

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO.BP1085/2015

CATCHWORDS

DOMESTIC BUILDING DISPUTE – Whether cash payments were made – onus of proof – sufficiency of evidence. Whether variation claim fails for lack of consideration.

APPLICANT	Green Design Homes Pty Ltd (ACN 140 038 142)
FIRST RESPONDENT	Hans Emin Richmond
SECOND RESPONDENT	Eric Richmond
WHERE HELD	Melbourne
BEFORE	Senior Member E Riegler
HEARING TYPE	Hearing
DATES OF HEARING	17, 18 and 19 August 2016
DATE OF ORDER	6 October 2016
CITATION	Green Design Homes Pty Ltd v Richmond (Building and Property) [2016] VCAT 1697

ORDERS

1. The First Respondent must pay the Applicant \$86,141.05.
2. Liberty to apply on the question of costs and interest, provided such liberty is exercised within 21 days of the date of these orders.

SENIOR MEMBER E RIEGLER

APPEARANCES:

For the Applicant	Mr P Hayes of counsel
For the First and Second Respondents	Mr Eric Richmond, in person

REASONS

INTRODUCTION

1. The Applicant is a builder of residential dwellings. It has been carrying on that business over the past seven years (**‘the Builder’**). It constructs approximately 40 homes per year and has display homes in various locations. In 2013 it owned a display home located in Jacksons Road, Drouin, from which it conducted its business, including sales.
2. The First Respondent is the registered owner of a property located in Officer (**‘the Property’**). In 2014, the Builder entered into a contract with the First Respondent, under which it constructed a residential dwelling on the Property. The contract was in the form of *HIA Victorian Homes Contract* and dated 28 April 2014 (**‘the Contract’**).
3. The Second Respondent is the father of the First Respondent. He was, at all relevant times, the main point of contact for the Builder. Both the First and Second Respondents, together with the Second Respondent’s wife and daughter (collectively known as **‘the Owners’**), currently live at the Property.
4. The dwelling constructed on the Property was completed in December 2014, at which time the Owners took possession of the Property. The Builder claims that when the Owners took possession of the Property, its progress claims for *Fixing Stage*, in the amount of \$59,882 and *Completion Stage*, in the amount of \$23,952.80, had not been paid. In addition, the Builder claims that a further \$8,001.25 remained unpaid in respect of variation work completed by it. Accordingly, the total amount claimed by the Builder in this proceeding is \$91,836.05.
5. The Respondents contend that the *Fixing Stage* and *Completion Stage* progress claims were paid in cash by the Second Respondent (**‘Mr Richmond’**). As for the variation claims, the Respondents contend that, apart from *Variation 6* in the amount of \$68.50, no amount is owed. The Respondents dispute the variation claims on the ground that the variation claims relate to work that was part of the original scope of work under the Contract. Therefore, there was no entitlement to charge any additional amount for that work.
6. The Builder was represented by Mr Hayes of counsel. Mr Keith Hogan, the director and nominated registered building practitioner of the Builder, gave evidence on the Builder’s behalf. In addition, Mr Hogan’s wife, Fiona Hogan, who is the accounts manager of the Builder, also gave evidence on behalf of the Builder. Further evidence was given by two of the Builder’s subcontractors, albeit confined to a narrow point; namely, that they were never paid in cash.

7. The Respondents were not legally represented at the hearing of this proceeding. Consequently, Mr Richmond appeared on his own behalf and also on behalf of the First Respondent.¹ The First Respondent (**‘Hans Richmond’**) did not attend the hearing, nor give any evidence in the proceeding. In fact, the only evidence adduced on behalf of the Respondents was by Mr Richmond. No other witnesses were called by him.

BACKGROUND

Payments for Deposit, Base Stage, Frame Stage and Lock up Stage

8. Mr Hogan’s witness statement, which he adopted as his evidence in the proceeding, sets out the background of the dispute between the parties and how payments were made under the Contract. Much of what he says concerning the history of the matter and how payments for *Deposit, Base Stage, Frame Stage* and *Lock up Stage* were made is not in dispute.
9. Mr Hogan states that he first met Mr and Mrs Richmond on 12 November 2013 at the Builder’s Drouin display home. He states, in part:
 3. I was with them for approximately 1½ hours, taking them through my standard presentation of what is included in Green Designs display homes. Eric advised he was a developer and had a number of houses built with Jennings Homes but he was no longer using them since they sold out to another company, Sekisui House.
 4. Eric told me that he signed up for four lots along McNeilly Road, Drouin but they were all subject to finance and he had not proceeded with them. Eric told me that he liked our homes and was interested in using me as his preferred builder for future projects. Eric also informed me that he owned Lot 108 McNeilly Road, Drouin and that he was interested in a custom-designed home that incorporated the design of the Display Home at Lot 102 McNeilly Road, Drouin that we had built (‘Lot 102’). I offered to take him through the Display Home at Lot 102 and so we went there together.
 - ...
 6. Later that same day (12 November 2013) Eric brought with him paperwork showing a signed Contract to build a two storey Orbit Homes design display home in Officer. He advised me that it was subject to finance and he would prefer to use Green Design Homes if we could do a \$7000.00 discount on the Orbit Homes price and have the same inclusions. He told me he was building the Officer house as an investment. I advised him we could build that house for him.

¹ By order dated 6 June 2016, leave was given to Mr Richmond to appear on behalf of the First Respondent.

At that time he told me he was a marketing consultant and mortgage broker and he was interested in doing work for us as a consultant in finance. I told him I would consider it and left it at that. He also told me that he wanted us to prepare a quote for him for a two storey custom design house based on the Lot 102 design that I had shown him on his block at 108 McNeilly Road, Drouin. We left on the basis that I would email him a quote for the House Eric wanted to build at ... Officer (**'Officer Home'**) and that I would start the design process for the McNeilly Road property. Later that same day, I emailed Eric a competitive quote which was approximately \$5000 less than the Orbit Homes quote for the Officer Home.

...

9. On or about 5 March 2014, Eric and his wife; Elizabeth arrived unannounced at the Display Home and they were with me for approximately 40 minutes. During our discussions around this time, Eric advised me that he has a son who was studying Law at University and that is also has a daughter who is a doctor [sic].
10. He further advised me that he was buying the home in the name of his son Hans Emin Richmond (the First Respondent)...
11. At that time Eric also asked to reduce the price slightly further or to put other inclusions in the quote. We then agreed on the inclusions and the contract price and he told me he wished to proceed with the project.
12. Over the next few weeks emails were sent by me and other members of my staff to Eric with elevations and inclusions for Eric to approve.
13. On 7 April 2014, we had reached agreement on all elevations and inclusions for the Project and accordingly I drew up a contract to build the Officer Home and following the instructions of Eric Richmond inserted Hans Emin Richmond's name in the Contract as the Owner under the Contract.

...

15. On 16 April 2016, I then received a phone call from Eric Richmond advising that the draft contract appeared to be in order and asking us to finalise the Contract and that he would collect it himself from the display home as son wasn't able to attend get to Drouin to sign the Contract because of his studies [sic].
16. Eric and Elizabeth Richmond then attended the Display Home shortly after the phone call and collected the two finalised Contracts and took them away with them.

17. On the morning of 28 April 2014, Eric and Elizabeth Richmond attended at the display home with a large plate of pastries for morning tea as a gift for me and my staff. Eric brought with him the two Contracts and said they have been signed and initialled by his son; Hans Emin Richmond and witnessed by Eric.
 18. The date that was inserted on the Contract was 28 April 2014... The contract contained a number of additional variations which I was prepared to agree to.
 19. I then signed the Contracts and let Eric Richmond have one original and I kept the other original ...
10. Mr Hogan said that the *Deposit, Base Stage, Frame Stage* and *Lock-Up Stage* progress claims were all paid in cash. He recalls that Mr Richmond and his wife would attend the Drouin display home, usually unannounced, with a plastic bag of cash which was then handed to Mr Hogan with a prepared receipt stating that the Builder acknowledged receipt of the payment. Each of the prepared receipts recorded the amount paid as being commensurate with the amount of each respective stage payment under the Contract. Mr Hogan recounts:
25. I was quite taken aback by Eric and Elizabeth Richmond attending the Display home with a bag of cash. I was at first quite unsure as to what to do as this was the first time that a client had shown up with cash to pay an invoice. I was in a slight state of shock by this but because they were new clients and they had informed me on a number of occasions that they had more building projects in the pipeline for which they would engage Green Design Homes in the future and I wanted to keep them as satisfied clients I signed the Deposit receipt that Eric gave to me without first counting the money and trusting Eric that the cash payment was inclusive of the Deposit component. I also signed the Deposit receipt without first counting the money as I didn't want to offend Eric and Elizabeth by counting the money in front of them. Further, I had other people walking in and out of the display home and felt it inappropriate to be counting cash is [sic] front of other potential customers.
11. Mr Hogan said that the cash payments did not, however, include any component of GST. He said that the payment claims in respect of the *Deposit, Base Stage, Frame Stage* and *Lock-Up Stage* were, therefore, all short paid.
12. It is at this point where the parties' evidence diverges. According to Mr Richmond, all cash payments included GST. He contends that the signed receipts corroborate his version of what was paid.

13. During his opening address, Mr Hayes submitted that the Builder conceded, in light of having signed receipts stating the full amount of each progress payment was received by it, that it would be difficult for it to prove that a lesser amount had, in fact, been paid. Consequently, he stated that the Builder was no longer pursuing any claim for short payments of the progress claims relating to the *Deposit, Base Stage, Frame Stage* and *Lock-Up Stage*.
14. Therefore, the Builder's claim is limited to the amounts claimed under the Contract for *Fixing Stage* (\$59,882), *Completion Stage* (\$23,952.80) and variations (\$8,001.25). As indicated above, apart from the variation claims, Mr Richmond contends that both *Fixing Stage* and *Completion Stage* progress payments have been made.

FIXING STAGE PROGRESS CLAIM

15. Mr and Mrs Hogan both gave evidence that despite an attempt by Mr Richmond to make a payment in respect of the *Fixing Stage*, no money was exchanged. Mr Hogan states:
 46. From lock up stage to fixing stage the building works continued without any problems. The next meeting with Eric and Elizabeth was the final meeting in the series. We had not completed fit out but we were close to it. Fiona had not forwarded an invoice for the Fit Out Stage, however, I clearly remember Eric and Elizabeth again arriving unannounced at the Display Home on Sunday, 9 November 2014.
 47. I saw Eric and Elizabeth arrive in their car and then observed them getting out of their car with another bag which I presumed would have contained money for the fixing stage. I stopped them at the front door and said words to the effect of "don't even think of it, if you are trying to pay by cash I am going to refuse the payment." Eric said words to the effect to me... "we have an agreement" and I replied with words to the effect... "we never had any agreement for you not to pay the GST, we only had an agreement that you would pay for the house being constructed." He then made a threat of and said words to the effect of... "it would make me very unhappy if you do not accept this."
 48. ... they sat at my desk and Eric put the bag on my desk and pulled out the receipt. He also pulled out a hand written Memorandum of Understanding that he had written dealing with the extras to be included which we were having a disagreement about in the variations. I told him I was not signing anything. He then withdrew the cash and the receipt from the table but left the hand written Memorandum of Understanding with me on the desk. He then asked Elizabeth to get something out of her bag and gave to me a set of three coffee cups that had Peter's, Fiona's and my name on them.

Eric and Elizabeth then left the Display Home. I threw the Handwritten Memorandum of Understanding in the bin as I was angry with Eric.

...

50. On 24 November 2014, the invoice for the Fixing Stage was issued...

16. Despite orders being made by the Tribunal that each party file and serve witness statements, no witness statements were filed or served by the Respondents. Nevertheless, Mr Richmond relied upon his two affidavits each dated 17 August 2016, which he had previously filed with the Tribunal. He also gave oral evidence disputing Mr Hogan's version of events. In his affidavit concerning the *Fixing Stage* progress payment, he states:

6. On Sunday 9/11/2014, payment of Stage 5, Fixing Stage was paid to the Applicant in Cash at the Applicants Drouin Display Home.

7. After the Applicant took the money, I asked for a receipt and memorandum of understanding.

8. Mr Hogan refused to sign a receipt and stated that he is not declaring receiving these payments in cash as he has been "paying cash to his tradies" and he doesn't want to have a problem with tax office.

9. On return to Berwick from Drouin, I emailed the Applicant a follow up email, confirming payment in cash and other items discussed with a copy of MOU.

10. At the meeting, he advised me that the date in paragraph 5 of the MOU is incorrect.

11. I corrected and have my son signed it and emailed it back [sic].

12. I called him next day approx. 9:10 a.m. and let him know you emailed the amended MOU. I also asked him again for receipt of payment made the day before. He said he gave the cash to Fiona and he will email later. He never signed and returned the aforesaid MOU. [sic]

13. The Applicant emailed and confirmed that the cash was paid to Fiona.

14. Subsequent email sent to and received from the Applicant on 19/11/2014 and 20/11/2016. Nothing complained and mentioned about Fixing Stage Payment.

17. Copies of the emails referred to in Mr Eric Richmond's affidavit were exhibited to that affidavit. The email dated 9 November 2014 referred to in his affidavit states, in part:

I confirm that on behalf of Hans, the following have been covered in our visit this afternoon:

1. You will provide a further detailed specification and inclusion by Tuesday 11/11/2014 in relation to Lot 108 McNeilly Road Drouin.
 2. Payment of fixing stage invoice in cash.
 3. You will sign and provide the outstanding memorandum of understanding by Tuesday 11/11/2014.
 4. You will let Gemma know of the circumstances and contents of the aforesaid memorandum so that she will fully understand GDH obligations in relation but not limited to inclusions, upgrades and specifications.
18. The *Memorandum of Understanding* referred to in Mr Richmond's affidavit concerns the scope of the works under the Contract, and in particular, whether the scope includes all of the specification comprised in a quotation obtained by the Owners from *Orbit Homes*, being another builder which had quoted on the building project. This issue still remains in dispute between the parties. In particular, according to the Owners, many of the variations claimed by the Builder relate to work that was included in the *Orbit Homes* quotation and therefore, should have been included as part of the works under the Contract. The Builder disputes this. According to the Builder, the specification provided by it was clear as to what was provided under the Contract and any change to that scope constitutes a variation.
19. Consequently, the *Memorandum of Understanding* was never signed or acknowledged by the Builder. This is despite the fact that Mr Hogan conceded that he did receive a copy of the email dated 9 November 2014, which attached an amended version of that document. During cross-examination, it was put to Mr Hogan that the email confirmed that payment of the *Fixing Stage* was made during the course of the meeting on 9 November 2014. He disputed that. He said that the email did not confirm payment but merely reflected that the purported payment was the subject of a heated argument on that day.
20. Mr Richmond also produced a copy of an email dated 10 November 2014, which he said was sent by Mr Hogan to him. That email stated:
- Hi Eric
- I gave the cash to Fiona.
- Regards Kevin
21. Mr Hogan vehemently denied having created or sent that email. In that respect, I note that the email does not contain the *Green Design Homes* emblem at the foot of the email, which appears on most (but not all) other

emails sent from the Builder to Mr Richmond. It is blank after the words *Regards Kevin*.

22. Mr Richmond gave evidence that on 7 and 8 November 2014, he and his son, Hans Richmond, withdrew money from various branches of the Commonwealth Bank of Australia in order to make the payment of \$59,882. When asked to produce copies of any bank statements, he subsequently tendered an internet copy of bank statements which showed a number of transactions. The first transaction was a payment by the bank into Hans Richmond's bank account of \$59,882 on 4 November 2014. What follows are a number of withdrawals from different branches of the Commonwealth Bank of Australia on 4 and 5 November 2014, which total exactly \$59,882. Although the dates on the bank statement do not match Mr Richmond's evidence, I nevertheless accept his evidence that \$59,882 was withdrawn, albeit that the withdrawals occurred a few days prior to what he had recalled in his oral evidence.
23. Mr Richmond said that he had contacted Mr Hogan on Saturday or Sunday to make a time for payment of the *Fixing Stage* claim. He said that Mr Hogan had told him to come to the display home in Drouin at 12:00 PM on 9 November 2014. He said that he visited the display home with his wife and met with Mr Hogan, who he said was alone. He said he took the money out, which had been collated into \$10,000 bundles, and gave it to Mr Hogan. He said that Mr Hogan put the money in his drawer and did not count it. He reiterated what he had deposed to in his affidavit; namely, that Mr Hogan had refused to sign his receipt for the money. He said that he then left the money with Mr Hogan, despite not obtaining a receipt or any confirmation of payment.
24. During cross-examination, Mr Richmond was asked why he believed that the *Fixing Stage* had been reached, given that no invoice had been raised prior to 9 November 2014. It was further put to him that payment of this statement was inconsistent with what Mr Hogan had stated in his witness statement; namely, that by 9 November 2014 fixing stage was close to being completed but not yet completed.² Moreover, it was said to be inconsistent with Mr Hogan's evidence that all other payments prior to that time were paid after the relevant invoice had first been raised.
25. Mr Richmond said he was told by the superintendent that *Fixing Stage* had been completed. Again, his evidence is at odds with that of Mrs Hogan who said she first became aware that *Fixing Stage* had been completed when Michael Stevens, the site foreman (supervisor) told her of that on 24 November 2014. She said that she then issued the *Fixing Stage* progress claim, which was emailed to Mr Richmond on the same day. She corroborated Mr Hogan's evidence that she was unaware of any payment for *Fixing Stage* having been made prior to that date. In fact, she states in

² Paragraph 46 of the witness statement of Kevin Hogan.

her witness statement, which she adopted as her evidence in the proceeding, that:

29. I rang Eric Richmond on 11 December 2014 asking about the overdue fix payment. He said he would pay all the money together on Monday, 15 December (fix completion and variations) at handover but required the Certificate of Occupancy which I then sent him via email.
26. During the course of Mr Richmond's evidence, I enquired as to whether either Hans Richmond or Mrs Richmond would be giving evidence as to what he or she observed or knew regarding cash payments to the Builder. Mr Richmond said that he was not intending to adduce evidence from either of these persons. At that point, I indicated to Mr Richmond that if there was no reasonable explanation given as to why those persons were not giving evidence, the Builder may argue that the failure to call either Hans Richmond or Mrs Richmond infers that their evidence would not have assisted the Respondents' case.³
27. Mr Richmond said that both Hans Richmond and Mrs Richmond were unwell and not medically fit to give evidence in the proceeding. I then enquired as to whether there was any medical certificate or other evidence to support Mr Richmond's contention. Mr Richmond said that there was documentation verifying what he had said but that he objected to the Builder seeing any of that documentation. I asked why he objected to the Builder seeing that documentation. He said that he feared that the Builder would use that information against him or his son, although he did not elaborate further as to how or why he held that fear.
28. I indicated to Mr Richmond that it was most unusual for critical documentation to be handed to the Tribunal for consideration without giving the opposing party an opportunity to first look at that material. He said that he accepted that convention and on that basis, would rather not rely upon any medical explanation as to why Hans Richmond or Mrs Richmond were not giving evidence in the proceeding. I reiterated that without proffering some reasonable explanation, the Builder may urge the Tribunal to infer that those persons would not have assisted the Respondents' case. Mr Richmond said words to the effect that he accepted that that may be the case but did not think it would be an issue because their evidence would merely repeat his own evidence.
29. It is regrettable that Mrs Richmond was not called to give evidence in relation to the meetings where Mr Richmond says cash was exchanged. Although her evidence would merely have been corroborative, it is nevertheless surprising that she was not called to verify matters which go to the very heart of what is in dispute between the parties. That being the case, I can only infer that she would not have been able to give evidence

³ *Jones v Dunkel* (1959) 101 CLR 298.

verifying that cash payments were made to the Builder for the *Fixing Stage* and *Completion Stage* progress payments. This is surprising given Mr Richmond's evidence that she was present when the cash payments were allegedly made.

30. Therefore, that leaves me with two competing versions of what occurred. On one hand, Mr Richmond says that cash was handed over on 9 November 2014, while on the other hand Mr Hogan says that it was not. Mr Hogan's evidence is corroborated by Mrs Hogan who said that no payment for *Fixing Stage* was ever made.

Was Fixing Stage paid - analysis of evidence?

31. It is common ground that the *Deposit, Base Stage, Frame Stage* and *Lock-up Stage* progress claims were paid in cash and accepted by the Builder. Mr Richmond points to this pattern of conduct giving rise to an inference that the same methodology was adopted in relation to both the *Fixing Stage* and *Completion Stage* progress claim payments.

32. I do not accept that submission. In particular, Mr Hogan gave evidence that the Builder was left with little choice but to accept cash payments for those progress claims, notwithstanding objection raised by him. For example, prior to receiving the *Frame Stage* payment he recalls the following exchange between Mr Richmond and him:

35. On the Sunday afternoon of 10 August 2014, Eric and Elizabeth again arrived at the Display Home. By this stage Fiona was pointing out to me that the cash flow and the GST were showing problems. Therefore, I told Eric we could no longer accept his cash payments because of two reasons: Firstly, cash payments affected the cash flow in our system and secondly, because we prepare monthly BAS statements through our electronic accounting system that the cash payments by Eric Richmond were not being properly recorded. Eric replied to me that is how he operates his business. Eric further insists to me that cash is legal tender and he is entitled to pay by cash. [sic]

36. I also told him not to come on a Sunday with cash because it is impossible for me to count it or deal with it on that day. I also told him that Lot 108 McNeally Road was not going to proceed unless it was by EFT (as per our usual payments) so that it could be properly recorded...

33. Similarly, in relation to the payment of the *Lock-up stage* progress claim, Mr Hogan stated:

40. On 5 October 2014, being the following Sunday, Eric and Elizabeth again arrived unannounced at the Display home.

41. When they arrived Eric informed me that because I have been so helpful with them that they want to give me a gift of a good

quality leather bag. Again I was busy with other clients and they were only with me for about 10 minutes. I thanked them and put the bag in the corner. I had no realisation at the time that it was anything but a good quality leather bag. It did not cross my mind that the leather bag may have contained any cash, as on the previous occasions that Eric had arrived with cash at the Display Home he had the cash in plastic bags and had made it clear to me that he wanted to pay in cash at those times. I simply presumed the leather bag was a gift from Eric and Elizabeth. When I think back on his actions on that day now it appears to me to have been a clever way of Eric delivering the cash payment to me for the Lock-Up Stage without alerting me to the fact that he was doing exactly that.

42. When I left the Display Home that night I left the leather bag there as I didn't attach any importance to the leather bag and simply forgot to take the leather bag with me. Upon arriving at home that night, I told Fiona that Eric and Elizabeth had visited the Display Home and given me a gift of a leather bag.
 43. Immediately Fiona said that the bag probably had money in it and it then dawned on me that it probably did. Fiona and I immediately drove back to the display Home and collected the bag because if it did contain money it should have had \$83,000 in it. When Fiona and I opened it up the bag we found that it did have money in it. We brought the bag home and the next day Fiona counted the money in the bag and found it the cash payment that Eric had made was again short of the GST. [sic]
34. Mr Hogan's evidence is supported by Mrs Hogan's evidence. In my view, it is difficult to conclude that the prior acceptance of cash payments, in this particular case, necessarily leads to an inference that the same practice was adopted in relation to the *Fixing Stage* and *Completion Stage* progress claims. That inference might more readily be found where there is clear evidence that a builder willingly accepts cash payments or where there is an agreement that payments are to be made in this manner. However, I do not find that to be the case in the present circumstances.
 35. In further support of Mr Richmond's evidence, he points to the fact that money was withdrawn from the Commonwealth Bank of Australia for the exact amount of the *Fixing Stage* progress claim. He contends that this reinforces his evidence.
 36. In my view, evidence of money being withdrawn is not determinative of money having being paid. Indeed, the fact that money was withdrawn is consistent with the uncontested evidence that Mr and Mrs Richmond attended the Drouin display home with a large amount of cash. However, that does not mean that the cash was ultimately accepted and retained by Mr Hogan. Therefore, and notwithstanding that the evidence of the cash withdrawal may lend some weight to Mr Richmond's evidence, I do not

regard this evidence as being definitive. Other factors need to be considered.

37. Mr Richmond also relies upon two emails, which he contends further corroborates his evidence. The first email is dated 9 November 2014 and expressly makes reference to the *payment of fixing stage invoice in cash*. The Builder admits having received that email but contends that it does not constitute a statement verifying that a cash payment was accepted. In fact, Mr Hogan says that statement reflects what actually occurred on that day; namely, that the topic of cash payments was the subject of a heated discussion.
38. It is not clear from the express words used in the email dated 9 November 2014, that payment was received. In particular, the relevant part of that email merely states the payment of the *Fixing Stage* invoice in cash was *covered in our visit this afternoon*. In my view, the words of that email could be read either way. Therefore, I do not find this correspondence to be corroborative of either party's position.
39. The second email is dated 10 November 2014 and states *I gave the cash to Fiona*. As indicated above, Mr Hogan denies having created or sent that email.
40. The email dated 10 November 2014 appears to be out of character with what had previously occurred as between the Builder and the Owners. In particular, no other similar type of email was produced, even though cash payments were received by the Builder for the *Deposit, Base Stage, Frame Stage* and *Lock-up stage* – and all in the same manner as what was alleged to have occurred with the *Fixing Stage* payment. On all other occasions, the Builder signed a receipt acknowledging the payment. This was not done for *Fixing Stage*.
41. Mr Richmond said that Mr Hogan was unwilling to sign a receipt because he did not want to declare the payment for tax purposes. Mr Hogan disputes this. Indeed, Mr Hayes submitted that that proposition was inconsistent with the Builder now pursuing payment for that money. In response, Mr Richmond contended that the Builder's motivation in now pursuing payments is to exert pressure on the Owners not to pursue a claim against the Builder for defective works. Mr Richmond says the issuing of this proceeding was a reaction to the Owners raising the number of defective work items, which they discovered after they took possession of the Property on 19 December 2014.
42. I do not accept that contention. The Builder had raised the non-payment of the *Fixing Stage* progress claim as an issue well before any allegation of defective work surfaced. In particular, the Builder's conduct in issuing the *Fixing Stage* progress claim invoice on 24 November 2014, of itself, indicates that it did not regard the *Fixing Stage* progress claim as having been paid.

43. I note that there was some suggestion that Mr Richmond did not receive the 24 November 2014 *Fixing Stage* invoice at that time. Nevertheless, subsequent emails from the Builder to Mr Richmond reiterated the Builder's stance that it had not been paid for *Fixing Stage*.
44. The first of those emails is dated 8 December 2014. It states, in part:
- Dear Eric.
- Please find attached a statement for money due prior to hand over. Your fixing stage payment as yet has not been received please attend to this immediately.
- ...
45. The second of those emails is dated 9 December 2014, and states:
- Hi Eric
- As you can see here is the original invoice which was sent on 24th November. We are entitled as per the contract to charge interest on over due payments.
46. According to Mrs Hogan. That email dated 9 December 2014 attached a copy of the *Fixing Stage* progress claim invoice.
47. The third email is dated 22 December 2014 and states, in part:
- Dear Eric
- As mentioned below on Tuesday, 9th December 2014, these above invoices were originally sent to you on 24 November 2014 and again at your request on 9th December 2014.
- You are now in substantial breach of your contract; you have failed to pay your fix stage payment as required by clause 30 of the contract.
- We now intend to end this contract and recover damages and interest.
- If you wish to remedy this situation you have until 11 AM on the 24 December 2014 to pay all monies owing to Green Design Homes.
- Once we have received all moneys as cleared funds into our bank account we will give you possession ...
48. There is no evidence to suggest that any responsive correspondence contesting what is stated in those three emails was sent to the Builder. Certainly, nothing of that nature was produced during the course of the hearing. This is surprising, given Mr Richmond's evidence that by 22 December 2014, both *Fixing Stage* and *Completion Stage* had been fully paid in cash. In other words, \$83,834.80 had been allegedly handed to the Builder. However, by those three emails, the Builder was clearly denying receipt of money.
49. My perception of Mr Richmond was that he is an intelligent and perceptive individual. In those circumstances, I find it highly unlikely that he would not respond to correspondence which unequivocally states that

payments totalling \$83,834.80 had not been made. At the very least, I would have expected a responsive email detailing when and how the cash payments were made. In my view, this factor weighs against a finding that the cash payment was made.

50. It is uncontested that a party who asserts that a payment has been made bears the burden of proving that fact; which in this case is the Respondents. When I weigh all the factors raised above and having considered all of the evidence given during the course of the hearing, I am not persuaded that the Respondents have discharged that burden of proof. Therefore, I am unable to find, on the balance of probabilities, that the payment for the *Fixing Stage* progress claim was ever made.

COMPLETION STAGE

51. Mr Hogan gave evidence that, on or about 8 December 2014, the Builder issued its invoice for the *Completion Stage* in the amount of \$23,952.80.
52. According to Mr Richmond, payment of the *Completion Stage* progress claim was made on 16 December 2014 in cash and directly to Mrs Hogan. Mr Richmond said that payment of the *Completion Stage* progress claim was organised after he had received a copy of the Occupancy Permit from Mrs Hogan by email on 11 December 2014. According to Mr Richmond, he then arranged to meet with Mrs Hogan at around 4:00 PM on 16 December 2014 at her private home. The purpose of that meeting was to make payment of the *Completion Stage* progress claim and arrange for the handover of the Property.
53. Mr Richmond said that on 16 December 2014 he and his wife, went to Mr and Mrs Hogan's private home in Drouin. He said he knocked on the door and Mrs Hogan answered. He said that he then gave the money to Mrs Hogan, who thanked him. Mr Richmond said that he asked for a receipt but was told *as we settle today, there is no need for a receipt*. He said that he was then given a *builders key* to open the temporary lock to the Property. He also said that he was given three remote controls for the garage.
54. Mr Richmond said that after that meeting, he went home and arranged for a removal company to move into the Property on the following Friday, 19 December 2014. He confirmed that he took possession of the Property on that day.
55. Mrs Hogan denies much of what was said by Mr Richmond concerning the *Completion Stage* progress claim. In her witness statement she states:
19. Eric Richmond also alleges in his Defence that the Completion Stage Invoice payment was paid in cash to me at Drouin on 16 December 2014 as per my email instructions/notification of handover. I specifically and categorically deny the allegation that Eric makes against me in his Defence in this respect.

20. Eric Richmond also alleges in his Defence that I refused to sign a receipt and that I made the following statement:... “there is no need for a receipt” and that I then handed over the property and “the matter settled that day”. I specifically deny the allegation that Eric makes against me in his Defence in this respect.
21. Whenever a Green Design Homes is completed, there is a welcome pack with house keys, roller door keys remotes and manuals that is provided to the customer when handover payment occurs. We still have the handover package as fix and final payment were not received and will be produced on the day of the hearing as it is unable to be annexed as an exhibit. I remember advising the roller door company not to issue any other remotes.
56. Mrs Hogan expanded on her witness statement in oral evidence. She said that she had only met Mr and Mrs Richmond on one occasion after her initial meeting with them at the display home, and that was in July 2014. She said that there was no meeting at her home or anywhere else in December 2014, although she recalls that on 12 July 2014, Mr and Mrs Richmond appeared at the front door of her home unannounced. She said that she specifically recalls that date because she had visitors at her home on that day, who she had purchased half a drum of hydraulic oil from and had written a cheque bearing that date. She recalls asking Mr and Mrs Richmond what they wanted, to which they replied that they were visiting. She said that she had visitors and Mr and Mrs Richmond then left.
57. Mrs Hogan also gave evidence that she was not at home on 16 December 2014. She said that she was at work. She said she was confident that she was at work on that day because 16 December was a Tuesday and she organised pays on Tuesday. Therefore, she was sure that she was at the display home in Drouin between 8:00 AM and 5:00 PM.
58. Mrs Hogan said that she did not have client meetings at her private home because she did not want to mix business with private life. She also said that she would never have handed over the *builder’s key* because that would have given Mr Richmond access to all of the Builder’s building sites operative at that time.
59. She reiterated that the handover procedure entailed a meeting where a *handover package* would be given to the homeowner in exchange for the final payment. The *handover package* in respect of the Property was tendered as evidence. It comprises a black folder bearing the Green Design Homes logo and contained the following material:
- (a) a sealed *Lockwood* envelope containing various keys;
 - (b) a Green Design Homes keyring;
 - (c) various compliance certificates;

- (d) a copy of the occupancy permit;
 - (e) a *90 Day Maintenance List*, noting a handover date of 15 December 2014;
 - (f) a covering letter dated 21 November 2014;
 - (g) a *Home Owner Manual* from A & L Windows and Doors, with a satchel of door and window keys; and
 - (h) a package containing the operating instructions for the garage together with three remote controls.
60. Mrs Hogan gave evidence that she subsequently became aware that the Owners had taken possession of the Property on 15 December 2014, after the site foreman, Michael Stevens, advised the Builder's office that he had noticed that the Owners had moved into the Property.

Was Completion Stage paid - analysis of evidence?

61. As was the case in relation to the *Fixing Stage*, \$23,952.80 was drawn from Hans Richmond's account on 15 and 16 December 2014. This factor lends weight to Mr Richmond's evidence that this amount was paid to the Builder on 16 December 2014. However, as I have already indicated, the mere fact that this amount was withdrawn from Hans Richmond's account does not necessarily mean that it was ultimately paid to the Builder. Other factors must also be considered.
62. Having considered all factors, I find that Mrs Hogan's version of what transpired is more feasible than Mr Richmond's account. There are a number of factors which lead me to that conclusion.
63. First, I accept Mrs Hogan's evidence that it was not her custom to arrange client meetings at her private home. Therefore, the alleged handover meeting at her home seems to be out of character. Moreover, it is an unlikely venue to arrange for such a critical meeting, especially considering that the Builder operated its business out of one or more of its display homes.
64. Second, Clause 38.0 of the Contract states that:
- When the Owner pays the Final Claim, the Builder must handover Possession of the Land to the Owner together with all keys, certificates and warranties in the Builders possession.*
65. Simply handing over the *builder's master key* falls far short of what is required under the Contract.
66. Third, I accept Mrs Hogan's evidence that the *builder's master key* would unlock more than the front door of the Property and would have allowed Mr Richmond access to other properties unconnected with the Contract between the parties. Therefore, I find it unlikely that the *builder's master key* was given to Mr Richmond.

67. Fourth, I accept Mrs Hogan's evidence that the usual procedure for handover was to supply the client with a *handover kit*. Mr Richmond conceded that he was never given a *handover kit*. In my view, that reinforces Mrs Hogan's evidence that the meeting on 16 December 2014 never occurred.
68. Fifth, as mentioned above, on 22 December 2014, Mrs Hogan forwarded an email to Mr Hans Richmond demanding payment of all monies owing to *Green Design Homes*. That email stated, in part:
- ...
- Once we have received all moneys as cleared funds into our bank account we will give you possession of ... Officer.
69. I understand that email to mean that the Builder was not accepting that it had given the Owner possession of the Property and that monies remained outstanding under the Contract. I have already indicated, it is surprising that there is no evidence of any correspondence from the Owners disputing that payments have not been made or that their entitlement to possession was not permitted.
70. Sixth, there is email correspondence in January 2015, in which the Builder is continuing to press for payment of outstanding amounts under the Contract. Mr Richmond submitted that the tenor of that correspondence suggests that the Builder is continuing to perform certain obligations under the Contract and is comfortable with the Owners being in possession of the Property. He argued that this correspondence is indicative of the fact that possession was consensually given, which, of itself, raises an inference that the *Fixing Stage* and *Completion Stage* progress claims had been paid by that date. For the reasons which follow, I do not accept that submission.
71. The first of those emails is dated 5 January 2015 from Mr Hogan:
- Hi Eric.
- Hope you had a good brk. Could you give me a call please.
- Regards Kevin
72. Mr Richmond responds on the same day:
- Hi Kevin.
- Hope you had a good break too.
- On final inspection and handover time, we have been told that fly screens will be fitted on Monday 05/01/2015.
- Just letting you know that no one showed up today to install aforesaid.
- Can you also kindly please arrange to have recycle water taps handle (x 3) delivered to us ASAP.
- Thank you.

Kind regards.

Eric Richmond.

73. Mr Hogan then responds on 6 January 2016:

Hi Eric.

I will follow up on the screens and also the tap handles. We need to address the final payments as soon as possible. I am not in a position to carry the amount that is outstanding. I would like to get this sorted so we can move forward. The payments are causing me quite a lot of stress. Can we please address this.

Regards Kevin.

74. Mr Hogan gave evidence that the fly screens were installed, despite the fact that monies were owed under the Contract. He said that he had obtained advice from the Housing Industry Association to the effect that he should ensure that the Builder's obligations under the Contract were fully performed before pursuing its claim further.

75. In my view, the January 2015 chain of email correspondence is consistent with the Builder's position that the *Fixing Stage* and *Completion Stage* progress claims had not been paid. To the extent that the emails contain a conciliatory tenor, inconsistent with there being a dispute, is explained by Mr Hogan's evidence that the Builder was merely following advice received from the Housing Industry Association. In my view, the emails, read as a whole, suggests that a substantial amount of money has not been paid.

76. Consequently, and for the reasons set out above, I find that the *Completion Stage* progress claim has not been paid.

VARIATION CLAIMS

77. There are six variation claims which comprise the Builder's claim for \$8,001.25. Of those six variation claims, only Variation Number 6, in the amount of \$68.50, is admitted.

78. All variation claims are the subject of written variation notices, which are in the form of a Housing Industry Association pro forma document. Apart from Variation Number 2, all variation notices appear to have been signed by Hans Richmond, although Variation Number 1 in the amount of \$710 has been signed but also crossed out.

79. As I have already indicated, the Respondents contend the disputed variation claims constitute work which was required under the Contract and so did not entail a variation to that work. That claim is premised on a contention that the scope of work under the Contract included all of the work that was part of an earlier quotation provided by *Orbit Homes* but which was not ultimately accepted by the Owners. Mr Richmond gave evidence that, at all times prior to signing the Contract, it was always the

case that the Builder was to include everything that was included in the *Orbit Homes* quotation as part of the build. That raises two questions; namely:

- (a) Was the *Orbit Homes* quotation or specification part of the Contract?
- (b) If so, is the work, the subject of each of the disputed variation notices, work that would have been undertaken by *Orbit Homes* pursuant to the quotation it provided to the Owners?

Was the *Orbit Homes* quotation or specification part of the Contract?

80. The scope of the Works is described in the particulars of the Contract as follows:

The Building works (Brief description) as set out in the Specifications and Plans.

These documents must be signed and dated with the Contract.

The **Specifications** include 6 pages that were prepared and supplied by Green Design Homes Pty Ltd

There are 13 sheets of **Plans** that were prepared by and supplied by Green Design Homes

There are 4 sheets in the **Engineers Design/s** and it/they was/were prepared by BuildEng-Consulting Engineers for the Builder.

81. In addition to the description of work set out in the particulars of the Contract, *Schedule 4* of the Contract also contains what is described as *Special Conditions*. They state:

1. Items as listed in attached Quote & Summary & shown in attached Architectural Drawings.

2 ...

82. Schedule 5 of the Contract lists the *Excluded Items*. The words *Items as listed in attached Quote & Summary* are stated under that heading. However, those words have been crossed out and both parties have initialled that change. I understand this to mean that whatever work was included in the *Quote & Summary* forms part of the scope of the work under the Contract.

83. However, there is no document attached to the Contract entitled *Quote & Summary*, nor was such a document produced during the hearing. The only document which resembles a quotation is a six page document dated 28 April 2013 annexed to the Contract, which appears to be a quotation from the Builder to the Owners. Each page of that document has been initialled by the parties.

84. The first page of that document sets out the details of the proposed agreement. In particular, it identifies the names of the parties, the price and the address of the proposed building work. The remaining pages contain what is referred to as the *Inclusions List* and the work which is *Excluded*. Some of the *Excluded* items have been crossed out and initialled by 'HR', which I understand to be the initials of Hans Richmond. Nowhere in that document is any reference made to the *Orbit Homes* quotation.
85. What follows in the Builder's bound version of the Contract documents are 12 pages comprising the Architectural Drawings. Sheet 3 of 12, which is the Floor Plan of the proposed dwelling, contains some hand-written changes. These have not been initialled. The first change relates to the ground floor portico area and has the word concrete inserted with a line pointing to that area. The second change relates to the garage door opening and has the words 'move as far as possible to right' handwritten next to the area depicting the garage. Sheet 4 of 12, which depicts the elevations, also has a handwritten note next to the east elevation. It states 'Balustrade wire' and has an arrow pointing to the balustrade on the first floor of the front elevation of the proposed dwelling. Again, this handwritten note has not been initialled.
86. The second last document is a concept drawing comprising colour images of the proposed joinery. Again, there are handwritten notes next to some of those images. In particular, the words 'Add waterfall end Back as per display' has been handwritten next to the image of the kitchen joinery. In addition, the solid pantry door has the word 'Louvre' handwritten on that image. In the image of the bathroom vanity, the words 'Add shelves x 2', with an arrow pointing to the depiction of drawers has been handwritten on the document. None of these notations have been initialled.
87. The last document is dated 22 December 2014. It sets out various invoice details against what has been paid. It concludes that the *Total Amount Due* is \$91,836.05. It appears that this document was subsequently added to the bound documents comprising the Builder's counterpart of the Contract documents. No explanation was given as to why this was done.
88. The *Orbit Homes* quotation was not produced during the course of the hearing. Consequently, the only evidence supporting the contention that it formed part of the Contract is the oral evidence of Mr Richmond.
89. In that regard, Mr Richmond's evidence details how he obtained the *Orbit Homes* quotation. He said that he had previously purchased eight allotments in Drouin, with the intention of developing three and on-selling five. He said he sold three allotments to *Frenken Homes* and four allotments were returned to the vendor. Mr Richmond kept one allotment being McNeilly Road, Drouin. Mr Richmond said that he obtained a quotation from *Orbit Homes* for the construction of a residential dwelling

on that remaining allotment, which he accepted and ultimately entered into a contract with on 30 November 2013. He said during this negotiation process, he also communicated with Mr Hogan who eventually persuaded him to *take the contract to him*. Mr Richmond said that he then cancelled the contract with *Orbit Homes* and ultimately entered into a contract with the Builder on 28 April 2014. He said he lost the deposit that he had given *Orbit Homes* but was nevertheless comfortable in contracting with the Builder.

90. Apart from the oral evidence given by Mr Richmond, there is no other evidence which would indicate that the *Orbit Homes* quotation formed part of the scope of the works under the Contract. The Contract documents tendered in evidence and the documents incorporated by reference to that Contract seem complete. Consequently, I am not persuaded that the *Orbit Homes* quotation formed part of the scope of the work under the Contract, insofar as the work described in that quotation is not already documented in the Contract or the documents incorporated by reference to that Contract.
91. Therefore, I find that the scope of the work under the Contract is what is described in the Builder's bound counterpart of the Contract documents tendered in evidence,⁴ together with the documents that are incorporated by reference to that Contract (such as the engineering drawings).

Variation 1 (\$710)

92. Variation 1 is dated 21 July 2014 and described as being an upgrade to the entrance door (\$660) and an additional electrical power point in the pantry (\$50).
93. Mr Richmond said that the *Upgrade to the entrance door* should not have attracted an additional charge because there was a mistake on the plan. He said the floor plan for the ground floor depicted the entrance door assembly as being 1200mm wide. However, in the specification it was described as being only 820mm wide. He said that the *Orbit Homes* quotation showed a wide door.
94. The ground floor plan depicts an entrance assembly measuring 1,220mm. The door itself appears to be 820mm wide with the remaining 400mm occupying the frame and a side glass. This is also confirmed in the drawing of the front elevation. However, what is constructed is a single door without a side glass and covering the width of what was previously depicted as a door and side glass assembly.
95. Mr Richmond said that the *Orbit Homes* quotation did not depict a side glass. He referred me to sheet 6 of 12 of the architectural drawings, which he said did not show a side glass. Therefore, he argued that the plans

⁴ Exhibit 'A-4'.

erroneously depicted a side glass when they should have simply shown a wider door.

96. As I have already found, the *Orbit Homes* quotation is not relevant. It does not form part of the Contract. Moreover, sheet 6 of 12 of the architectural drawings is the Subfloor Plan. I do not consider this to be relevant in determining whether the scope of the work included a side glass or not. What is relevant is a ground floor plan and the front elevation plan. Both these drawings show a side glass and both these drawings have been initialled 'HR', which Mr Richmond conceded were the initials of Hans Richmond. In my view, the departure from these drawings is a clear variation to the original scope of the work under the Contract.
97. There is no evidence to suggest that the amount charged for changing the side glass and door assembly to a wider door is unreasonable and in those circumstances I find that the variation charge of \$660 is proven.
98. In relation to the additional electrical power point, Mr Richmond acknowledged that an additional electrical power point had been installed to what was shown on the electrical layout plan but said that there should not have been any charge for that. He said the power point was depicted in the *Orbit Homes* plan.
99. In my view, the additional electrical power point constitutes a variation to the scope of the work under the Contract. Accordingly, I find the variation charge of \$50 is also proven.

Variation 2

100. Variation 2 is dated 25 July 2014. It has not been signed by either Mr Richmond or Hans Richmond. The variation notice comprises three components, which the Builder claims increased the cost of the building works. These changes all relate to the kitchen joinery and amount to \$2,536, taking into account credits. The changes are as follows:
 - (a) *Base cabinet to right of oven to be 3 pot-drawers* (\$240)
 - (b) *Upgrade from matt to gloss finish in kitchen* (\$600)
 - (c) *Change to pantry layout - see 3D layout* (\$1,620)

Matt to gloss finish

101. Mr Richmond said that he admitted the cost of changing the finish of the kitchen from matt to gloss, in the amount of \$600. However, he disputes that the other parts of Variation 2 constitute changes to the original scope of the work under the Contract. Moreover, he notes that the variation notice was not signed.
102. Consequently, I find that the Contract price was increased by \$600 as a result of this change to the original scope of work under the Contract.

Three pot-drawers in lieu of cupboard

103. The architectural drawings annexed to the Contract document only depict wardrobe joinery and not the kitchen joinery. However, the bound copy of the Contract produced by the Builder includes the single page concept drawing which has graphical illustrations of the kitchen, laundry and bathroom joinery. That document contains handwritten notations and mark-ups.
104. Mr Richmond produced the same document as a single sheet.⁵ It also has handwritten notations and mark-ups, which are largely consistent with that shown on the Builder's version of the document. The difference between the two documents is that Mr Richmond's version appears to have three draws to the right side of the oven, whereas the Builder's version appears to depict a two-door cupboard on the right side of the oven.
105. Mr Richmond gave evidence that the handwritten mark-ups were made prior to the Contract being signed and evidenced what was agreed to be changes to the original design of the kitchen and bathroom joinery. The Builder led no evidence to dispute that contention. Therefore, I accept Mr Richmond's evidence on this point.
106. Consequently, I accept Mr Richmond's evidence that the inclusion of three pot-drawers, in lieu of what was originally to be a cupboard to the right side of the oven, formed part of the original scope of work under the Contract. Consequently, I do not accept that the Builder is entitled to charge any additional amount in respect of that work. This aspect of the Builder's variation claim is dismissed.

Changes to pantry layout

107. There is no document or other evidence before the Tribunal indicating what changes were made to the original layout of the pantry compared to what was ultimately constructed.
108. Mr Richmond gave evidence that the as-constructed pantry layout was not a variation to the scope of the work as originally agreed but rather, reflected what was negotiated between the parties prior to the Contract being signed.
109. Mr Hogan gave very little evidence in relation to this or the other variation claims. Most of his evidence is contained in two paragraphs of his witness statement. In essence, he states that the variations claimed by the Builder were approved by Mr Richmond. However, no specific detail was provided as to what changes were actually made or how any changes came about.
110. In my view, there is insufficient evidence adduced by the Builder to satisfy me that changes were made to the pantry layout, justifying the

⁵ Exhibit 'R-3'.

additional cost of \$1,620 (less credits of \$154.54). At the very least, evidence should have been adduced showing the original pantry layout compared to the as-constructed pantry layout. This was not done. In the absence of such evidence, I find that aspect of Variation 2 also unproven.

111. Consequently, the only aspect of Variation 2, which I find proven is the admitted amount of \$600 representing the change from matt to gloss finish.

Variation 4 (\$742.75)

112. Variation 4 relates to an upgrade to the driveway and portico concrete finish to *Sorrento Blue 5* exposed aggregate. The cost of the *Sorrento Blue 5* exposed aggregate is stated to be \$1,502.50. However, the variation includes a credit of \$827.27, being the deletion of the originally specified coloured concrete. The variation notice is dated 20 October 2014 and bears the signature of Hans Richmond. It is not in dispute that what has been constructed is different to what was originally depicted in the Contract documents tendered in evidence.
113. Mr Richmond disputes the variation claim on two grounds. First, he contends that the work was part of the *Orbit Homes* quotation and therefore should not have attracted an extra charge. Given my finding that the *Orbit Homes* quotation did not form part of the Contract, this ground is not sustainable.
114. Second, although Mr Richmond concedes that the signature at the bottom of the variation appears to resemble that of Hans Richmond, he contends that the signature might have been scanned from some other document and then placed onto the variation notice, rather than actually being signed by Hans Richmond.
115. As I have already indicated, Hans Richmond was not called to give evidence in this proceeding. Therefore, there is no first-hand evidence suggesting that Hans Richmond's signature was fraudulently placed on the variation notice. That being the case, I do not accept Mr Richmond's contention that the signature appearing on Variation 4 was placed on that document without Hans Richmond's knowledge or authorisation.
116. Given that it is not in dispute that the as-constructed work differs from that shown on the Contract documents tendered in evidence, I find this variation claim proven.

Variation 7 (\$851)

117. Variation 7 has two components; namely, the inclusion of a *Waterfall end to kitchen bench* (\$660) and an upgrade to the mirror in the ensuite (\$113.64).
118. The variation notice is dated 30 October 2014 and also bears the signature of Hans Richmond. Mr Richmond said that he did not remember the

variation notice ever having been signed. As was the case with Variation 4, he suggested that the signature may have been scanned from another document and fraudulently placed on this variation notice.

119. As I have already indicated, there is no first-hand evidence suggesting that the signature on that variation was not placed there by Hans Richmond. I do not accept Mr Richmond's contention on this point.
120. Mr Richmond also disputed the variation on the ground that the waterfall end was an inclusion that was negotiated between the parties prior to the Contract being signed. He said that this is confirmed by reference to the handwritten notes on the concept drawing which graphically illustrated the kitchen joinery. Both versions of that document bear the handwritten note: *Add waterfall edge back as per display.*
121. For the reasons outlined in paragraph 105 above, I accept Mr Richmond's evidence that the parties had negotiated to include a waterfall edge to the side of the kitchen island as part of the joinery to be included under the Contract. I do not accept that the Builder is entitled to charge for that waterfall edge, notwithstanding that the variation notice has been signed by Hans Richmond.
122. Mr Richmond did not dispute that the as-supplied mirror was not shown on the Contract documents tendered in evidence. However, he contended that the as-supplied mirror was no different to what was specified in the *Orbit Homes* quotation. Therefore, he said no additional charge should have been levied. For the reasons which I have already articulated above, I do not consider that the *Orbit Homes* quotation defined the scope of the work under the Contract. Accordingly, given the fact that the variation has been signed by Hans Richmond, I find this aspect of this variation notice also proven. I will allow \$113.64 (\$125) in respect of Variation 7.

Variation 11 (\$3,093)

123. Variation 11 comprises two elements. The first element relates to an adjustment of the contract price for what appears to be a cost over an allowance for the supply and installation of carpet (\$796.86 plus GST). The second element appears to be a cost over an allowance for the supply and installation of laminated timber (\$2,015.45 plus GST). This variation notice also bears the signature of Hans Richmond.
124. It is not in dispute that both carpet and laminated timber were to be supplied and installed as part of the scope of the work under the Contract. The Contract *Inclusions List* states:

FLOOR COVER:

Builders Category 1 ceramic floor tiles to attached floor covering lay-out including wet areas or Manhattan or Bolero Euro plank Laminated Timber look floor covering (or equivalent) to attached floor covering lay-out (excluding wet areas)

Builders Category 3 Carpet floor covering with quality underlay throughout to attached floor covering lay-out (excluding wet areas).

125. There was no *floor covering lay-out* plan produced in evidence. Nevertheless, there seems to be common ground as to what areas were required to be tiled, carpeted and laid with laminated timber.
126. Mr Richmond disputed the variation claim on a number of grounds. First, he said that the Builder had miscalculated the amount of area in order to determine the cost of the variation. Further, he said that the Contract did allow for an additional amount to be charged for the floor coverings supplied and installed by the Builder.
127. As was the case with most of the other variations claimed by the Builder, very little evidence was given in support of the variation. In essence, Mr Hogan's evidence was limited to a statement to the effect that the variation notice was signed by Hans Richmond.
128. The signing of a variation notice, of itself, may raise an inference that a change to the scope of the work under the Contract has taken place. However, it is not determinative and, upon reflection, it may be that the signing of a variation notice was done under a misapprehension that additional work had been undertaken when in fact it had not. In that sense, it is trite to suggest that there needs to be some change to the work under the Contract in order to constitute a variation. The corollary of that proposition is that a claim for payment of a variation which comprises work which a builder is already obligated to undertake is unsustainable, as it lacks consideration.
129. In the present case, there is no evidence that the *Edgewater texture* carpet named in the Variation 11 notice is any different to what would have been supplied under the Contract. Moreover there is no evidence that the *Classic 1050* laminated timber named in Variation 11 is any different to what would have been supplied under the Contract.
130. Insofar as the variation purports to charge a sum based on the cost of the carpet and the laminated timber being greater than the contracted allowance, there is no evidence suggesting that these elements of the work were the subject of either a prime cost or provisional sum allowance.
131. Moreover, Schedule 2 of the Contract provides for the inclusion of certain items of work to be identified as a prime cost item or a provisional sum allowance. However, no items of work are specified within that Schedule 2. Similarly, the *Inclusions List*, which is also annexed to the Contract documents does not refer to the carpet or laminated timber by reference to any provisional sum allowance or prime cost item. In those circumstances, I am not satisfied that the additional amounts charged represent any additional work under the Contract or give rise to any entitlement to

charge more than the specified Contract price. Therefore, this aspect of the Builder's claim is dismissed.

CONCLUSION

132. Having regard to my findings set out above, I calculate that the Builder is entitled to be paid the total sum of \$86,141.05 (inclusive of GST), made up as follows:

Description	Amount
<i>Fixing stage</i> progress claim	\$59,882
<i>Completion stage</i> progress claim	\$23,952.80
Variation 1	\$710
Variation 2	\$660
Variation 4	\$742.75
Variation 6	\$68.50
Variation 7	\$125
Variation 11	0
TOTAL	\$86,141.05

133. Although Mr Richmond was the main point of contact, there is no evidence to suggest that he was a party to the Contract or that Hans Richmond signed the Contract as agent for him. Therefore, the above amount is payable by Hans Richmond, given that he is the only party that contracted with the Builder. Orders will be made to that effect.

SENIOR MEMBER E RIEGLER