, or, to enter into a building contract provided it contained written conditions requiring such a policy, requiring it to be issued before work commenced, requiring that no money be paid before a policy was issued, and requiring the builder to deliver a copy of the policy to the owner within 7 days of its issue.

30 There was no policy, because the respondents did not seek to obtain one. S.136 of the *Building Act* makes it an offence for a builder to carry out domestic building work under a major domestic building contract unless covered by the required insurance.

31 Further, one of the requirements of s.31 of the Act was that the contract set out details of the insurance cover provided. In this regard, it is pertinent to note that s.4 of the Act, which sets out its objects, specifies the following:-

> "(c) to enable building owners to have access to insurance funds if domestic building work under a major domestic building contract is incomplete or defective."

32 Notwithstanding the above, although the printed form of contract recited two alternatives relating to insurance, one which required the builder to provide insurance, and the other which required the owner to do so, the builder deleted the former. Consequently, notwithstanding the mandatory statutory requirements to which I have referred, the builder presented the owner with a contract which placed the burden of insurance of the works and of public liability on the owner.

33 Insofar as the contract is concerned, it does not comply with a considerable number of requirements imposed by the Act. It does not distinguish between domestic and commercial building work (s.12). It offends s.14 of the Act in that it requires reference of a dispute to arbitration. It offends s.20 and s.21 and s.22 of the Act in relation to prime cost items. It offends against a number of the requirements set out in s.31(1) of the Act. There is no evidence of compliance with s.32 of the Act. It does not set out the warranties implied by ss.8 and 20; (31(q)).

34 By s.53(1) of the Act, the Tribunal is empowered to make any order it considers fair to resolve a domestic building dispute. Thereafter, the section sets out, without limiting the generality of the above, a number of particular powers available to the Tribunal (s.53(2)) and a number of matters to which it may have regard (s.53(4)).

35 It was the contention of the applicant that the absence of insurance of itself required the Tribunal to declare the contract void. Alternatively, it was said that the combination of the absence of insurance, the oppressive and one-

sided nature of the contract, and the exclusion from the contract of a significant number of statutory requirements compel the conclusion that the contract is void.

36 For the respondents, it was said that, although insurance as required by the *Building Act* was not provided by the respondents, the respondents had insurance which provided relevant cover, being a policy for commercial insurance. What is expressed to be a summary of the policy of insurance was one of a large number of documents to be found in Volume 2 of the Tribunal Book, which volume was put into evidence (Exhibit 25). The document is at pp.471-3. There, it is recited that the policy does not cover domestic dwellings, residences or other domestic premises. Accordingly, I reject that submission, as one which has no foundation and should not have been made. Secondly, it was said that the owner might have taken out the relevant insurance. I reject that submission. The statutory requirements are clear and impose the burden on the builder. By operation of the legislative process any contractual requirement that the owner take out insurance is void. Thirdly, it is said that because the building surveyor, as the owner's agent, issued a permit classifying the premises as commercial, the owner should bear responsibility for the failure to obtain domestic building insurance. In the light of the statutory requirements, I regard this as an untenable submission and I reject it.

37 I was referred to the decision of the High Court in *Pavey and Mathews Pty Ltd v Paul* (1986) 162 CLR 221, which was a decision concerning a building contract entered into orally between builder and owner. Section 45 of the *Builders Licensing Act* 1971 (NSW) was in these terms:-

> "A contract (in this section referred to as a 'building contract') under which the holder of a licence undertakes to carry out, by himself or by others, any building work or to vary any building work or the manner of carrying out any building work, specified in a building contract <u>is not enforceable against the other party</u> to the contract unless the contract is in writing signed by each of the parties or his agent on their behalf and sufficiently describes the building work the subject of the contract." (My underlining).

38 In that case the building work was completed, but the owner refused to pay what was said to be the balance due to the builder for the work. The owner pleaded that the contract was one which was unenforceable under the statute and that the sum claimed was irrecoverable. The builder pursued a claim on a quantum meruit. The High Court found for the builder, determining that such a claim did not amount to a direct or indirect enforcement of the oral contract.

39 Here, the Acts do not, in terms, deal with the effect on the contract of a failure on the part of the builder to obtain and provide the statutory indemnity. In the second reading speech, in the Legislative Council, on the Bill (Hansard 15 November, 1995, p.539) the Minister made it clear that Parliament regarded insurance as an integral part of the contract. As I have observed, the penalties imposed by s.136 of the *Building Act* identify the seriousness with which Parliament considered this matter. It is clear that the insurance provisions exist for the protection of the public.

40 In *Buckland v Massey* [1985] 1 QR, 502, the relevant statute prohibited the disposal of a second hand vehicle unless the vendor had first obtained a roadworthiness certificate. Upon a sale, without the provision of such a certificate, the vendor sued for the unpaid balance. A defence of illegality succeeded. The Court determined that the contract was unlawful from its inception as it was in violation of a law intended to protect purchasers of second hand vehicles and the general public.

41 As I have indicated, there is no provision in the various enactments relating to insurance which, in express terms, renders a contract entered into without such insurance void or unenforceable, the latter leaving the guilty party with remedies not open in the former circumstance (see *Pavey and Matthews Pty Ltd v Paul*, supra).

42 The Act, by s.132, provides that terms which infringe against the Act are

void. That form of statutory severance does not assist the central question here, because insurance of the kind required is regulated by the *Building Act* and the Ministerial Order. Nor does s.133 assist the respondents for a like reason. Insurance is not a requirement of the Act, but of the other legislation to which I have just referred.

43 In relation to s.133 of the Act, it is not immediately apparent that there is any express contrary intention appearing in the Act, save for s.37 and s.38 where it is enacted that a builder is not entitled to recover money for variations save in certain circumstances, so as to render a contractual term entitling a builder to be paid for variations unenforceable. However, and I do not intend to decide this question on this narrower basis, the introductory wording of s.31(1) namely that:-

> "A builder must not enter into a major domestic building contract unless the contract – "

is one of such import that there is a significant argument for saying that a contract which does not contain the statutory terms, or at least offends against provisions which are there solely for the protection of owners and by extension the public generally, is void against the builder. Indeed, in the second reading speech, to which I have referred, the Minister said, at 541:-

> "One of the key areas which has caused difficulty in the domestic building industry to date is the owner's ability to understand the domestic building contract …
>
> However, the Government still believes that the contracts could do more to clarify the rights of the building owner, the average Victorian family.
>
> The current Act prescribes certain minimum terms and conditions in domestic building contracts. The current Bill builds upon these by concentrating on areas which have historically been the cause of considerable dispute – for example, work undertaken to be able to make a proper costing for a contract before it is signed and variations to the contract.
>
> The Bill also incorporates a number of statutory warranties into every building contract for the protection of the home owner."

44 The Act itself expresses the intent to protect home owners by its various provisions. The Minister's second reading speech underlines that intent. As

I have said, the implication of significant force is that Parliament intended non-compliance with s.31 would render such a contract void.

45 In the present case, it seems to me that the statutory requirement of insurance imposes an obligation which is central to the agreement between the parties. It pervades the whole agreement, for the financial protection of the owner is assured by the statutory indemnity. Indeed, the present case is a prime example of the need for such protection. Defects are admitted by the respondents and, as I determine hereafter, there are further defects beyond those admitted. Further, the applicant has a claim for loss by reason of the statutory restrictions upon sale of the residence without insurance. There is no evidence before me that shows whether or not the first respondent is a $2 company, nor is there any evidence that the third respondent is worth powder and shot.

46 I have earlier made the finding that the third respondent was well aware of the fact that this was, insofar as the residence was concerned, a domestic building contract and that domestic building insurance was required.

47 I conclude that he wanted the best of all worlds. He wanted the job, but he did not want the burdens associated with domestic building insurance, and his answers at T. 506/7 speak eloquently in support of those conclusions.

48 In my view, the legislative intention was that an agreement for domestic building works, where the builder has not taken out insurance of the kind required by statute, is void against the builder.

49 In the result, it seems to me that the contract is illegal as performed. I note that s.136 of the *Building Act* does not prohibit the entry into a contract without insurance, but prohibits the builder carrying out the works without the requisite insurance cover. The illegality was known only to the respondents; the applicant had no knowledge of the illegality.

50 In any event, s.53 of the Act gives the Tribunal express power to make orders in favour of the applicant. In consequence, the applicant is entitled to pursue its claims against the builder. Further, the claim for damages for loss by reason of the respondents' failure to have insurance is not an action brought in contract, but separately for breach of the statutory obligation.

51 At common law, the respondents, as the contract is void against them as the guilty parties, would have no rights to enforce, and their counterclaims would fail.

52 I point out that had the contract been held to be unenforceable and relief by way of a right to recover on a quantum meruit was open to the respondents, the evidence falls far short of enabling the respondents to succeed. No attempt was made to pursue a claim based upon a quantum meruit. There is no evidence before me to enable me to be satisfied that the base work undertaken was worth more than the payments made overall by the applicant. At best for the respondents, the fact that the payments were made allows the conclusion that the works were worth what was paid. I am not assisted by the tendering of the quotation of the builder Wallace, who was not available to perform the works and was not called to justify his quotation. In terms of the base contract price, the respondents have lost the right to claim any sum which might otherwise be proved to be outstanding by comparison with payments made by the applicant.

53 However, it seems to me that s.53 of the Act serves to modify the common law rules relating to the effect of a contract that is declared void. The overriding power given by s.53(1) provides the Tribunal with the power to make orders in favour of the respondents if it considers it fair to do so. In the present case, this seems to me to require the Tribunal to consider whether the respondents should recover any sums relating to the 17 variations claimed by them. The claim by the respondents for interest does not have

substance, save as to variations, by reason of my conclusions expressed above; namely, that for the basic work there is no ground for concluding that it was of greater value than the payments made by the applicant. It follows that the same conclusion is reached in relation to allegedly outstanding progress payments. Accordingly, I shall consider the question of making an allowance in favour of the respondents for variations in due course.

EVIDENCE

54 In summarising the evidence, I shall deal with it in two parts. The first part relates to what is largely lay or non-technical evidence. In that I include William Barlow, the architect, as his evidence did not focus on the critical matters in dispute, and the various tradesmen, who were called to identify work done by them. The second part is that of the witnesses who gave evidence concerning the matters central to the dispute. These witnesses are Lees and Walter, called for the applicant, and Stone, the third respondent, and Permewan, architect, called for the respondents.

55 Geoffrey Fraser confirmed the accuracy of statements made by him on 4th April, 2005 and 14th June, 2005. He stated that he had conducted his chiropractic practice at the premises since 1976. In 1978, the applicant purchased the premises as trustee of the Fraser Family Trust. Subsequently, it held the premises as trustee of the Fraser Superannuation Trust. The premises were commercial and of one storey only. In 2001, a decision was made to build a residence above the business premises. Upon completion, it was envisaged that he and his partner would purchase the premises as a residence and with a view to subsequent sale. Fraser and Kettle were to advance the monies necessary to finance the building of the residence. An architect, William Barlow, was retained to prepare plans and specifications. A planning permit was obtained. A detailed quotation, in the sum of $327,541.00 was obtained from Rodney Wallace & Associates Pty

Ltd. However, Wallace was not free to undertake the building works. Accordingly, a quotation was sought, and obtained, from the first respondent. It was for $330,000.00. The third respondent informed Fraser it was commercial work. After discussion, in which Fraser said the quotation was beyond his budget, cost savings were agreed, reducing the quoted cost to $313,236.00. In July, 2003, the third respondent produced a contract. It was signed for applicant and the first respondent. Fraser said he did not read it carefully. Fraser said he became aware that the works were residential works, when he consulted a solicitor, one Hassell, in April, 2004.

56 Once the work commenced, the first respondent furnished the applicant with variations for which payment was claimed. As to one variation, that relating to external wall cladding, Fraser said he was informed that it would not add to the cost. In relation to each variation, Fraser stated:

(1) He requested the installation of a central vacuum system.

(2) Two additional cupboards. The applicant sought additional cupboards for the kitchen.

(3) Bulkheads to reception. Fraser believes overcharging occurred.

(4) & (5) Further air conditioning. The third respondent claimed a variation – stating that in his quotation he had overlooked one of the units.

(6) Plumbing extras. Fraser complains that details were not provided.

(7) Tiling extras. Kettle sought a change in the tiles from ceramic to slate. No details of extra costs was provided.

(8) Additional paint colours. The changes were sought. However, no detail to justify the extra cost was given.

(9) Change in wall panels – external cladding. Said to be required

because of delay in delivery of specified panels. Third respondent told Fraser it would not increase the cost. One panel broke and was installed in two broken pieces.

(10) Additional electrical. Some electrical changes were requested. No detail of the increased cost was given.

(11) Balustrade. Applicant sought change from plasterboard to safety glass. No detail of the extra cost was given, which appears to Fraser to have been prohibitive.

(12) Shower screen height increase. No longer an issue.

(13) Installation of TV screen. The variation is unsatisfactory and the applicant refuses to pay for it.

(14) Splashback to kitchen. A variation for which no detail of the increased cost has been given.

(15) Upgrade of Jetmaster. Fraser has stated that no variation was sought.

57 Credit allowed by the respondents for window cost adjustment has no detail and Fraser is unable to determine whether the allowance is a reasonable assessment of the credit due.

58 In all the applicant has paid $294,394.95 for work which is incomplete and defective.

59 The above is a summary of Fraser's witness' statements. I turn to a summary of his evidence at the hearing.

60 He accepted that the architect would do plans and specifications but not be available to supervise the works. Fraser completed and signed the application for a building permit, which had been handed to him, partly

completed, by the builder. Leaks to front and rear balconies arose after rain.

61 In cross-examination, he conceded that he had not taken any photographs to substantiate the existence of the leaks to which he referred, nor did his statements refer to the leaks. Because of the defects and the absence of warranty insurance, he and Kettle were unwilling to purchase the premises. Miroslav Walter, a patient of the practice, and an architect and engineer, had recommended the builder, Stone. Previously, Fraser had had a holiday home at Nungurner built for him. He had also had additions done to the commercial premises at 475 Balcombe Road. The architect's plans specified Rapid wall sheeting as the cover for the external walls. When by September it was said that there was to be a delay in delivery to November with Rapid wall sheets, Stone and Walter had discussed using Ultra panel sheets as a substitute. Fraser agreed to this, having been told by Walter that it was "OK" Cranes were required to lift Ultra panel sheets into place. They were there for about a month and Stone complained about the extra work involved.

62 He did not believe that the variation statements provided a reasonable level of detail to enable him to determine what work was done. Fraser said that the relationship with Stone was good up until Christmas, but after that the wheels fell off when promises were not kept.

63 The tiling and slate works involved workmanship which was abominable, and that claim is in dispute. With the change to Rapid wall, he had been told it would not involve any extra cost, but three months later he was given a bill for $20,000. He agreed that there was a meeting with Stone on 17 March, 2004, at which Walter was present, when variation claims were discussed. After that meeting, he made Stone a goodwill payment of $10,000 to have the work proceed. Mediation was suggested. Fraser said that he rejected the suggestion as he was after arbitration, not mediation. He agreed that he was given spreadsheets concerning extra costs, but he regarded these as

being meaningless, because they were not supported by primary documentation. There was a meeting on 17 June, 2004, at which Hassel, his solicitor, Lees and Stone were present. The meeting lasted for five hours. Lees went through his report with Stone. In the result, Fraser agreed to pay Stone a further $30,000 immediately and a further $30,000 on completion, with the balance claimed by Stone remaining in dispute. On his solicitor's advice, he did not make the second payment of $30,000 because the works had not been completed. He agreed that the occupancy permit had been issued on the 27th July, 2004. By December, Lees had reported that some works which had not been attended to in May, had been completed.

64 Fraser said that a variation showing an upgrade of the model of the Jetmaster caused him to feel outraged, because the upgrade had not been requested. However, he signed the variation signifying his acceptance of it. He said that he had signed 9 variations, because he felt "intimidated by Stone". He agreed that both Lees and Walter had inspected the premises at his request.

65 Toni Kettle's witness statements, by and large, confirm the contents of the statements of Fraser. She has been Fraser's partner since 1998, and she worked as a receptionist in his practice. She said she believed that the variations which had been signed by Fraser were not in dispute between the parties. She agreed that she had chosen tiles and slate which were more expensive than those specified. She said she was concerned about the quality of the slate work. She did not agree to a larger Jetmaster. On 23 February, 2004, they moved into the premises because the builder allowed them to. Ms Kettle objected to the black door handles as she had specified chrome on four doors.

66 William Barlow gave evidence of his retainer. He stated that he ceased work on the project on 5th April, 2003. He obtained a quote for air conditioning

from C & S Air Conditioning, a copy of which he gave to the applicant. In cross-examination, he said he had an initial meeting with the client about the project in June, 2001. He was engaged in early July. He sought the air conditioning quote to provide budget advice for the client.

67 Jamie Fitzgibbon, a valuer, produced a report on his valuation of the premises given on the 16th December, 2004. The witness considered that the value of the property was depreciated by $15,000 by reason of defects noted in Lees report of August, 2004. He considered that the property was further depreciated by $24,000 by reason of the absence of the statutory warranty insurance cover. That sum of $24,000 represented five percent of the valuation of the property. The witness thought, upon reflection, that the deduction should, properly, be within the range between five and ten percent.

68 Thomas Callery, house painter, gave evidence concerning painting he carried out at the premises. He said that, during the course of the work, Fraser had directed him to paint certain down pipes and not to paint others, which directions he followed.

69 Simon Gatt, stonemason, gave evidence that he was a stonemason of 15 years' experience. He had been engaged by the respondents to carry out slate tiling at the premises. Prior to commencing, he discussed the layout of the slate paving with Fraser, setting out the slate in a pattern to demonstrate its appearance. Fraser approved and Gatt followed the pattern in laying the paving. Fraser also approved the mode of tiling at the entry at the front. Upon completion, Fraser stated he was happy with the work. Because he had not been paid, about three months after completion he approached Fraser. Again, Fraser did not express any concern about the paving.

70 Lori Stone, the wife of the third respondent, stated that, on 3rd June, 2004, she had a meeting with Fraser and Kettle at the premises, in order to obtain confirmation concerning the particular Jetmaster heater that they wanted.

She said that she explained to them that the contract made provision for a 440cm unit and that a larger one would cost more. Using a tape measure, she indicated the floor area which would be occupied by each of the various models. In the result, Kettle and Fraser selected a larger unit – identified as "700S hour unit". Ms Stone said she then ordered the model selected.

Expert Evidence

71 I propose splitting the summaries of the evidence of these witnesses into two parts. First, I shall give a brief summary of any passages of general evidence. Then in relation to each of the discrete claims, I shall identify the claim, give a concise summary of the evidence of each witness and then set out my finding in relation to that matter.

1 Miroslav (Mike) Walter

Walter impressed me an honest, intelligent, objective and reliable witness. The witness gave evidence that he qualified as an architect in Czechoslovakia, and in engineering in both Czechoslovakia and Australia. He is registered as a building practitioner, an engineer and a draftsperson. He was retained by the applicant. The balance of Walter's evidence related to the discrete claims.

2 Robert Lees

Lees was retained by the applicant in March, 2004, to inspect the premises and report thereon. He was an enthusiastic witness, exhibiting a desire to advocate the cause of the party employing him. He is a building consultant with over twenty-five years' experience in the building industry. Reports based upon inspections by him of the premises and dated 21st May, 2004; 9th August, 2004; 13th December, 2004; 21st April, 2005 and 11th October, 2005, were put into evidence, together with some fifty-one photographs of the premises. The three

reports given in 2004 provided commentary concerning all the defects identified by him on his inspections. The August and December 2004 reports were by way of updating and commenting upon work done following the May 2004 report. The report given in April 2005 referred specifically to the Ultra panel external wall panels and their integrity. The final report, that of October 2005, is a wide ranging review of allegedly defective items and the attention which has been given to them. Unfortunately the numbering is not identical to, and much more extensive than, that set out in the December 2004 report which has made cross referencing a difficult and laborious process. I point out that those present at the view of the premises which I conducted on 12 October last, identified the allegedly defective items by reference to the items set out in the report of Lees of 13th December 2004, and I shall work through the disputed items by reference to those items identified in Lees' report of that date. Lees has stated, in more than one of his reports, that the upper floor apartment has basically been well constructed. That comment appeared to me to be confirmed by what I observed during the view.

3 John Permewan

Permewan, Architect, provided reports for the respondents based upon inspections of the premises and consideration of the contents of lees' reports. I found him to be an impressive and reliable witness, who appeared to me to be giving his evidence in an even handed and objective manner. My criticism of his evidence was that, with some costings, he appeared to pare the costs too severely.

In essence, whilst I felt that both Lees and Permewan were both expert in the subject field, I concluded that in relation to some items Lees advocated more extensive work than was required. Likewise, in relation

to items about which both agreed on the work to be performed, Lees was at times overly generous whilst Permewan was niggardly. These conclusions are reflected in determinations I made concerning a number of items.

Defects

72 As I have stated, I propose to deal with the individual items said to result from defective workmanship, singly and in the order set out in Lees' report of 13 December, 2004, to which items I added one numbered 23A, a separate matter pointed out during the view.

Key:- L = Lees; P = Permewan; S = Stone; W = Walter; J = Judge

ITEM		COMMENTS	QUANTUM $		OUTCOME $
			Applicant	Respondent	
1	Plaster Finish – Stairwell – Front	L: Require sanding and painting. P: No obvious imperfection – nothing required. J: I could not observe any defect. Accept Permewan.	676	Nil	Nil
2	Front Door	L: Requires painting and seal at base. P: Agrees – painting and seal required. J: Allow compromise seal.	453	319	400
3	Entrance – Ceiling	L: Remove ceiling – pack level – instal and paint new ceiling. P: Minor distortion – skim coat and then re-paint. J: Minor defect – allow lower estimate.	463	206	206
3A	Front Entry Tiling	L: Reworking required. P: No action required. J: No need for action, for	755 (approx)	Nil	Nil

		reasons given by P – Exhibit B – Photo 2 supports P's reasons.			
4	Handrails – Finish to Staircase (Front)	L: (a) Handrail needs to be trimmed back – cosmetically unacceptable. (b) Stains apparent on timber – stained before being cleaned – strip, sand and recoat. P: (a) Handrail complies with building code – no action required. (b) Argues stairs marked by owners. J: (a) No basis for further work on handrail. (b) Probable that builders marked staircase, not owners – accept L.	(a) 290 (b) 1931	(a) Nil (b) 605	(a) Nil (b) 1500
5	Sunshade Louvres	L: Included in quote – not supplied. P: Agree, not installed – supplier will supply and instal for $2450 – allow 10% overhead and profit.	4290	2695	2940 – allowing 20% overhead and profit.
6	Verandah Roof & Boundary Wall Cappings	L: (a) Boundary wall capping inadequately supported and secured. (b) Front capping incorrect colour – replace. (c) Roof – verandah canopy – clean. P: (a) It is supported and does not distort. (b) 8m of capping is wrong colour. (c) Verandah requires cleaning. J: (a) Capping requires attention. (b) Requires replacement. (c) Requires cleaning.	896	387 (inc. GST)	Allow $896

7	Fibro Cement Cladding (Front Wall)	L: Believe cladding wrongly installed in small uneven pieces – likely to crack – lack of waterproofing around windows. Remove, replace and render. S: Cladding properly installed and sealed. Windows are sealed. P: Construction best allowed given materials specified. Minor maintenance items only require completion. J: Accept S that there was proper installation and sealing.	1637	132	132
8	Waterproofing Front Balcony	L: Waterproofing is not up to specifications – seems leaks have developed – not adequately returned up adjoining walls. Remove slate tiles – waterproof entire floor areas including upturns – instal new tiles. Create 2 further drainage outlets. S: Waterproofing done to manufacturer's specifications. Area waterproof tested successfully. P: Satisfied that there is no evidence of leaking or defective sealing of balcony. Agree 2 further drainage outlets are required. The upstand can be completed without removing slate. If L's suggested restoration be accepted – costing is $3340. J: Evidence does not satisfy me that removal of slate is required. I accept P's evidence concerning work required.	7166 (for items 8-9) Semble. 6966 for 8 200 for 9	1500	1500
9	Finish to Slate Paving	Note: Item 8 has relevance as I do not conclude that replacement of slate is required. I do	200	143	500

		not accept that floor is susceptible to leaking. L: (Semble). If work limited to cleaning and resealing. S: Cleaning and resealing only required. P: Internal tiling to be completed. J: The experts have dealt with different matters. I conclude there should be allowances both for cleaning external tiles and for completion of internal tiling – say $500 in all.			
10	Skirting Details	Minor Item. L & P: Agree skirting requires repair.	175	50	175
11	Door Handles	Minor Item – Owner entitled to have door handles of chosen colour – replace.	615	Nil	615
12	Protruding Nail	Trivial – barely observable on close inspection.	50	33	40
13	Sliding Door Cavity	Trivial.	89	Nil	89
14	Shower Screen	L: Waterproofing inadequate. P: Waterproofing appropriate – but no water stop. Strict compliance with BCA requires installation.	965	363	750
15	Mirror Installation	Trivial	31	–	31
16	Courtyard	Note: In relation to the appearance of the slate pattern internally and on balconies and courtyard, I find the appearance to be acceptable cosmetically. I do not consider that a basis cosmetically exists for replacing them. L: Remove tiling and	4555	1034	1500

		replace. Tiling to be sealed with appropriate external sealer. S & P: No more required than stripping slates and resealing. J: Accept P as to nature of work required.			
17	Fibro Cement Cladding Courtyard	L: Saw cladding before it was rendered. Criticised open joints broken sections. Failure to waterproof. Queried whether thermal insulation had been provided. In cross-examination he conceded that there was no evidence of failure of the cladding. S: Cladding was installed following specification and manufacturer's requirements. Filler was put in where required. Cladding was covered by fibreglass – before being rendered. Sarking is contra indicated. P: Patching holes in cladding is acceptable practice – using a flexible sealant – minor maintenance items need attention. J: Not satisfied that builder failed to instal cladding effectively or that he failed to waterproof it.	1782	220	220
18	Gutters and Downpipes Courtyard	L: Painted where they should have been natural colour. Fraser: He did not give the painter instructions to paint the downpipes. Painter (Callery): Instructed by Fraser to paint certain downpipes and not others. We did as we were told. Specification referred to painting. J: Not satisfied that	252	Nil	Nil

		painter was in error. Trivial item.			
19	Skirting and Tile Function	J: There is no dispute – sealant needs to be provided. Allow $200.	372	33	200
20	Shower Installation Bathroom	L: Conceded that shower screen as installed be accepted.	–	–	Nil
21	Shower Construction Ensuite and Bathroom	L: Not adequately waterproofed – water bar has not been installed. P: Believe it has been waterproofed, but strictly water bar should be installed. J: Accept that a water stop is required in each case.	2640 (1320 x 2)	787 (363 + 424)	1500
22	Rear Balcony	L: Doubt that waterproofing has been installed to manufacturer's instruction. Leak has occurred. Action remove tiles, waterproof and re-lay – see notes for 8 (supra). P: See comment 8 (supra). S: Leak caused (perhaps) by workman putting shovel through floor. Work specified by L costed at $3,049. J: Conclude – noting Stone's surmise – that major work is only satisfactory means of dealing with defect.	4572	581	3750
23	Downpipe	J: Minor item – accept Lees.	266	55	266
23 A	Rear Bedroom	J: Staining caused by rain through open window.			Nil
24	Back Stairs	J: Need to be stripped, sanded and resealed.	1931	418	1500
25	Back Door	J: Fixed.			Nil
26	Meters	J: Viewing holes required for meters.	107	55	75

27	Jet Master Flue	J: Rectified – allow owner $25 for paint.			25
28	Steel Columns	J: Base plates need to be grouted.	98	88	90

Accordingly, the applicant is entitled to recover $17,950.00 by way of damages for rectification of defects.

73 I turn then to the question of damages for loss consequent upon the failure of respondents to have insurance cover.

74 The evidence here was in relatively short compass. The claim is based upon the evidence of the valuer, Jamie Fitzgibbon. The respondents did not call evidence to dispute the conclusions reached by Mr Fitzgibbon. Any reservations I might have had about his knowledge of values in the Beaumaris area, given his geographic remoteness from it, abate by reason of that. However, although Mr Fitzgibbon was not cross-examined on this point, it seems to me his estimate for loss of value must be approached cautiously, for I suspect that this may be one of a very few, perhaps the only, premises he has valued where domestic building insurance, being required, has not been obtained.

75 Of course there is a clear qualifying feature. The diminution in value related to insurance lasts only for the prescribed period of 6 years and 6 months (s.137(B)(7) *Building Act*) from completion, i.e. to 29 January, 2011. As the premises provide a residence above the business premises, it doesn't appear to me that there is any compelling reason why a sale should occur within that time. Further, there must also be a discount for the fact that damages represent a present payment for a contingent future loss. Finally, insofar as Mr Fitzgibbon made an allowance for the defects as identified in Lees' report, damages cannot separately be awarded relating thereto, as the claim for damages for rectification of defects has been made, and determined separately.

76 I have made a summary of Fitzgibbon's evidence. He arrived at a figure of $24,000.00 for diminution in value because of the absence of the statutory insurance. Taking into account the discounting factors, which in my view are heavy in this case, I allow a figure of $8,000.00 under this head of damages.

77 Therefore insofar as damages are concerned, the applicant is entitled to an award in the sum of $25,950.00, being $17,950.00 for damages for rectification of defects and $8,000.00 for diminution in value.

78 Upon the evidence before me, it seems clear that liability for any award in favour of the applicant is properly made against both the first and third respondents, and counsel did not contend otherwise.

79 I turn then to consider the one claim by the respondents which may be said to be viable; namely, the claim for variations. It is alleged by the respondents that they undertook 17 variations, primarily at the specific request of the applicant. Of others, it is said that circumstances required the variation and that it as agreed to by the applicant. One such detailed example was the change to the external wall cladding used, namely the substitution of ultra panel sheets for Rapid wall sheeting.

80 Before the respondents can succeed in claims for variations they must bring themselves within the provisions of s.37(3) or s.38(3) of the Act, save in a small number of claims where variations were sought by the applicant which did not require a variation to the permit, did not cause delay and, did not add more than 2 percent to the original contract price. In those cases, s.38(2) of the Act has application. In cases where the respondents are required to rely upon either s.37(3) or s.38(3) of the Act, the hurdles confronting them are significant, as I have outlined earlier in these reasons.

81 On behalf of the applicant, Fraser signified his assent to some 9 of the 17 variations during a discussion with Stone in July, 2004. This was done after

he had retained solicitors and received advice and the solicitors, having made demand of the respondents, had had an extensive conference with Stone. Stone did not appear to have obtained legal advice at that stage. Fraser said that he signed the 9 variations referred to because he felt intimidated by Stone. I reject that explanation. His partner, Toni Kettle, gave evidence that she believed the variations were signed by Fraser because they were not in dispute between the parties. I am satisfied that Fraser voluntarily signed the variations because, in good conscience, he accepted that the amounts of those variations were properly due to the respondents. The variations to which I refer are numbered 1, 2, 6, 8, 10, 11, 14, 15 and 17. It will be noted that variations 16 and 17 are adjustments which give credit to the applicant for items the cost of which was less than that quoted or as allowed for. There the variations have been acknowledged by Fraser's signature, I have accepted the cost shown.

82 I shall deal with each variation sequentially:-

1 Supply and Installation of Central Vacuum System

This was done at the request of the applicant. The work falls within s.38(2) and I allow the respondents the amount claimed, $1,169.51.

2 Alterations to Joinery

This was done at the applicant's request also. It is work which falls within s.38(2). I allow the claim – for $2,970.00.

3 Bulkheads to Reception

This was not domestic building work. I accept that the work was done and I allow the small sum involved - $880.00.

4 & 5 These Claims Relate to Air conditioning

They arise, according to Stone, because the expense of the goods and installation was significantly greater than the sum he had allowed as a prime cost. I do not allow this item. I do not regard the prime cost as being a genuine pre-estimate of the actual cost. If there be a loss, it must be borne by the builder.

6. Plumbing Alterations

Although the evidence is not clear-cut, these works appear to have flowed from requests of the applicant. As such, I am satisfied that s.38(2) applies and I allow the builder the sum of $2,655.40.

7. Tiling and Slate

Although this work was done at the request of the applicant, the respondents did not provide details of any extra costs. It is impossible to calculate what, if any, extra expenditure was incurred. As the variation claimed is for an amount in excess of the contract price, it does not comply with the requirements of s.38(2) and I disallow this amount.

8. Painting

This work was done at the applicant's request. Despite Fraser's protest I regard the sum as reasonable. Section 38(2) applies and I allow the respondent's $1,999.80.

9. Ultra Panel Extra Cost Compared with Rapid Wall

I am satisfied that any extra cost must be borne by the builder. Delays caused by the non-availability of Rapid wall sheets would eat into the builder's profit. I am satisfied that Stone represented to Fraser that the substitution would not involve extra expense. The amount claimed is markedly in excess of 2 percent of the contract

price. Section 38(2) has not been complied with. This claim fails.

10 Electrical Variations

These were done at the owner's request. Section 38(2) applies and I allow the claimed sum of $1,588.00.

11 Stair Balustrade

This work was done at the owner's request. Section 38(2) applies and the builder is entitled to this sum; $5,060.00.

12 Shower Screens – Height Increase

I am unable to determine whether this was done at the owner's request or at the behest of the builder. I am not satisfied that an allowance should be made and I decline to do so.

13 TV Screen

It is common ground that installation has not been completed. I do not allow the builder any part of the sum claimed.

14 Kitchen Splashboard

This work was done at the owner's request. The provisions of s.38(2) have been complied with. The parties appear to have agreed upon a figure of $682.00, and I allow that sum.

15 Jetmaster Upgrade

I accept the evidence of Mrs Stone on this matter. I am satisfied that the applicant requested the upgrade. The provisions of s.38(2) apply and I allow the respondents the sum of $357.50.

16 By this variation, the builder gives a credit of $3,056.00, which I shall

allow against the earlier variations.

17 The comments relating to 16 apply here. The sum allowed is $3,900.00.

83 The outcome is that for the variations I have allowed, the sum represented by them is $21,262.21. From that sum must be deducted $6,956.00, being the aggregation of the sums allowed by items 16 and 17. The resulting figure is $14,306.21. As I have ignored GST to this point, I now add it in. It is in an amount of $1,430.62. The total allowed is therefore $15,736.83.

84 At this point the above exercise becomes academic because the respondents have attached a document Schedule 1 to the Amended Points of Defence and Counterclaim. By that document, it is conceded that the applicant has paid $37,707.70 towards the variations, which were claimed at $48,692.16 (which latter sum is overstated by $5,000.00). Although I am far from satisfied that the payments on 31 December, 2003 and on 15 March, 2004 were in reduction of sums claimed by way of variation, I feel obliged to accept the respondents' concession and conclude that, as to the sum of $15,736.83 which I allowed for the variations, that sum has been paid by the applicant. Accordingly, the claim for variations is extinguished by the payments conceded to have been made. Without that concession, I would have regarded those payments as going against the base contract sum.

85 As the claim for damages for delay arises out of the contract, the findings I have made extinguish any right of the respondents to pursue such a claim. I can say simply that the paucity of evidence concerning the claim for delays otherwise would have deprived the respondents of any entitlement to damages under that head.

86 The result is that the applicant is entitled to recover damages in the sum of $25,950.00 against the respondents. Further, the applicant is entitled to

damages in the nature of interest on this sum. I award $4,000.00 by way of such damages. Thus the applicant is entitled to an order that the respondents pay to it the sum of $29,950.00 on the claim. The counterclaim is dismissed.

87 I shall hear the parties concerning the formal orders to be made.

88 Subject to any submissions by counsel I propose to order the following:-

1. That the respondents pay damages to the applicant in the sum of $29,950.00, including $4,000.00 damages in the nature of interest.

89 I shall hear counsel on the question of costs and in relation to any other matter raised by these reasons. In the light of the orders I propose, I do not see the need to give declaratory relief.

HIS HONOUR JUDGE DOVE