

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. D337/2014

CATCHWORDS

Domestic Building Contracts Act 1995 – defective workmanship – evidence – agreed entitlement and amount for liquidated damages for delayed completion of work - claim for damages for delay –plans and permits to be provided by Owner – permit from water authority to build over easement – structure required by Contract drawings not compliant with build-over permit – refusal of relevant building surveyor to grant occupancy permit - whether resulting delay amounts to prevention by Owner – delay in grant of permit not related to delay in completing work -Owner requesting change of cabinet maker – replacement cabinet maker causing delay – builder responsible for delay by its cabinet maker - whether Owner confined to agreed amount for liquidated damages for allowable delay – general damages – causation – premises unable to be occupied because no occupancy permit - s.38 of the Act - variations requested by Owner – evidence

APPLICANT	Mourad Ghobrial
RESPONDENT	Solo Developments Pty Ltd (ACN 087 942 989)
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	19, 20 and 22 March and 26 April 2018
DATE OF ORDER	2 July 2018
CITATION	Ghobrial v Solo Developments Pty Ltd (Building and Property) [2018] VCAT 943

ORDERS

1. Order on the claim that the Respondent pay to the Applicant the sum of \$76,362.07.
2. Order on the counterclaim that the Applicant pay to the Respondent the sum of \$89,643.08.
3. Order that the two amounts be set-off and the Applicant pay to the Respondent the sum of the sum of \$13,281.01.
4. Costs and the claim for interest are reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant

Mr P. Little of counsel

For the Respondent

Mr N.J. Phillpott of counsel

REASONS FOR DECISION

Background

1. The Respondent (“the Builder”) is a building Contractor. Its director is a Mr Solomou, who is a registered building practitioner.
2. On about 4 June 2010, the Builder and the Applicant (“the Owner”) entered into a major domestic building contract (“the Contract”) to construct three two-storey town houses on land owned by the Owner at the corner of Evelyn Street and Tucker Road in Bentleigh (“the Site”), for a price of \$1,100,000.00 inclusive of GST. Work was to be carried out in accordance with plans provided to the Builder by the Owner.
3. Construction took place between 23 August 2010 and 25 August 2011 when the Owner took possession of all three buildings. A certificate of occupancy was issued for the buildings on 8 September 2011.
4. After taking possession, the Owner complained of defects in the work. He also claimed damages from the Builder for allegedly failing to complete the construction of the units on time.
5. This proceeding was issued by the Owner in May 2014 seeking damages. The proceeding was defended by the Builder and a counterclaim was issued in October 2014.
6. Thereafter the Builder returned to the Site and carried out some rectification work, but the dispute was not resolved.

Hearing

7. The matter came before me for hearing on 26 April 2018 with five days allocated. The Owner was represented by Mr P. Little of counsel and the Builder was represented by Mr N.J. Phillpott of counsel.
8. I heard lay evidence from the Owner and from Mr Solomou. Their expert witnesses, who were Mr Johnson for the Owner and Mr Jeffery for the Builder, gave evidence concurrently. I also visited the Site with the parties and their experts.
9. A lay day was taken on Wednesday, which would otherwise have been the third day of the hearing, and evidence concluded on the following day.
10. Directions were then given for the filing and service of written submissions and the proceeding was fixed for the hearing of oral submissions on 26 April 2018. Submissions were made on that day.

The witnesses

11. As to the lay evidence, the Owner’s evidence consisted largely of bald denials. Mr Solomou’s evidence had more detail and was also supported by the documents that he produced and the evidence of his expert, Mr Jeffery.
12. As to the experts, Mr Phillpott submitted that I should place greater reliance upon the costings of Mr Jeffery because he is a quantity surveyor as well as

a building expert. I do not think that I can take a broad approach like that. Mr Johnson is also qualified to assess the cost of building work. In making findings as to costings, I should look at the opinion of both experts in regard to each item and see which assessment seems more likely to represent the actual cost that will be incurred, having regard to all of the evidence.

The issues

13. The Owner claims damages for defective workmanship and delay, totalling \$243,040.34. The claims by the Builder are for the balance of the final claim, which is \$22,000.00, and for payment for 22 variations, totalling \$68,032.00.
14. I will deal first with the Owner's claims.

The defects

15. Of the defects originally identified:
 - (a) some have been rectified by the Builder;
 - (b) some have been abandoned by the Owner; and
 - (c) some are agreed, both as to the existence of the defect and the cost of rectification.

Of the remainder, many were acknowledged and the issue between the parties related only to the damages to be assessed.

16. In general, damages for each Contract are assessed on the basis of what it would cost to put the innocent party in the position he would have been in if the contract had been complied with, subject always to that being a reasonable course to adopt in the circumstances (see *Tabcorp Holdings Pty Ltd v. Bowen Investments Pty Ltd* [2009] HCA 8; *Clarendon Homes Vic Pty Ltd V Zalega* [2010] VCAT 1202 and the cases there cited).
17. The following are the defects with respect to which damages are sought. The figures given for all of the following defects are for the base cost of rectification before adding a Builder's margin or any preliminaries.

Unit 1

18. The following items are agreed, both as to defect and amount:

(a)	Inadequate fixing to cappings	\$ 170.00
(b)	Inadequate fall on parapet capping	\$ 350.00
(c)	Inadequate fasteners to pressure flashing	\$ 95.00
(d)	Substandard installation of flashings	\$ 160.00
(e)	Failed caulking in articulation joint	\$ 170.00
(f)	Water damage in guest ensuite	\$ 235.00
(g)	Faults in cabinetry	\$ 315.00

(h)	External door seals	\$ 125.00
	Total agreed items	<u>\$1,620.00</u>

19. The following items are in dispute in regard to Unit 1:

Roof and gutters not cleaned \$200.00

20. There was some debris in the gutters and on the roof. Mr Johnson allowed \$460.00 to remove the debris and to replace any roofing sheets that might need to be replaced. Mr Jeffery allowed \$200.00 to remove what appeared to me from the photograph to be minimal debris. He allowed nothing for the roofing sheets because there was no evidence that they needed to be replaced. I think that is right and I will allow \$200.00.

Spreaders not installed correctly \$635.00

21. The existence of this item was agreed. The difference was between Mr Johnson's assessment of \$635.00 and Mr Jeffery's assessment of \$400.00. Mr Jeffery has not allowed for painting which Mr Johnson said will be required. I will therefore allow Mr Johnson's figure.

Incorrect drainage from box gutters \$730.00

22. Mr Johnson said that the outlets from the box gutters were not wide enough and he assessed a cost of \$730.00 in his report to continue them in full width, discharge them into rain heads and to supply a sump and overflow.

23. Mr Jeffery did not dispute that the drainage from the box gutters was non-compliant but he said that, given the relatively small roof areas draining into these three locations, the Builder might be able to provide calculations to show that, although not in compliance with Building Code of Australia ("the Code"), the restricted openings are adequate. I think that in the absence of any such calculations I must find this to be a defect and allow the amount assessed by Mr Johnson.

No damp proof course installed

24. Mr Johnson said that there was no damp-proof course in the brickwork below floor level. He referred to the requirement in the Code in this regard and said, that if no damp course has been provided, an application of a silicon injection system would be required at a cost of \$2,210.00.

25. Mr Jeffery disagreed and said that there was evidence of a damp proof course. At the Site inspection I could see that there was a damp proof course, albeit that the damp-proof material did not extend quite all the way to the outer face of the building which I was told was required under the Code. Mr Jeffery said that what the Builder has done was sufficient for the purpose and so I am not satisfied as to the item.

Control joints missing polystyrene foam cladding

26. Mr Johnson said that the polystyrene foam cladding was installed without control joints, causing cracking (*photos 20 and 21*) and control joints had also been rendered over. He said that to cut control joints and fill them with a sealant, rake out the render, repair cracks and re-render the wall, would cost \$720.00.
27. Mr Jeffery said that, since the wall in question was less than 8 metres long, no control joint was required. It appears that there is no requirement in the Code for control joints in polystyrene foam cladding but the manufacturers of the various cladding systems specify spacings to suit their own system. It is not known what system was used for the cladding in question.
28. No cracks were apparent to me on Site. One is shown above an upper window in photograph 21 of Mr Johnson's report but there is no evidence as to the length of that wall. Mr Jeffery said that the wall in the adjoining photograph is only 4,350 mm long. I am not satisfied as to this item.

No caulked joints at junctions between dissimilar materials \$835.00

29. The existence of this defect was acknowledged and this is just a matter of assessment. Mr Johnson assessed an amount of \$835.00 and Mr Jeffery assessed a cost of \$505.00. The difference is in the time allowed for the renderer. I prefer Mr Johnson's opinion that a full day should be allowed for that.

Render to the perimeter of window and door frames \$150.00

30. The acrylic coating to the polystyrene foam cladding has been applied against the perimeters of window and door frames. This was acknowledged to be incorrect. Mr Johnson said that the render would need to be raked back and a caulking bead applied to the perimeter of all aluminium frames and render coatings. He assessed the cost of that at \$620.00.
31. Mr Jeffery disagreed that raking back the render was necessary but said that it was necessary to caulk the joints between the rendered wall panels and the window and door frames. For that he assessed a figure of \$150.00. I prefer Mr Jeffery's opinion and will allow his figure of \$150.00.

Faults in timber flooring \$5,715.00

32. Due to water damage to the timber floor, a section of the floor was replaced and the replacement planks did not match the existing. There is also a gap between the original floor and the replacement planks. It appears from water stains on the ceiling that the air-conditioning register over the kitchen island bench has leaked. Mr Johnson said that to replace the damaged flooring would cost \$5,715.00.
33. Mr Jeffery said that, as timber is a natural product, it is extremely difficult to match colours and the best solution to match the colour would be by staining, which he said would cost \$1,800.00. He acknowledged the presence of the 2 mm gap at the junction between the new and old flooring.

34. Mr Phillpott submitted that Mr Johnson's scope was excessive in that it did not take account of the age of the unit and the daily use of the floors over the years.
35. The problem is not due to wear and tear or age but to the colours not matching and the damage to the flooring from the leak. On this item I prefer the evidence of Mr Johnson and his figure of \$5,715.00 will be allowed.

Faults in roof space

36. Mr Johnson said that cables inhibit access into the manhole, that no globe has been fitted to the batten holder and access to the air-conditioning units is restricted by ducting. He assessed a scope of works required to rectify these problems at \$420.00.
37. Mr Jeffery agreed that the ceiling space was restricted by ductwork but said that this was due to the design. He said that he was advised that cables were installed by the Owner's contractors. Mr Solomou said that the missing globe was installed.
38. I am not satisfied as to this item.

Moisture penetration into entry porch ceiling of Unit 1 \$990.00

39. There are water stains on the ceiling of the front porch. Mr Johnson has identified a leak from the parapet flashing above. He has assessed a cost of \$1,790.00 to rectify the leak by replacing the flashing. The major item in his costing is an amount of \$800.00 for scaffolding.
40. Mr Jeffery said that the replacement of the flashing was excessive and unreasonable. He also said that the job could be done from ladders and did not require scaffolding.
41. Having been shown where the problem is I accept Mr Johnson's opinion that the flashing needs to be replaced but I prefer Mr Jeffery's opinion that the job does not require scaffolding. I will therefore allow \$990.00 for this item.

Moisture damage to meals area ceiling in Unit 1 \$1,250.00

42. There is some moisture damage on the ceiling in the Unit 1 meals area, indicating a leak. Mr Johnson assessed a cost of \$1,250.00 to carry out water tests, rectify the leaking and repair the paintwork. He suggested as a likely cause the flashing against the wall above.
43. Mr Philpott said that it was unclear what the exact defect being claimed is said to be. He said that no source of water leaking or damage had been identified and it is unclear if this is consequential damage from another leak claimed by the Owner. He submitted that I should make only a minimal allowance.
44. The Owner said in cross-examination that the leak was caused when the Builder came back and cut some expansion joints in the foam upstairs and that the cut was left uncaulked for a period. However the Tenant said that the leaking still occurred.

45. The ceiling should obviously not be leaking and in the absence of evidence of any other cause, I accept Mr Johnson's opinion that it is defective flashing against the wall above. I will allow his assessment of \$1,250.00.

Low water pressure at laundry taps

46. Mr Johnson assessed a cost of \$255.00 to address a perceived problem with low water pressure in the laundry tap. Mr Jeffery said that he thought the pressure was satisfactory.
47. When I operated the tap during the Site inspection I could not notice any reduced water flow, although I am not a plumber. No damaged pipe or other defect in the plumbing was demonstrated. I am not satisfied as to this item.

Defective kitchen tap installation

48. The kitchen tap could be moved relative to the sink and it appeared to need tightening. Mr Johnson assessed a cost of \$615.00 to remove and re-fit the tap.
49. No particular defect could be identified in the tap and it is now a number of years since the certificate of occupancy was issued. Even if the tap was fitted by the Builder I cannot attribute the present movement in the tap to poor workmanship on the part of the Builder at the time of construction. This appears to be a maintenance item.

Unit 2

50. The following items are agreed, both as to defect and amount:

(a)	Inadequate fixing to cappings	\$ 170.00
(b)	Inadequate fall on parapet capping	\$ 275.00
(c)	Inadequate fasteners to pressure flashing	\$ 95.00
(d)	Insufficient fall in box gutters	\$ 85.00
(e)	Brickwork repair incomplete	\$ 90.00
(f)	Defects in garage south side door	\$ 468.00
(g)	Fault with stairwell window	\$ 326.00
(h)	Loose toilet pan in guest en suite	\$ 85.00
(i)	Ridge in first floor level flooring	\$ 555.00
(j)	Painting manhole cover	\$ 43.00
(k)	External door seals	\$ 125.00
	Total agreed items	<u>\$2,317.00</u>

51. The following items are in dispute.

Roof and gutters not cleaned \$200.00

52. This is similar to the dispute in regard to the equivalent item in Unit 1. I will allow Mr Jeffery's figure of \$200.00.

Spreaders not installed correctly \$635.00

53. It was acknowledged that spreaders at the base of the downpipes from the upper level roofs have not been installed properly. The dispute concerns the rectification costs. Mr Johnson assessed a figure of \$635.00.

54. Mr Jeffery said that only \$400.00 was warranted. For the same reason as in Unit 1, I accept Mr Johnson's figure.

Incorrect drainage from the box gutters \$780.00

55. This is similar to the equivalent item in Unit 1 and the same considerations apply. I accept Mr Johnson's assessment of \$780.00.

No damp proof course

56. I am satisfied that there was a damp proof course installed.

Control joints missing in polystyrene foam cladding

57. The same considerations apply as for the equivalent item in Unit 1. I am not satisfied that a defect is established.

No caulked joints at junctions between dissimilar materials \$875.00

58. As with Unit 1, this is a matter of assessment. In this instance Mr Johnson's revised assessment is \$875.00 and Mr Jeffery's assessment is \$505.00. Again, I prefer Mr Johnson's assessment.

Render to perimeter of window and door frames \$150.00

59. This is the same problem as with Unit 1. Again, I prefer Mr Jeffery's opinion and will allow his figure of \$150.00.

Cracked stone panels to front facade

60. These are not stone but very large and very thin tiles which the Owner directed the Builder to attach to the front facade of the unit. There were a number of penetrations required to be made in these tiles to allow for drainage, a cable for the earth stake and other outlets. Cracks have appeared in some of the tiles, radiating out from these penetrations.

61. I accept Mr Jeffery's opinion that the penetrations created weak spots in the tiles and that, being installed on the northern facade of a brick wall this would result in cracking due to expansion and contraction with changes in temperature.

62. Mr Jeffery said that the tiles selected by the Owner were unsuitable for the application. Mr Solomou said that he advised the Owner against fitting these tiles but that, despite his warning, the Owner nevertheless directed

them to be fitted. Mr Johnson said that it will cost \$5,340.00 to replace the cracked tiles but it seems from the expert evidence that, if they are replaced, the same thing is likely to happen again.

63. To allow this item I would need to be satisfied that the cracks are due to defective workmanship by the Builder. Nothing about the Builder's workmanship in installing the tiles has been identified as a cause of the cracks. Since the presence of the cracks is explicable on the basis that the tiles were unsuitable for the application, I cannot infer from the mere presence of the cracks that they were necessarily due to defective workmanship.
64. Mr Jeffery provided an expert opinion as to the cause of the cracking which I accept. The tiles were chosen by the Owner and directed to be installed contrary to the Builder's advice, Consequently, this item is not established.

Water damage in the lounge

\$6,170.00

65. There is an upper floor balcony over the northern end of the lounge and water has penetrated into the lounge from the position of the balcony. Where exactly this water is coming from is unknown. A section of plaster has been removed from the ceiling in an effort to determine the precise source.
66. There is a strip drain running from side to side across this balcony to receive run-off and carry the water to a drain that takes it down to a pipe that exits at the front of the Unit. There is a grate in this drain that is set slightly proud of the surface level of the balcony.
67. Mr Johnson considered that the waterproof membrane of this balcony has failed and needs to be replaced. For that, and to repair the consequential damage, he assessed a cost of \$6,170.00.
68. Mr Jeffery said there were two areas where there have been water leaks from this balcony. The first was from the downpipe connected to the recessed gutter, which he said has been repaired, and the second is an unknown source. He assessed a cost of \$1,045.00 to repair and paint the ceiling in the lounge room.
69. Mr Phillipott said that since the balcony had not been flood tested as Mr Jeffery had suggested, no one could say where the leak was coming from. That is true in terms of a precise location but it nonetheless comes from the balcony.
70. On this item I prefer the evidence of Mr Johnson. It is quite clear that water is entering the unit from the balcony and, although the precise point or points of water penetration cannot be identified, the fact remains that the Builder has constructed a balcony over a lounge room and water is leaking through the balcony into the lounge room. That should not occur and would not have occurred if the balcony had been correctly constructed and properly waterproofed. In those circumstances it is reasonable to allow the Owner of the cost of re-waterproofing the balcony.

Damaged timber flooring

\$670.00

71. There is some moisture related movement to the timber floor in the living area near the bi-fold doors and some leakage appears to be occurring through the ceiling, although the precise cause of the leak has not been identified. Mr Johnson assessed a cost of \$1,100.00 to replace the damaged flooring and repaint the moisture affected ceiling. It appears that part of the problem is caused or contributed to by the fact that the external paving is at the same level as the internal floor.
72. Mr Jeffery said that the deterioration of the flooring near the bi-fold doors was not the fault of the Builder because the external paving was not done by the Builder. He also said that it would not be necessary to replace the damaged boards.
73. In this matter I prefer the evidence Mr Jeffery and will allow his figure of \$670.00.

Timber flooring in the kitchen

\$2,665.00

74. The filler used in the timber floor in the kitchen does not match the floorboards. Mr Johnson assessed a cost of \$2,665.00 in his report to remove the mis-matched filler and replace it with something that matches.
75. Mr Jeffery assessed a cost of \$1,340.00 for a lesser scope of works. He said that it would not be necessary to re-sand the whole floor.
76. The issue is appearance. Mr Jeffery acknowledged that if the repairs were localized as he suggested, it would be noticeable initially but would ultimately blend in with wear and tear.
77. The Owner did not pay for a patchy appearance and so I will allow Mr Johnson's figure.

The staircase

78. The plans required a hardwood staircase, "As per manufacturers details" and "to the value \$5,000.00". During the course of the works the Owner requested Mr Solomou to provide stair treads that were short of the wall on each side in order to create what is known as a "shadow line" effect. Mr Solomou said that he told the Owner at the time that, since the plaster on the walls that already been hung, the shadow line finish would be less than optimal. Despite this warning, the Owner nevertheless proceeded with the change.
79. When the stairs were installed, it was seen that because the wall on each side was not perfectly straight, the effect was not what the Owner wanted.
80. Mr Johnson assessed a cost of \$3,450.00 to disassemble the staircase, strip the timber and reassemble it with a more consistent shadow line. He said that this would involve cutting each tread to match the plasterwork. Mr Jeffery agreed that the gaps between the ends of the treads and the walls varied but said that filling the gaps with black flexible sealant was the

appropriate remedy. This was discussed extensively on Site. It was not suggested that the straightness of the wall on either side of the staircase did not comply with the Guide to Standards and Tolerances.

81. The problem is that, whereas each stair tread is a perfect rectangle, the wall on each side, although within tolerance, was not perfectly straight. I cannot see how specially shaping each tread of the staircase could be said to have been within the Builder's scope of works. Since the variation was requested after the walls been built, the end result is a consequence of the Builder doing what the Owner requested. I find no defect.

Living room window

82. The Owner demonstrated during the Site visit that when one closes the back door leading out to the yard from the kitchen and living area, there is a rattle in the rear window. Neither expert could suggest an explanation for that and no defective workmanship in the wall, the window or anything else has been demonstrated. This item is not established. The perceived problem may well be due to design or the Owner's choice of materials.

Cracked glass block in powder room window

83. There is a glass block in the powder room window that has a crack in it. Mr Johnson assessed a cost of \$230.00 to replace it. Mr Jeffery agreed that the crack was there and it was pointed out to me on Site.
84. Since there is no evidence that this crack was present at the time of handover and some years had passed before Mr Johnson inspected the unit, I cannot be satisfied on the balance of probabilities that this is a building defect.

Cracked basin in the powder room

\$357.50

85. It is acknowledged that there are a number of fine cracks in the vanity basin in the powder room. The question was simply whether they were there from the time of construction. Mr Johnson assessed a cost of \$420.00 in his report to replace the basin. Mr Jeffery assessed the cost of \$295.00, if the Builder should be found to be at fault.
86. On the appearance of the cracks it seems to me likely that Mr Johnson is right and that this is a defect in the basin that was supplied. As to the amount to be allowed, Mr Johnson allowed \$250.00 to replace the basin and Mr Jeffery allowed \$125.00. One is as likely to be right as the other. I will allow \$357.50.

Defective paintwork

\$450.00

87. It was acknowledged that the paintwork on the laundry was defective in some areas. Mr Johnson assessed the rectification cost at \$600.00 in his report. Mr Jeffery assessed a figure of \$450.00. What was pointed out to me on Site seemed to be fairly minimal so I will allow Mr Jeffery's figure.

Electrical points not installed

88. Mr Johnson said that some of electrical outlets were not installed and that the power point for the air-conditioner was less than the required rating causing a short circuit. He said that the missing items were on the electrical plan. He assessed a rectification figure of \$1,100.00 in his report.
89. Mr Jeffery agreed that a number of items shown on the electrical plan were not installed but said that, on his instructions, the Owner had changed the electrical plan for all three units in consultation with the electrician He said that he had reconciled all of the electrical work which resulted in a variation in favour of the Builder. This is dealt with in the Builder's claim for variations. I am not satisfied as to this item.

Suspected failed waterproofing to guest ensuite \$320.00

90. Mr Johnson said that moisture damage had occurred around the doorway to the guest/study ensuite shower base on the first floor. The precise cause is uncertain. Mr Johnson suggested water testing the shower base and he assessed a cost of \$320.00 to rectify the defect, being two hours for a plumber and two hours for a painter. Mr Jeffery allowed \$235.00 to pressure test the pipes.
91. On this item I prefer Mr Johnson's opinion and will allow his figure of \$320.00.

Moisture damage to the vanity cupboards \$280.00

92. Mr Johnson said that there is moisture damage to the vanity cupboard caused by the failure of the Builder to seal the stone top to the carcass of the cabinet which has allowed water to penetrate the cut ends of the cabinet. He assessed a cost of \$280.00 for a cabinet maker to replace the damaged panels.
93. Mr Jeffery said that the swelling was only minor and that the gap should simply be sealed without replacing the panels. His costing for that was \$55.00.
94. I prefer Mr Johnson's opinion and will allow his costing of \$280.00.

Unit 3

95. The following items are agreed, both as to defect and amount:
- | | | |
|-----|---|-------------|
| (a) | Inadequate fixing to cappings | \$ 170.00 |
| (b) | Inadequate fall on parapet capping | \$ 275.00 |
| (c) | Flashing not secured | \$ 95.00 |
| (d) | Inadequate fasteners to pressure flashing | \$...180.00 |
| (e) | Brickwork repair incomplete | \$ 90.00 |
| (f) | Control joints missing in polystyrene foam cladding | \$..920.00 |

(g)	No caulked joints between dissimilar materials	\$1,035.00
(h)	Substandard patching of render	\$ 295.00
(i)	Defects in garage south side door	\$ 180.00
(j)	Rusting window lintels	\$ 85.00
(k)	Damage to timber flooring	\$1,230.00
(l)	Vanity in master bedroom en suite	\$ 33.00
(m)	Top and bottom edges of doors not sealed	\$ 365.00
(n)	Electrical points not installed	<u>\$ 400.00</u>
	Total agreed items	<u>\$5,353.00</u>

96. The following items are in dispute. Again, the figures given are base costs.

Roof and gutters not cleaned \$200.00

97. This is similar to the other two units and for the same reasons I will allow Mr Jeffery's assessment of \$200.00 for the cleaning.

Spreaders not installed correctly \$635.00

98. This is the same problem as with the previous unit and for the same reasons I will allow Mr Johnson's figure of \$635.00.

Reduced outlets from box gutters \$730.00

99. This is similar to the other two units and for the same reasons I will allow Mr Johnson's assessment \$730.00.

No damp proof course supplied

100. I am satisfied that there was a damp proof course. This item is not established.

Render at the perimeter of windows and door frames \$150.00

101. The same comments apply to this unit. I will allow Mr Jeffery's assessment of \$150.00.

Porch roof

102. The Owner claims that a roof should have been constructed on the side of the building over the door. No such roof is shown on the roof plan or on the sectional drawings but it is said to be shown on the east elevation in Sheet 14 of the working drawings.

103. Mr Johnson said that he was uncertain whether the two unbroken lines on that elevation represented a roof. Mr Jeffery said that they did not and, having looked at the drawing, I accept Mr Jeffery's opinion. This item is not established.

Roof over retreat incorrectly constructed \$500.00

104. The roof over the first floor retreat of the building has not been constructed as shown in the approved drawings in that there is no setback to the infill above the rendered east wall from the lines of the north and south wall.
105. Mr Johnson initially allowed a prime cost figure of \$6,000.00 to reconstruct the wall to accord with the drawings because, since the truss design was not available, a precise scope of works could not be determined. In the absence of the truss design, neither expert knows how to reconstruct the roof in order to create the setback.
106. Mr Jeffery said that the Builder was required to follow the structural engineering drawings in constructing the roof. I accept that is the case but the engineering drawings do not explain why the roof was built in this way. However they do show a girder truss sitting on the internal corner to support the trusses and the slope of the roof is only 22.5 degrees. That might afford some explanation.
107. Mr Philpott submitted that the allowance of \$6,000.00 was simply a guess and that that was not a satisfactory approach to adopt. That is true but the Builder has not constructed what is shown in the drawings.
108. In the course of discussion it appeared that the most practical solution would be to build out the rebate on the other side to create a symmetrical effect. There is no costing of that but, since all that is required is a small false wall addition in lightweight material it is unlikely to cost a great deal. In the absence of any other evidence I will allow \$500.00.

Faults in the kitchen cabinets

\$1,020.00

109. It was acknowledged that there were some substantial faults in the kitchen cabinets, many of which seem to be matter of adjustment and fitting clips although some components need to be replaced.
110. Mr Johnson assessed the cost of rectification in his report at \$1,190.00. Mr Jeffery agreed that these faults were present but pointed out that, by the time of Mr Johnson's inspection, three years and nine months had passed since the certificate of occupancy was issued. He assessed the cost of \$1,020.00 to install the missing components. On this item I prefer Mr Jeffery's evidence.

Filler in the kitchen floor

\$2,465.00

111. This is the same problem as in the previous unit. Mr Johnson assessed the cost in his report of \$2,465.00.
112. Mr Jeffery agreed that there had been some colour mismatch in the filler which has been used in some places but he disagreed that the entire timber flooring area would need to be re-sanded and polished and he assessed the rectification cost at \$1,190.00.
113. The difference between the two assessments appears to be the extent of sanding and polishing required and, as with Unit 2, I prefer Mr Johnson's opinion.

The staircase

114. This is the same complaint as with the previous unit and, for the same reasons, I find no defect.

Water penetration into garage

115. Mr Johnson said there was water leakage into the garage throughout the base of the south wall during and after heavy rainfall. He assessed a cost in his report to rectify it of \$690.00.

116. Mr Jeffery found no evidence of any water ingress and none could be pointed out to me at the Site inspection. I find no defect proven.

Fencing

117. There is a timber framed fence on the eastern and northern boundaries of the property, which has been constructed of pine with rails spaced at approximately 700 mm centres. The slats fixed to these rails are machined treated pine and many of them are quite distorted. Mr Johnson says that this distortion should have been anticipated because of the material used. He has assessed a cost of \$10,040.00 to reconstruct the fence. Mr Jeffery has not assessed this item.

118. This fence is not shown in the plans. Mr Solomou's evidence was that, although he ordered the materials, the fence was not constructed by the Builder but by the Owner's own contractor. I prefer Mr Solomou's evidence and I am not satisfied as to this item.

Preliminaries and margin

119. In addition to the figures for the individual items, the Owner claims an additional 10% to take account of preliminaries.

120. Mr Johnson allowed 60 hours of supervision per unit and the hire of a chemical toilet for a four-week period per unit. Mr Jeffery said that it was likely that a small builder would undertake the work and he allowed a total of 40 hours supervision across the three units as well as the cost of a skip. His figure was \$4,000.00. Given the extent of the work I prefer Mr Jeffery's evidence.

121. There was no dispute as to the margin to be allowed to the rectifying Builder, which was agreed at 25%. The total to be allowed for defects is therefore \$58,984.07, calculated as follows:

Unit 1

Total agreed items	\$ 1,620.00
Roof and gutters not cleaned	\$ 200.00
Spreaders not installed correctly	\$ 635.00
Incorrect drainage from box gutters	\$ 730.00
No caulked joints at junctions between dissimilar	\$ 835.00

materials	
Render to the perimeter of window and door frames	\$ 150.00
Faults in timber flooring	\$ 5,715.00
Moisture penetration into entry porch ceiling of Unit 1	\$ 990.00
Moisture damage to meals area ceiling in Unit 1	\$ 1,250.00
<u>Unit 2</u>	
Total agreed items	\$ 2,317.00
Roof and gutters not cleaned	\$ 200.00
Spreaders not installed correctly	\$ 635.00
Incorrect drainage from the box gutters	\$ 780.00
No caulked joints at junctions between dissimilar materials	\$ 875.00
Render to perimeter of window and door frames	\$ 150.00
Water damage in the lounge	\$ 6,170.00
Damaged timber flooring	\$ 670.00
Timber flooring in the kitchen	\$ 2,665.00
Cracked basin in the powder room	\$ 357.50
Defective paintwork	\$ 450.00
Suspected failed waterproofing to guest ensuite	\$ 320.00
Moisture damage to the vanity cupboards	\$ 280.00
<u>Unit 3</u>	
Total agreed items	\$ 5,353.00
Roof and gutters not cleaned	\$ 200.00
Spreaders not installed correctly	\$ 635.00
Reduced outlets from box gutters	\$ 730.00
Roof over retreat incorrectly constructed	\$ 500.00
Faults in the kitchen cabinets	\$ 1,020.00
Filler in the kitchen floor	\$ 2,465.00
	\$38,897.50
Preliminaries	\$ 4,000.00
Total gross cost	\$42,897.50
Margin 25%	\$10,724.38
	\$53,621.88

Plus GST	<u>\$ 5,362.19</u>
Total defects claim	<u>\$58,984.07</u>

Relocation costs ...\$578.00

122. Relocation costs for the tenants of Unit 3 on 14 November 2011 were \$578.00. This was for accommodating the tenants of Unit 3 at the Quest Apartments in Cheltenham for the nights of 12 November 2011 and 13 November 2011. That was to allow the Builder to carry out rectification work and so that sum will be allowed.

The claim for delay

123. The Owner claims damages for delay as follows:

(a) loss of rent for Units 1 and 2 for 193 days at \$235.36 per day	\$45,488.78
(b) one half of the cost of preparing a license for Unit 1:	\$ 96.25
(c) rent paid by the Owner for his old house from 13/7/11 to 8/9/11 at \$550 per week	\$ 4,478.57

Time

124. Clause 8.1 provides that the Builder will commence construction of the works on the date (if any) specified in Item 9.1 of the appendix. Item 9.1 of the appendix has the date “21/06/10” written after the words “Anticipated Commencement Date”.

125. Clause 8.2 provides that, within one working day after having commenced to construct the works, the Builder must give written notice to the Owner stating:

- (a) the Builder has commenced construction of the works under the Contract; and
- (b) the date on which construction of the works commenced (the actual construction date); and
- (c) the construction period (as set out in Item 9.2 K of the appendix) started to run on that actual commencement date; and
- (d) the completion date, having regard to the actual commencement date and the construction period.’

126. Clause 8.4 of the Contract provided as follows:

“The Builder agrees to reach completion on the completion date which is calculated with reference to the actual commencement date and to the construction period (and which is also advised in the notice under Clause 8.2).”

127. There is some tension between these clauses because, although it would appear at first sight that the Builder was contractually obliged to commence work on the date in Item 9.1 of the appendix, that date is specified in that item as an anticipated commencement date and, by Clause 8.2, the construction period runs from the actual commencement date.

128. On 28 July 2010, Mr Solomou sent a letter to the Owner confirming that the deposit had been paid in full on 26 July 2010, that 3 to 4 weeks would be required to schedule works with suppliers and trades and that the commencement date of the Contract would be on 23 August 2010. Notwithstanding this letter, the actual commencement date was 28 July 2010 because that is when the Builder's Contractors set out the works. Since the construction period provided in the Contract was 244 days, the completion date was 24 March 2011.
129. No extensions of time were applied for under the terms of the Contract. However the Builder placed the blame for the delay on the Owner on a number of grounds.

The prevention principle

130. Mr Phillpott referred me to the following paragraphs from my decision in *TCM Building Group Pty Ltd v. Mercuri* [2015] VCAT 983 (at paras 541-2):

“541. In general, an owner cannot recover liquidated damages for delay in the completion of works by a builder where that delay has been caused by an act or omission of the owner in breach of the contract. This prevention principle does not apply where the building contract, as here, contains a provision giving to the builder a right to an extension of time for delays caused by the owner's breach of contract but the person having power to extend time must exercise it honestly and fairly and the owner will be in breach of contract if he does not do so, even though the builder has no absolute entitlement to an extension of time (see *Built Environs Pty Ltd V Tali Engineering Pty Ltd & Ors* [2013] SASC 84 and the cases there cited).

542. Where work by a builder is dependent upon an owner supplying an instruction, design, material, earlier work or anything else which is required to be done or supplied in order for the work to be performed, the builder cannot be blamed for delay in doing his work insofar as that delay is caused by the failure of the owner to supply what was needed in order for him to do it. In such a case the owner himself is the cause of the delay and it would be most unfair not to extend time for Practical Completion in such circumstances.”

131. Mr Phillpott said that the issue of an occupancy permit was delayed because the plans that the owner provided to the Builder required the construction of the Unit 1 carport over an easement.

The carport over the easement

132. At the time the Contract was signed, the planning permit for the development had already been obtained by the Owner. The building permit was also to be obtained by the Owner.

133. Amongst the permit documents was a “build-over” permit which had been granted by South East Water to allow construction of the carport of Unit 1 over an easement on the western boundary of the Site.
134. The Owner said that the permit to build over the easement was obtained by the architect. No copy of the permit was produced and the architect was not called to give evidence.
135. Clause 11.12 of the Contract provides:
- “Whenever the Owner supplies plans and/or specifications to the Builder, the Owner:
- warrants that the plans and/or specifications supplied are accurate and correct and good and suitable for the purpose for which they are to be used; and
 - acknowledges that it is reasonable for the Builder to rely on the plans and/or specifications supplied and that the Builder intends to rely upon any plans and/or specifications supplied for the purpose of carrying out the works;”
136. On 31 January 2011, South East Water sent a letter to the Owner stating that the carport of Unit 1 was not in accordance with the requirements specified in the build-over permit that had been granted to the Owner. The letter states that the working drawings did not accord with the drawings provided to South East Water for the initial approval and did not comply with South East Water guidelines. It described the construction of the carport as “an illegal build-over” and said that an encumbrance to that effect had been placed on the title of the property. The letter offered the Owner only two options; they were:
- (a) to permanently remove the structure so that it was 600 mm clear from the edge of the sewer main in accordance with build-over requirements; or
 - (b) to amend the structure to be an independent and removable lightweight carport.

At the date of the hearing, neither of these options had been implemented.

137. The Owner said that, following receipt of this letter, in about June or July 2011, he applied to this tribunal to have the planning permit amended to, amongst other things, reduce the double carport of Unit 1 to a single carport so that the supporting wall would no longer be on the easement. Notwithstanding this amendment, the carport to Unit 1 has not been altered and it is still a double carport, the wall of which is supported on the easement.
138. Mr Solomou said in his witness statement that, between February and June 2011, he had numerous discussions with the Owner and the building surveyor concerning what should be done about this carport issue and that, during those discussions, the building surveyor made it clear that he would not issue an occupancy permit until the issue with South East Water had

been resolved. Mr Solomou said that, in June 2011 he told the Owner that the works were complete and that the carport was the only issue preventing the issue of an occupancy permit.

139. On 10 August 2011 the building surveyor sent a Building Notice to the Owner stating that he had inspected the building and land on 3 August 2011 and that, contrary to the building permit, the building works were not in accordance with the approved documentation in that the Unit 1 carport was not constructed to be dismantlable and the on-site conditions were not consistent with the approved documents. The notice called upon the Owner to show cause within 90 days of the date of service of the notice why he should not make the Unit 1 carport consistent with council requirements to be made dismantlable and make the on-site conditions consistent with the approved drawings.
140. On 11 August 2011 the building surveyor sent an email to the Owner and to the Builder stating that the building notice served upon the Owner would be cancelled once the requirements set out in that email had been satisfied. Those requirements included the following:
 - “7. Unit 1 carport to be made consistent with council requirements so as to be made dismantlable. If current works are to remain, this must be to the satisfaction of the Council.
 8. Provide amended town planning drawings to reflect alterations made on site to ensure consistency.”
141. He stated in the email that he understood that an application had been made to this tribunal for approval in relation to the construction of the carport at Unit 1 as well as other changes. He said that, should the application be successful, a revised set of drawings reflecting the approved changes will need to be submitted for assessment so that the variation to the building permit could be issued.
142. Notwithstanding non-compliance with the notice, on 8 September 2011, the building surveyor issued an occupancy permit. There was no explanation of how or why that occurred, although it was suggested to the Owner in cross-examination that the occupancy permit was conditional and he appeared to agree that it was. It may be that the building surveyor was content to issue an occupancy permit pending the determination of the foreshadowed application to the Tribunal. Whatever the reason was, the occupancy permit was issued.
143. It is apparent from these emails that, at least until 11 August 2011, the building surveyor was not prepared to issue an occupancy permit while the issue of the carport was unresolved. Sometime between then and 8 September he appears to have changed his mind.
144. Although it appears that the problem with the carport arose from the plans that the Owner supplied, and although this delayed the issue of the

occupancy permit, it does not appear to have prevented or delayed the Builder in completing the work. It had already constructed the carport.

The cabinetry delay

145. It seems to be common ground between the parties that the biggest delay in the construction was due to the cabinetmakers that the Owner requested the Builder to engage, AAW Cabinets.
146. The Owner acknowledged in cross-examination that he obtained a quotation from these cabinetmakers and told them what he wanted. The cabinetmakers sent an email to the Owner on 17 February 2011, quoting a price of \$64,000.00 inclusive of GST. The copy of the email in the Tribunal book purports to be signed by the director of the cabinetmakers with the date 3 March 2011 next to the signature. The email is not expressed to have been copied to the Builder. The Owner said that he sent it to the Builder.
147. Since the Builder's cabinetmaker, Clayton Kitchens, had already designed the cabinetry and given a quote some months earlier, it is reasonable to suppose, as Mr Phillipott suggested, that the cabinets might have been installed earlier if the Owner had not requested AAW Cabinets to be engaged.
148. Apart from the much later date upon which they were engaged, Mr Solomou complained that the cabinetmakers caused significant delay to the project in carrying out their work. He said under cross-examination that their attendance on Site was erratic, they would come when they were not supposed to come and they would not come when they said they would. He also said that they installed cabinetry in an unorthodox way.
149. Even accepting those complaints, the cabinetmakers were nonetheless the subcontractors of the Builder and so the Builder was responsible for any delays they caused. It would have been open to the Builder to refuse to engage AAW Cabinets because they were not nominated subcontractors.

Damages for delay

150. The provision in the Contract relating to damages for delay is Clause 18.1, which provides as follows:

“Owner’s entitlement to liquidated damages

If the Builder fails to bring the works to completion by the completion date, the Builder will pay or allow to the Owner by way of the estimated and liquidated damages, a sum calculated at the rate stated in Item 17 of the appendix for the period from the completion date until the works reach completion or until the Owner takes possession, whichever is earlier.”

Item 17 of the appendix provides for an amount of \$1,200.00 per week.

151. Notwithstanding this provision, the Owner seeks to recover damages with respect to the losses that he claims to have actually suffered, which are

greater than what he would receive if liquidated damages were allowed at the Contract rate.

152. Given the problem with the carport and the refusal of the building surveyor to issue an occupancy permit until that was addressed, it does not appear that a failure by the Builder to complete the work in the meantime could have caused the Owner any actual loss because he could not have occupied the units until the permit was issued. The same difficulty does not arise if liquidated damages are claimed because, by the terms of the Contract, the entitlement to liquidated damages arises upon the failure of the Builder to complete on time and it is no answer for the Builder to say that, in fact, no loss was suffered.

153. Mr Phillpott submitted that the Owner was bound by the by the Contract to seek liquidated damages only. He referred me to the following passage in the judgement of Burns J in the case of *Adapt Constructions Pty Ltd v. Whittaker and anor* [2015] ACTSC 188 (at para 79):

“79. The principles which I distil from these cases are:

- (a) the requirement in each case is to ascertain the intention of the parties to the agreement concerning damages for delay;
- (b) in ascertaining that intention, consideration may be given not only to the language of the agreement, but also to the surrounding circumstances known to the parties and the apparent purpose and object of the transaction. *Temloc* was a case where evidence was received of surrounding circumstances, being evidence of a course of dealings between the parties to the agreement which confirmed that the intention of the parties was that damages for late completion would not be available;
- (c) the vesting of a discretion in the proprietor to exercise a contractual right to claim liquidated damages may indicate that the parties did not intend the contractual right to liquidated damages to be the exclusive remedy for delay; conversely, a mandatory clause, in the sense of compelling the builder to pay regardless of any demand for payment by the principal, may indicate that the clause is intended to provide an exclusive remedy; and
- (d) in construing a contract which, on its face, provides for no liquidated damages for breach, an intention to exclude a right to common law damages must be expressed in clear and unambiguous terms.”

154. In that case the learned judge was considering the effects of a liquidated damages clause where no figure at all had been inserted for liquidated damages in the printed clause in the form of contract that was used. He considered a number of authorities where either nothing at all, or the word

“nil” had been inserted. In the present case a substantial sum has been inserted by the parties.

155. A liquidated damages clause such as this is intended to be a genuine pre-estimate by the parties of the loss that will be suffered by the Owner if the Builder should fail to complete on time. It saves not only the Owner, but also the Builder, the difficulty, trouble and expense of proving or disproving the loss the Owner has actually suffered. In this way, such a clause benefits both parties.
156. If nothing at all had been inserted in the clause for liquidated damages then a right to exclude common law damages would need to be expressed in clear and unambiguous terms. However where, as in this case, a substantial sum has been inserted, that indicates that the parties turned their minds to the consequence of a failure to complete on time and agreed on what those consequences would be. In those circumstances, and in the absence of any contrary indication, the intention of the parties must be that the clause is intended to provide an exclusive remedy.
157. In the present case, there is nothing in the clause or the surrounding circumstances to indicate that the parties intended that it would be open to the Owner to elect whether to accept damages for late completion at the agreed rate or prove and recover a greater sum.
158. I therefore accept Mr Phillpott’s submission that the Owner is confined to the liquidated damages that were agreed upon in the Contract, which is \$1,200.00 per week.

When were the works brought to completion?

159. According to Mr Solomou, the works reached practical completion in June 2011, although he has not given a precise date. He said that he reached an agreement with the Owner in June 2011 that the Owner would pay \$88,000.00 and acknowledge the practical completion had been reached and that he would pay the final payment for \$22,000.00 once the building surveyor issued the occupancy permit. He said that in consideration of those payments, it was agreed that the Builder was not to claim for the variations. The Owner denied any such agreement and the payments were not made.
160. The Owner claimed that the Builder was still working on the three units in August 2011. Mr Solomou said that although he carried out some work in regard to the Owner’s complaints of defects at that time, the work required by the Contract was completed in June.
161. I am satisfied on Mr Solomou’s evidence that the work was completed in June 2011. In the absence of evidence of a specific date in June I can only find that it was completed on or before 30 June. In this regard, I note that the Builder issued its final invoice on 1 July 2011.
162. Since the work should have been brought to completion by 24 March 2011, the Owner’s entitlement to liquidated damages is for 98 days which, at the contract rate of \$1,200.00 per week, amounts to \$16,800.00.

The Builder's claim for the balance of the Contract price

163. The Builder seeks payment of the final claim due under the Contract, which is \$22,000.00. The Owner admits that this has not been paid but seeks to set off his own claim against it. He conceded in cross-examination that the amount is otherwise payable to the Builder.

The Builder's claim for variations

164. The Builder seeks \$68,032.00 for 22 variations that Mr Solomou said were requested by the Owner. In his Points of Defence to Counterclaim the Owner denied liability for variations, saying that no notice was given by the Builder under Clause 13 of the Contract and that he did not authorise any variations. He also relied upon s.37 of the Act.

165. In his witness statement, Mr Solomou stated in brief terms the circumstances of each of the claimed variations and said as to each that he was asked to proceed with it by the Owner, although he provided very little detail of these discussions. In his own witness statement, the Owner denied that there was anything said at all at the time about the subject of most of these variations.

166. Although Mr Little said that there was insignificant evidence to support the claims for variations, the fact that additional work and materials were supplied is proven by the invoices that have been produced and by the expert evidence of Mr Jeffery.

167. Mr Little suggested that, since the Owner had made it clear when the Contract was entered into that he only had \$1,100,000.00 to spend and no more, it would have been reasonable for the Owner to expect some communication at the time if there was extra to be charged.

168. The Owner had obtained a bank loan to finance the construction but the bank would only agree to pay the staged payments under the Contract, not for any variations. However, the Owner said in cross-examination that he told Mr Solomou during discussions that he would pay for any variations if there were any "in a formal way" and so it appears that he acknowledged the possibility of variations.

169. Where there was an additional expense to be incurred I think that it is unlikely that there would have been nothing said at all about it at the time. Since, in most instances, the only evidence that I have concerning what was said at the time is that of Mr Solomou I should accept that evidence unless it appears improbable.

170. Mr Little said that the Owner was not informed of the cost of the variations until March 2013. Mr Solomou said that it was agreed that the variations would be charged at the end of the job. The Owner denied that but I prefer Mr Solomou's evidence.

The Contractual provisions regarding variations

171. Variations are dealt with in the Contract in Clauses 12 and 13 which (where relevant) are as follows:

“12.1 Notice required when Owner requests a variation

If the Owner wishes to vary the plans or specifications then the Owner will give to the Builder a written notice describing the variation requested.

12.2 Builder not obliged to perform variation but may agree to do so

If the Builder reasonably believes that the variation requested in writing by the Owner:

- will not require an amendment to any permit; and
- will not cause any delay in reaching completion; and
- will not add any more than 2% to the original Contract price;

then

the Builder, although not obliged to, may at its discretion carry out the variation.

12.3 Builder to provide notice to Owner in certain circumstances

If the Builder reasonably believes that:

- an amendment to any permit will be necessary; or
- there will be delay in reaching completion; or
- the variation will add more than 2% to the original contract price;

then

- upon receipt of the written variation notice from the Owner, the Builder will give the Owner a written notice that either:

(a) states that the Builder refuses to or is unable to carry out the variation and the reason for that inability or refusal;

or

(b) states that the Builder will carry out the variation and if so, the Builder will in the notice:

- i. state the effect the variation will have on the works as a whole being carried out under the Contract;
- ii. state whether or not an amendment to any permit will be required;
- iii. give a reasonable estimate of any delay in reaching completion;
- iv. state the cost of the variation; and

v. state the effect of the cost on the Contract price

12.4 Builder not to commence variation until certain matters satisfied

The Builder will not commence any variation requested by the Owner unless either:

- the Owner has given to the Builder a signed written request for the variation and that written request is attached to the notice required by the Builder Clause 12.3;

or

- the Builder reasonably believes that the variation requested by the Owner:
 - i. will not require any amendment to any permit and
 - ii. will not cause any delay in reaching completion; and
 - iii. will not add more than 2% to the original Contract price.”

172. Clause 13.1 of the Contract is as follows:

“If the Builder wishes to vary the plans or specifications, then the Builder will give the Owner a written notice that

- describes the variation; and
- states why the Builder wishes to make variation; and
- states the effect the variation will have on the Works; and
- states whether or not an amendment to any permit will be required; and

- gives a reasonable estimate of any delay (if any) in reaching completion the variation is likely to cause; and
- states the cost of the variation; and
- states the effect of that cost on the Contract price.”

173. Clause 13.2 provides that the Builder will not give effect to any variation unless the Owner has given signed consent or in various other circumstances set out in the clause, including where the variation arose as a result of circumstances beyond the control of the Builder. That clause applies to variations requested by the Builder.

174. It will be seen that these clauses are similar in effect to sections 37 and 38 of the *Domestic Buildings Contracts Act 1995*.

175. The following variations are claimed. In each case, the variation claimed was said to have been requested by the Owner, the amount was less than 2% of the Contract price and no extension of time has been claimed by the Builder for carrying out the variation. Consequently, the Builder was entitled by Clause 12.4 to carry out the variation.

Variations 1, 4 and 5: Site cut and tree removal \$8,338.50

176. Clause 4 of the Project Specifications provided that the Site was to be cleared by the Owner and that if any work was to be done by the Builder it would be at cost with no margin. Grading and levelling of the Site was also to be by the Owner and anything above 40 m³ for the excavation for the slabs was to be paid by the Owner at cost with no margin. Removal of spoil from the Site was also to be by the Owner and any that was required to be done by the Builder would be charged at cost with no margin.
177. Mr Solomou said that, although it was agreed that the Owner would ensure that the Site would be clear of trees and debris before the Builder commenced work, that was not done and the Site was not sufficiently cleared to commence work. He said that, in about August 2010, he spoke to the Owner and explained that this would be a variation of the Contract and the Owner agreed.
178. The Owner said that, by the time the Contract was signed the Site was cleared except for two fruit trees.
179. The claim for the variation is \$8,338.50, calculated as follows:

Date	Details	Amount
11 August 2010	CN Papasavva & Sons - Site cut	\$4,220.00
4 August	Landtrak – Rubbish removal	\$ 396.00
6 August 2010	Geoff the tree man	\$1,100.00
9 August	Landtrak – Rubbish removal	\$ 132.00
10 August	Landtrak – Rubbish removal	\$ 484.00
	Dingley tip	\$ 349.50
	8 Hours labour @ \$35 per hour	\$ 280.00
	Machine hire for trees (1 day)	\$ 640.00
	Bin hire for trees	\$ 737.00
	Total	\$8,338.50

This is what the Builder has paid and it seeks to recover this amount from the Owner.

180. The Owner said that his obligation was only to ensure that the footprint for the buildings was free of trees and that he did so. He said that he told the Builder that two fruit trees in the south-western corner of the Site were to be left and the Builder agreed. He said that the Builder later removed the two fruit trees and in doing so, undermined the support for the southern boundary fence which then partially collapsed. He said that Mr Solomou admitted his fault in removing the trees and said that he would replace them and also the fence at his own cost.

181. As to the extent of the Site clear that was done by the Owner, photographs were tendered of the clearing done afterwards by the Builder that show a substantial quantity of excavated trees and shrubs and old pipes mixed with soil on the nature strip. There is also a picture of a full skip. That supports Mr Solomou's evidence that there was a substantial amount of material left for the Builder to remove. There are also the invoices the Builder has paid. I prefer the evidence of Mr Solomou that the additional work was both required and requested by the Owner and I accept that it was agreed that this would be a variation.
182. As for the two fruit trees, Mr Solomou said he could not recall any conversation about them but they are not shown on the landscape plan as trees to be retained. I think the Owner's evidence of the fence falling over because of the removal of two fruit trees is unlikely to be true. Mr Solomou's evidence was that there were extensive Site excavations on that boundary for a sewer pipe and they had to prop the fence and there were complaints from the next door neighbour. He said that the fence was in a deteriorated condition and had to be replaced. Mr Solomou said that he spoke to the Owner and it was agreed that the Builder would replace the boundary fence at a cost of \$100.00 per lineal meter.
183. I think that is more likely to be true than the Owner's account that the fence was in good condition and only fell down because two fruit trees were removed. I also think that it is most unlikely that Mr Solomou would have agreed to replace an old fence at the Builder's expense.

Variation 2: Upgrade to bricks

\$1,710.50.

184. After the Contract price had been agreed upon but before the Contract documents were signed, the Owner requested more expensive bricks to be provided. Rather than amend the price in the Contract, the specifications were written to require the Builder to provide Boral "Vic Blue" Bricks as a "variation", charging \$55 per thousand, including GST, to the Owner. The bricks were supplied and the amount claimed for this "variation" is \$1,967.08. The Owner said that it was agreed that the variation was to be "cost neutral" and that cheaper bricks were to be used behind the render. Mr Solomou said that the labour cost of the render over the bricks would outweigh any saving.
185. The specification which the Owner has signed provided for this extra charge and so I find that this variation is established although, since it is set out in the specification itself, it is an extra charge provided for in the Contract rather than a variation.
186. The amount claimed for this variation is \$1,967.08, but that includes a margin of 15% and no such margin is provided for in Clause 7.1 of the specifications. All that I can allow is the agreed amount in Clause 7.1, which reduces the claim to \$1,710.50.

Variation 3: The amended energy report

187. In May 2010, Mr Solomou suggested to the Owner that an amended energy report be obtained in order to make the construction of the units cheaper, bring the price to within \$1.1 million and still obtain a five star energy rating. The Owner agreed but denied that any extra cost was discussed. Mr Solomou said that it was agreed that the Owner would be responsible for the cost of obtaining this report. The Owner denied having agreed to pay for the report.
188. An amended report was obtained at a cost of \$140.50. This was not obtained until after the Contract was signed. Mr Solomou said that the purpose of the report was to save money on the construction. Since the Contract price was agreed, I cannot see how the Owner benefitted from the report. It seems to me that its purpose was to save the Builder money. I am not satisfied as to this claim.

Variation 6: Boundary fence and fences between the units \$8,376.34

189. Clause 27.1 of the project specifications provides that fencing was to be by the Owner. Clause 27.2 provides that a front fence was required and the Builder was to “Price up vertical slats just like Beaumaris”. It does not appear that that happened, although the Builder did supply materials for a front fence.
190. Mr Solomou said that due to the condition of the boundary fence and complaints from the neighbour, he approached the Owner who directed him to replace the boundary fence for a price of “approximately \$100.00 per lineal metre”, and the Owner agreed to that price. He said the Builder then replaced the fence.
191. The plans showed no fences to divide the yards of the three units. According to Mr Solomou, in about May 2011 he was approached by the Owner and asked to construct fences between the units using the same fencing contractor. Mr Solomou said that he told the Owner that it would cost the same amount as the boundary fence, namely \$100.00 per lineal metre. The Owner denied having requested the Builder to construct these dividing fences but they have been built and since the Contract documents show that these were not within the scope of works I think it is unlikely that the Builder would have constructed the fences if it had not been asked to do so.
192. Mr Solomou said that the Builder then engaged the fencing contractor and the dividing fences were constructed
193. Invoices have been produced for the amount claimed with respect to the fences that were constructed.
194. In addition, the Builder has invoiced the Owner the further amount of \$1,547.37 for materials supplied to the Owner to enable him to construct a front fence for property. No invoice was rendered for labour to erect the front fence. Mr Solomou said that this was because the Builder did not

construct it. The Owner's evidence was that the Builder did build the front fence. I prefer Mr Solomou's evidence. It is unlikely that the Builder would have built it and not charged for doing so.

195. The balance of the claim, being \$1,092.57 is the Builder's margin on all these figures. The total claim is \$8,376.34.

Variation 7: The second set out \$230.00

196. This is a claim for \$230.00, being the cost of a second set out because the first set out was disturbed when trees were removed.
197. Mr Solomou said that these trees ought to have been removed by the Owner and if he had done so then the original setup would not have been disturbed and the second set out would not have been necessary. He said that he told the Owner that this would be a variation and the Owner agreed to it. I accept his evidence and the amount claimed, which includes the Builder's 15% margin, will be allowed.

Variation 8: Concreting \$18,190.70

198. The project specifications provided for the Builder to concrete the floor slabs, the concrete footings and also the landscaped areas of the Site, such as driveways and paths.
199. Mr Solomou said that, in about May 2011, the Owner asked him to replace the concrete footpath outside the property boundary. He said that he told the Owner at the time that the work would cost roughly \$80.00 per square metre and roughly \$2,500.00 per crossover. He said that the Owner agreed to this estimate and that the Builder then proceeded with the works. The Owner denied that there was any discussion or that he agreed to pay more.
200. The Builder has produced an invoice from its concreter for \$27,967.50 which includes the concrete driveways and pathways.
201. Mr Jeffery has calculated that the portion of this invoice that is referable to the crossovers and the external concrete footpath is \$18,190.70, calculated as follows:

Three crossings at \$2,500.00 plus GST	\$ 8,250.00
Council footpath - 86 m ² at \$80 per square metre plus GST	\$ 7,568.00
15% margin	<u>\$ 2,372.70</u>
Total	<u>\$18,190.70</u>

202. I accept that this extra work was requested and the amount claimed will be allowed.

Variation 9: Alteration to bathroom layout \$2,678.35

203. Mr Solomou said that, in about December 2010, after the framing and plumbing works had been completed in the bathrooms, the Owner asked him to change the layout so as to move the toilet to a different location. He

said that he told the Owner at the time that the Builder would charge for the additional work plus a margin of 15% and the Owner agreed.

204. The Owner acknowledged that he changed his mind about the layout of the bathroom in Unit 3 but denied that there was any discussion. However he acknowledged that this was a variation and I am satisfied that these changes were requested by the Owner.
205. The amount charged by the Builder for this variation is \$2,678.35, which has been calculated by Mr Jeffery as follows:

Carpenter 3 hours at \$65 per hour plus GST - two bathrooms	\$ 429.00
Materials \$250 plus GST - two bathrooms	\$ 550.00
Plumbing to altered layout (Plumber's invoice 706)	\$1,350.00
15% margin	<u>\$ 349.35</u>
Total	<u>\$2,678.35</u>

Variation 10: Increased kitchen cost \$12,286.72

206. As stated above, the Builder had wanted to engage its own sub-contractor, Clayton Kitchens, to supply the joinery for a price of \$53,315.90 and he gave a copy of this quotation to the Owner. Mr Solomou said that it was on the basis of the Clayton Kitchens quotation that the Contract price was calculated. The Specifications refer to the drawings and plans prepared by Clayton Kitchens. The Owner requested the Builder to use another cabinetmaker, AAW Cabinets, at the higher price of \$64,000.00.
207. Mr Solomou said that he told the Owner that if he wanted to engage AAW, the difference in price would be paid by the Owner as a variation. He said that the Owner agreed to that. He said that it was the Owner who dealt with AAW and ordered what he wanted.
208. The Owner said that he repeatedly told Mr Solomou that his limit was \$1.1 million and denied that he was given a copy of the quotation from Clayton Kitchens. I think the evidence of Mr Solomou that the Owner was given a copy of the quotation is more likely to be true because the cabinetry to be supplied was described in detail in that quotation and, without it, AAW would not have known what to quote on.
209. The Owner also knew how much money AAW were going to charge for the cabinets that he ordered because the quotation was sent to him. It is not credible that he believed that the Builder would pay for whatever he ordered, notwithstanding the contractual allowance.
210. Mr Little said that the cabinet maker also did other work for the Builder, including building shelves in some wardrobes but the evidence about that was vague. Mr Solomou said that it might have done so but he could not recall. He did not acknowledge that the invoices relied upon included any extra work. I am satisfied as to this variation.

211. The amount claimed for the additional cabinetry cost is \$12,286.72, calculated as follows:

Amount charged by AAW	\$64,000.00
less quotation from Claytons kitchens	<u>\$53,315.90</u>
additional cost	\$10,684.10
15% margin	\$1,602.62
	<u>\$12,286.72</u>

Variation 11: Towel rails/toilet roll holders \$1,656.00

212. The Contract required the Owner to provide towel rails and toilet roll holders. At the request of the Owner, these were supplied by the Builder. This variation is not disputed.

Variation 12: Air-conditioning \$8,797.50

213. Clause 13.12 of the specifications provided that there was an allowance of \$10,000.00 for each of the three units for heating and cooling.

214. The Owner obtained a quotation from a company called Conway Heating and Air Conditioning (“Conway”) to supply and install heating and cooling for the three units for a price of \$12,550.00 per unit plus GST, making a total price of \$37,650.00. Mr Solomou said that the Owner gave him the quotation, said that he wanted to use Conway and asked Mr Solomou to try negotiate the price down.

215. The Owner said that Mr Solomou had told him that the air-conditioning specified would not work because there was inadequate roof space and that he had obtained the quote from Conway in order to show that it was possible. He said that he told Mr Solomou that the Builder could source air conditioning from whoever it wanted so long as it was refrigerated cooling and ducted heating.

216. I am satisfied that the Builder was requested to use Conway and that the Contract price exceeded the allowance in the specification. The Builder is entitled to a variation for the additional cost. The amount due is \$8,797.50 which is calculated as follows:

Amount paid to Conway	\$37,650.00
<u>less</u> Contract allowance	<u>\$30,000.00</u>
	\$ 7,650.00
add margin 15%	<u>\$ 1,147.50</u>
	<u>\$ 8,797.50</u>

Variation 13: Plaster on battens

\$6,802.54

217. Clause 16.5 of the Project specifications provided for the ceiling plasterboard be fixed to the joists. Mr Solomou said that, in about January 2011 the Owner asked him to fix the ceiling plasterboard to metal battens. The Owner denied that he made any such request. I think that it is unlikely that the Builder would have carried out this additional work and incurred the resulting cost unless it was requested to do so and so I prefer the evidence of Mr Solomou.
218. The amount claimed for this variation is \$6,802.54. The Builder has produced invoices from its plastering sub-contractor, Caprice Plaster Pty Ltd. Mr Jeffery set out in his report the items in these invoices that relate to the extra amount charged. The amount claimed of \$6,802.54 is the total that he calculated, which includes a 15% Builder's margin.

Variation 14: Additional tiling

\$2,884.25

219. Clause 21 of the specifications set out the number of square metres of tiling that had been allowed for in the Contract price. According to Mr Jeffery's report, the allowance was \$6,457.00.
220. Mr Solomou said that the Owner requested additional tiling and so additional tiles were purchased which exceeded the allowance. Mr Jeffery has calculated the additional tiling, with a 15% margin, at \$2,884.25. The extra tiling comprised tiling of the powder room in Unit 3 from floor-to-ceiling and large, very thin tiles to the front facade of Unit 2.
221. The Owner denied having requested any additional tiling. He denied that there was a powder room in Unit 3, even though that is shown on the plans and even though, at the on-site inspection, I could see that the room had been tiled from floor-to-ceiling. It appears that he considered that it should not be called a powder room because there is a shower in it. He did not deny having requested the large tiles to be affixed to the front facade of Unit 2.
222. Mr Little pointed out that Mr Solomou agreed that he had not told the Owner how much extra it would cost because he said he had never worked with tiles like that before and did not know how time consuming it would be to put them up.
223. I am satisfied that this extra tiling was requested by the Owner and that he knew that it would be extra, although Mr Solomou was not able to tell him at the time that it was requested how much the extra cost would be. The variation and the amount claimed of \$2,884.25 will be allowed.

Variation 15: Additional tiling labour

\$2,909.50

224. Mr Jeffery said that the labour cost for the tiler to fix the additional tiles amounted to \$2,909.50, which includes a 15% percent margin. In the absence of any other evidence that amount will be allowed on the same basis as the previous item.

Variation 17: The staircases

\$2,234.45

225. Clause 19.2 of the specifications provided an allowance of \$5,000.00 for each staircase, making a total allowance of \$15,000.00. The Owner ordered shadow line stairs from the Builder's supplier at a cost of \$16,943.00. The claim with respect to this variation is the difference plus a 15% margin of \$291.45, making a total claim of \$2,234.45.
226. The Owner said that he told Mr Solomou before entering into the Contract that he wanted shadow line stairs. There is nothing about that in the Contract documents. There was simply an allowance of \$5,000 for each staircase. The Owner acknowledged attending the stair manufacturer and selecting the staircases that were supplied but he denied that he ever agreed to pay more.
227. There is a letter that has been included in the Tribunal Book purporting to be from the stair supplier to the effect that the Owner was warned by the supplier that, given that the plaster walls were already up, the effect of a shadow line would be less than optimal. The author of the letter was not called and Mr Little said that I should give the letter no weight.
228. Whatever might have been said about the shadow line effect, I think that it is unlikely that there would not have been a discussion to the effect that the stairs that had been selected by the Owner exceeded what was allowed for in the Contract documents. The stairs selected by the Owner exceeded the Contract allowance and the Builder is entitled to the extra cost plus its margin.

Variation 18: Extra electrical work

\$1,062.60

229. Mr Solomou said that, in about January 2011 the Owner did a walk-through with the Builder's electrician and asked him to vary the quantities and positions of light fixtures and power points from the specifications that the Owner had supplied. The electrician carried out the work and charged the Builder an extra \$924.00. This sum, plus the 15% margin of \$138.60 amounts to \$1,062.60, which is the amount claimed.
230. The Owner denied that he requested anything extra and said that the lights and the electrical work were determined by the electrical layout plan and not by him. During the evidence it was acknowledged that different lights were provided in the stairwell and I saw these during the on-site inspection. Further, Mr Jeffery's evidence is that the amount claimed is for work not shown on the drawings. I prefer Mr Solomou's evidence and the amount claimed will be allowed.

Variation 19: Framing out ducts

\$1,190.03

231. Mr Solomou said that, in late 2011 the heating and air conditioning sub-contractor, Conway, informed him that additional framing work was needed in order to create voids and ducts that were not shown on the plans supplied by the Owner. He said that he spoke to the Owner who advised him to proceed with the work.

232. The claim is for three hours labour for a carpenter at \$65 per hour plus GST plus \$300.00 plus GST for materials. With a 15% margin of \$146.03 the total claim is \$1,190.03.

233. The Owner denies that there was any such discussion but I think that it is unlikely that nothing was said. I prefer Mr Solomou's evidence and the amount claimed will be allowed.

Variation 20: Engineering \$632.50

234. Mr Solomou said that there were problems with the engineering that required an additional report which he was instructed to obtain from the engineer. He said that the Builder did that and incurred a cost of \$550.00. With a margin of 15% that became \$632.50.

235. This variation appears to be acknowledged.

Variation 21: Letterboxes \$1,062.60

236. Clause 7.9 of the specifications allowed \$100.00 each for three letterboxes. The Owner selected letterboxes from Bunnings and asked Mr Solomou to purchase them.

237. Mr Solomou said that he told the Owner that the selected items exceeded the Contractual allowance and he was nonetheless asked to proceed. The additional charge is for an extra \$60 plus a 15% margin, making a claim of \$184.00.

238. The Owner denied that was any such discussion but the variation now appears to be acknowledged. I accept Mr Solomou's evidence. The amount claimed will be allowed.

Variation 22 - Credits due to the Owner (\$13,400.00)

239. The Builder acknowledges the following credits, totalling \$13,400.00, to the Owner:

(a)	delete appliances of \$3500 per unit	\$10,500.00
(b)	balcony chrome rail to Unit 1	\$ 500.00
(c)	shower screen reduction to bathrooms to Units 1 and 2	\$ 1,200.00
(d)	three storage sheds of \$400 each	<u>\$ 1,200.00</u>
		<u>\$13,400.00</u>

That credit will be allowed.

Conclusion as to variations

240. The total to be allowed to the Builder for variations is therefore \$67,643.08, calculated as follows:

Variations 1, 4 and 5: Site cut and tree removal	\$ 8,338.50
Variation 2: Upgrade to bricks	\$ 1,710.50
Variation 6: Boundary fences between the units	\$ 8,376.34
Variation 7: The second set out	\$ 230.00

Variation 8: Concreting	\$18,190.70
Variation 9: Alteration to bathroom layout	\$ 2,678.35
Variation 10: Increased kitchen cost	\$12,286.72
Variation 11: Towel rails/toilet roll holders	\$ 1,656.00
Variation 12: Air-conditioning	\$ 8,797.50
Variation 13: Plaster on battens	\$ 6,802.54
Variation 14: Additional tiling	\$ 2,884.25
Variation 15: Additional tiling labour	\$ 2,909.50
Variation 17: The staircases	\$ 2,234.45
Variation 18: Extra electrical work	\$ 1,062.60
Variation 19: Framing out ducts	\$ 1,190.03
Variation 20: Engineering	\$ 632.50
Variation 21: Letterboxes	<u>\$ 1,062.60</u>
Total	\$81,043.08
Less: Variation 22 - Credits due to the Owner	<u>\$13,400.00</u>
Amount to be allowed:	<u>\$67,643.08</u>

Conclusion

241. The Owner's claim is established in the sum of \$76,362.07, being \$58,984.07 for rectification of defects, \$578.00 for relocation costs and \$16,800.00 liquidated damages for late completion.
242. The Builder's claim is established in the sum of \$89,643.08, being the balance of the contract price of \$22,000.00 plus \$67,643.08 for variations.
243. The two amounts will be set-off and there will be an order on the counterclaim that the Applicant pay to the Respondent the sum of \$13,281.01.
244. Costs and the claim for interest will be reserved.

SENIOR MEMBER R. WALKER