VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION [2004] VCAT 1264

DOMESTIC BUILDING LIST **VCAT Reference: D203/2002**

CATCHWORDS

Builder, Domestic Building Contract, Assignment, Novation, Domestic Building Insurance, Damages for Completion, Insurer not liable for overpayments.

APPLICANTS:	Mr Huner, Mrs Huner
FIRST RESPONDENT:	Housing Guarantee Fund Ltd
SECOND RESPONDENT	Uzay Pty Ltd
THIRD RESPONDENT:	Verdi Constructions Pty Ltd
WHERE HELD:	Melbourne
BEFORE:	Senior Member R. Young
HEARING TYPE:	Hearing
DATE OF HEARING:	28 and 29 October 2003, 10, 11 and 12 November 2003, 19 November 2003, 19 December 2003.
DATE OF ORDER:	29 June 2004

ORDERS

1. The first respondent has leave to withdraw its cross claim and there are no orders as to costs in relation to the cross claim.

2. The second respondent must pay the applicants the sum of $82,805.00.

3. The applicants application to review the first respondent's decision to refuse to indemnity them is upheld and the first respondent is directed to reverse its decision and to indemnify the applicants in the sum of $67,658.00 under the policy, together with the reasonable legal costs of the applicants associated with the enforcement of their claim.

4. **This proceeding is set down for a hearing at 9:30 am on 21 July 2004 at 55 King Street, Melbourne with an estimated hearing duration of one hour.**

SENIOR MEMBER R. YOUNG

APPEARANCES:

For Applicants:	Mr E Riegler of Counsel, who called the following witnesses:- Mr H Huner, Applicant Owner, Mr R Arends, Building Consultant, and, Mr W Lennon, Building Consultant
For First Respondent:	Mr K Howden of Counsel
For Second Respondent:	Mr F Uzay, Director
For Third Respondent:	Mr H Erliinoglu, Director

REASONS

1 INTRODUCTION

1.1 This is a claim by the owners, Huners, of a new dwelling at 61 Ravenhill Boulevard, Roxburgh Park against the builder of the premises alleging defective and incomplete work; the owners have brought the application against two companies, alleging in the alternative that one or the other is the builder. These companies are the second respondent, Uzay Pty Ltd, represented by its sole director, Mr Fikri Uzay, and the third respondent, Verdi Constructions Pty Ltd, represented by its sole director, Mr H Erliinoglu.

1.2 The owners second application was to seek a review of the insurer's refusal to meet the owners claim for indemnity for defective and incomplete works. The insurer, Housing Guarantee Fund Ltd ("HGF"), is the first respondent and is the insurer by reason of the enactment of the *House Contracts Guarantee (HIH) Act* 2001 to cover homeowners who held domestic building insurance with the failed insurer HIH.

1.3 Uzay Pty Ltd and Verdi Constructions Pty Ltd were represented by their directors. Mr F Uzay for Uzay Pty Ltd required a Turkish interpreter. Understandably neither director had a great understanding of the legal process. Discovery was a continuing problem throughout the hearing. On the second day of the hearing, I made orders for specific discovery by Uzay Pty Ltd and Verdi Constructions Pty Ltd relating to bank statements, bank records such as specimen signature cards, executed domestic building contract documents and documents forwarded by Uzay Pty Ltd to Mr H Erliinoglu and that company's invoices, and any documents sent by Verdi Constructions to Uzay Pty Ltd or Mr Uzay. On the due date Uzay Pty Ltd submitted it had complied with my directions but, on closer inspection, it became apparent it had not. In relation to

Verdi Constructions Pty Ltd, it informed the Tribunal that it could not meet the directions for further discovery as its previous accountant had all of its documents and would not release them due to a dispute between itself and the accountant. No request was made by Verdi Constructions Pty Ltd for an order that the accountant deliver up the materials, and no explanation was provided as to the specific details as to why the accountant would not provide the relevant documents. This being the case, there are many documents that would be relevant in establishing the precise positions of the parties in relation to the factual disputes in this proceeding; however, they were not produced and I must do the best I can.

1.4 A major issue in this case was who, out of Uzay Pty Ltd and Verdi Constructions Pty Ltd, was the builder under the major domestic building contract entered into in the names of the Huners and Uzay Pty Ltd? If the builder was Uzay Pty Ltd, there was an HIH Certificate of Insurance in the name of Uzay F. and, via that domestic building policy of insurance, the HGF may have to indemnify the owners for any failings of Uzay Pty Ltd, as builder, covered by the policy. If, however, the builder was Verdi Constructions Pty Ltd, then the policy in the name of Uzay F. would not respond to any shortcomings on behalf of Verdi Constructions Pty Ltd and HGF would not be liable to indemnify the Huners under the policy for such shortcomings. This meant that factual issues as to who in fact was the builder were hotly contested by the parties.

1.5 Due to the lack of legal representation for Uzay Pty Ltd and Verdi Constructions Pty Ltd, a further problem that arose when Uzay Pty Ltd led evidence-in-chief that had been contradicted by the evidence of one of the owners, H. Huner, and which had not been put to Mr Huner. H. Huner's Counsel sought leave for him to be recalled, and as it involved matters in issue I granted leave for the applicants to reopen their case and recall H. Huner.

1.6 During the final day of hearing, a letter was delivered to the Tribunal from Pattisons Business Advisors and Insolvency Specialists informing the Tribunal that, by an order made in the Supreme Court on 26 November 2003, Mr Paul A Pattison had been appointed as the official liquidator of Verdi Constructions Pty Ltd and that the proceeding against the company was therefore stayed unless the leave of the Supreme Court was given. The parties agreed that I could make findings against Verdi Constructions Pty Ltd, but I could not make any orders against Verdi Constructions Pty Ltd, I agree.

1.7 On the first day of the hearing it became apparent that the parties had not pleaded or particularised their causes of action clearly and with sufficient precision for the matters in issue to be determined. I gave leave for further amended points of claim, points of defence and replies to be exchanged prior to the hearing recommencing in November 2003.

1.8 Prior to any evidence being given, the HGF applied for leave to give its evidence last on the basis that it knew very little of the factual matrix of this proceeding. Neither the Huners, Uzay Pty Ltd or Verdi Constructions Pty Ltd objected to this and I granted such leave.

1.9 On 5 November 2003, the HGF filed points of cross claim; however, no leave had been given to file and serve such a cross claim and no fee accompanied the cross claim. On the first day of the hearing it became apparent that the cross claim had not been served on the Huners or any of the other respondents. After lunch on the first day, I was informed by Counsel for the HGF that it did not wish to proceed with the cross-claim and it was withdrawn. No party objected and, therefore, the points of cross-claim of the HGF of 5 November 2003 are withdrawn, with no orders as to costs.

1.10 Immediately prior to final submissions the HGF applied to re-open its case to put into evidence the terms of the HIH policy that was applicable

to the Certificate of Insurance taken out by F Uzay. The Huners opposed the application. However, the Huners could not demonstrate to me that there would be a detriment to them that was so severe it should bar the HGF from being able to put the relevant policy into evidence. Further, to consider the matrix of fact in this case without the actual words of the policy would lead to an artificial assessment. Accordingly, I allowed the HGF's application.

1.11 In setting out my reasons for this decision, I will initially set out the factual matrix with a broad brush of basically agreed facts. I will then set out each party's factual contentions as to who is the builder and what is the status of the Certificate of Insurance issued by HIH to the Huners. Once I have settled on my factual determinations in this proceeding, I will apply those to the parties' contentions of law, so as to come to a determination in this matter.

2 FACTUAL MATRIX

2.1 I have taken the general factual matrix from the evidence of the parties with an emphasis on the documentary evidence.

2.2 In 1998, H Erliinoglu, a carpenter and registered domestic builder, formed a partnership with F Uzay, a plumber and domestic builder with limited registration, to build dwellings, using as the partnership's corporate vehicle, a company owned by F Uzay, Uzay Pty Ltd. F Uzay and H Erliinoglu were made directors of Uzay Pty Ltd. The creation of the partnership was done in consultation with F Uzay's accountant and a joint bank account between the partners was opened in the name of Uzay Pty Ltd at the same time, with F Uzay and H Erliinoglu being joint signatories. Although H Erliinoglu and F Uzay disagree about some details there were a number of reasons for the formation of the partnership. Firstly, H Erliinoglu owed F Uzay approximately $17,000.00 for plumbing works F Uzay had carried out on domestic

building contracts of H Erliinoglu's; secondly, F Uzay only had a limited registration as a domestic builder and could not build more than 2 houses per year whereas H Erliinoglu had an unlimited registration, and, thirdly, H Erliinoglu, for an unexplained reason, had only a limited authorization to take out domestic building insurance by the insurance companies that issued such insurance, whereas F Uzay had a more extensive authorization and found it far easier to obtain the required domestic building insurances.

2.3 Some months after the foundation of the partnership, F Uzay arranged to have H Erliinoglu removed as a director of Uzay Pty Ltd. H Erliinoglu claims that this was without his knowledge and he was not aware of his removal until told by his solicitor, following a company search some time after this proceeding commenced. Under cross-examination F Uzay admitted that the partnership via Uzay Pty Ltd was set up to get around the requirements of the Building Act in relation to the need for a registered domestic builder in any corporate entity. F Uzay was aware that by removing H Erliinoglu as a director of Uzay Pty Ltd, the company no longer had a director that had unlimited registration as a domestic builder and, for the number of houses Uzay Pty Ltd was contracting to build annually, this was in contravention of the requirements of the Building Act.

2.4 The evidence was never precise, but it appears that the partnership built a number of houses. About the time of the signing of the contract for the Huners' house, the partnership had commenced or was about to commence a number of dwellings; however, the timelines for these other projects were not put into evidence, nor were any of their building contracts, so that information in relation to the other projects undertaken by the partnership remained vague.

2.5 In approximately September 1998 the Huners engaged an architect,

Ibrahim Kissa, to prepare architectural drawings, and they later engaged a structural engineer to provide the required engineering drawings and computations to construct a dwelling on the subject land. At this stage the Huners intended to do the work as owner/builders. In anticipation of this the architect lodged an application for a building permit on 14 December 1998 with the Hume City Council. A building permit issued on that date for the work to be carried out by the Huners as an owner/builders. The estimated value of the work was $140,000. Work did not commence under this building permit.

2.6 The Huners had previously known Mr H Erliinoglu, a builder, and arranged to meet him in March 1999 at their then residence. At the meeting Mr Erliinoglu gave the Huners a business card in the name of Uzay Pty Ltd, which showed himself as the manager of the company and F Uzay as director. Mr Erliinoglu informed the Huners that he worked in partnership with Mr Uzay and they built houses together.

2.7 The Huners gave their plans to Mr Erliinoglu, a few days later Mr Erliinoglu rang the Huners to arrange a meeting so they could discuss his quotation. Mr Erliinoglu's initial quotation was for $212,000 and, upon discussion with the Huners, some items were deleted or reduced in quality so that the price came to $195,000. Mr Erliinoglu prepared a Master Builder's Association of Victoria: HC5 "New Homes Contract" ("the domestic building contract") with a contract price of $175,000. At the same time the parties signed a hand-written agreement in the following terms:-

> "I, Harun Huner, gave Hasan Erliinoglu the sum of ten thousand dollars ($10,000) for the extra cost of the house on 61 Ravenhill Blvd. Roxburgh Park.
>
> Extra ten thousand dollars ($10,000) to be paid to the builder on or before the final payment for the house. This being the extra

cost of the house. Total being twenty thousand dollars ($20,000)."

Signed Harun Huner

"I received ten thousand dollars ($10,000). Balance ten thousand dollars ($10,000)."

Signed Hasan Erliinoglu

The handwritten agreement was dated the same day as the domestic building contract, 6 April 1999. I find that the handwritten agreement is a variation of the domestic building contract and the total contract sum for the construction of the Huners residence was $195,000.00.

2.8 H Huner paid a deposit of $8,750.00 by personal cheque made out to Uzay Pty Ltd and gave H Erliinoglu the $10,000.00 cash as required under the variation agreement. The deposit cheque was paid into the bank account of Uzay Pty Ltd by F Uzay and the $10,000.00 was retained by H Erliinoglu to, in his own words, "obtain supplies and pay workman".

2.9 In late April 1999 a surveyor, setting out the proposed house under the instructions of H Erliinoglu, informed H Huner and H Erliinoglu that the dwelling setbacks from the property boundaries were incorrect by 200mm and did not comply with the local municipality's requirements. An officer of the Building Department at Hume City Council investigated and found that the original approved plans were incorrect. He informed H Huner and H Erliinoglu that amended plans would be required for reconsideration and approval.

2.10 In June 1999 there were discussions between H Erliinoglu and F Uzay centring on the fact that the partnership was not satisfactory; there were counter allegations as to who was contributing the most to the

partnership and who was taking funds from the joint account without a proper accounting. At these discussions they agreed to split the partnership, but that this would only come into effect when, H Erliinoglu maintained, they had completed the work for which they had signed the domestic building contracts. F Uzay maintained it was for contracts where work had started. They apportioned the contracts between them with each being responsible to complete specific contracts; they agreed that at the completion of these dwellings they would have an accounting, which would account for the costs and any profits or losses resulting from the completion of the works. The accounting would signal the finalisation of the partnership. As part of his specific contracts, H Erliinoglu was to carry out the domestic building work under the Huner contract.

2.11 The decision to end the relationship between F Uzay and H Erliinoglu is evidenced by two letters, signed by F Uzay. The first of 25 June 2001 from F Uzay to H Erliinoglu states that H Erliinoglu and F Uzay would, at some time, come together and sort out the losses and profits. The letter goes on to demand a return of tools, which the letter claims belongs to Uzay Pty Ltd. The second letter is undated and written by F Uzay, apparently in response to a letter from Home Owners Warranty Limited that the insurance of Uzay Pty Ltd had been cancelled due to the partnership within Uzay Pty Ltd being dissolved. The letter is headed "To Whom It May Concern", but there is no dispute that it was forwarded to Home Owners Warranty Limited some time in July 1999; this letter informed the insurer that he had been equal partners in Uzay Pty Ltd with H Erliinoglu from July 1998 until July 1999 and they were still currently completing contracted works, but would not be entering into any new contracts together. As a result of the agreement to end the partnership F Uzay removed H Erliinoglu's name as a signatory to the joint account.

2.12 In approximately May 1999 H Huner instructed both his architect and his structural engineer to prepare and produce revised plans. During this process it became evident that the correct setbacks on the original arrangement of the house, specifically the position of the second storey, meant that the setbacks would not comply with the applicable planning standards as set out in the Good Design Guide. This required that the second storey be moved to the other side of the house in a mirror image of the original approved plans. H Huner and H Erliinoglu submitted the revised plans at Hume City Council on 28 July 1999 and the Council's building officer informed them that a new building permit was required. Both of them filled out the application form for a building permit. H Huner filled out the top box, consisting of the owner's name and address. H Erliinoglu filled out the balance and put as the name of the builder on the application, Verdi Constructions, with an address of 2/19 Rokewood Crescent, Coolaroo. This was a company owned by H Erliinoglu and of which he was sole director. H Huner said after he had completed the owner's name and address he gave the application to H Erliinoglu and he did not see what H Erliinoglu wrote on the application prior to its lodgement with the Council.

2.13 In August 1999, H Erliinoglu went to Cyprus for a number of months. Around this time H Huner rang the Hume City Council and requested to be informed as to when the second building permit would issue. He was told that before it would issue the Council would need to see evidence of domestic building insurance policy. H Huner rang H Erliinoglu in Cyprus on his mobile phone to ask when the domestic building insurance would be sent to the Council. H Erliinoglu rang F Uzay to request him to arrange the required domestic building insurance. Upon H Erliinoglu's return to Australia in mid-September 1999 he went directly to F Uzay's home to discuss with him the provision of domestic building insurance. At this stage F Uzay had not applied for domestic building insurance.

The next day or so, being 20 September 1999, F Uzay made application by facsimile to the Master Builders Association of Victoria ("MBAV"), who issued a Certificate of Insurance in the name of HIH Casualty and General Insurance Limited, the certificate named Uzay F as the builder. The Certificate of Insurance was forwarded to F Uzay by return fax on the same day as he had made the application to the MBAV, i.e. 20 September 1999.

2.14 H Erliinoglu gave a copy of the Certificate of Insurance to the Hume City Council and the Council issued the second building permit on 22 September 1999; this building permit named Uzay F as the builder.

2.15 Some work on setout and excavating the footings was done prior to the issue of the second building permit. Work on the Huner dwelling under the second building permit commenced at or about 22 September 1999 and the first progress payment claim for the base stage was rendered in October 1999 for $18,800.00; this was in the name of Verdi Constructions. H Huner asked H Erliinoglu why the claim was in the name of Verdi Constructions, H Erliinoglu informed him that the partnership with F Uzay via Uzay Pty Ltd was having trouble and H Erliinoglu no longer had access to the Uzay Pty Ltd joint account. As F Uzay had taken H Erliinoglu's name off the joint account he did not have sufficient working capital to carry out the contract work and he was going to use Verdi Constructions' account to carry out the work, accounting to Uzay Pty Ltd and F Uzay at the end of the work. H Huner said he was convinced by this and made out the base stage claim cheque to Verdi Constructions.

2.16 In November 1999, H Erliinoglu telephoned H Huner to request him to pay an advance of $10,000 on the frame stage; he gave as the reason that payments for other jobs had not been received on time and he was running short of working funds. H Huner paid the amount by cheque.

2.17 H Erliinoglu requested another $10,000.00 advance on the frame stage in March 2000 and H Huner paid by cheque. The progress payment claim for the frame stage was made near the end of March 2000 and H Huner paid $16,500.00 by bank cheque, being the balance allowing for the two early payments.

2.18 There were problems with the work being carried by H Erliinoglu. There were dimensioning errors in either the drawings or the construction, with the result that the roof trusses had to be rebuilt resulting in a substantial delay. There was also a lengthy delay in the ordering and delivery of the roof tiles. H Huner said the delays and construction mistakes were the result of the builder's unsatisfactory progress of workmanship. H Erliinoglu said that the delays were due to defective drawings and, further, that the Huners had run out of money and they were also experiencing marital problems.

2.19 In April 2000 H Erliinoglu requested H Huner for a $10,000.00 advance against the lock-up stage payment and H Huner paid by cheque.

2.20 At the time of seeking the frame stage of payment H Erliinoglu had not had a frame inspection by the building inspector. When this was carried out, some seven (7) months later, the building surveyor issued a Building Direction Notice on 10 October 2000 requiring ten (10) items to be completed or rectified before the frame stage could be regarded as satisfactory and the building work could proceed further.

2.21 In early November 2000, H Erliinoglu requested a further $10,000.00 advance against the lock-up stage payment from H Huner, who paid by cheque. At about the same time, the electrician complained to H Huner that he had not been paid by H Erliinoglu, presumably for the electrical rough-in, and he was not going to continue working. In November 2000, H Huner paid $4,000.00 to the electrician to keep him working.

2.22 In about January 2001, the building surveyor reinspected the frame, but the items requiring attention had not been completed and the frame was not passed.

2.23 In early January 2001, H Huner rang F Uzay and asked where H Erliinoglu was as his house was not progressing and H Erliinoglu was not on site. F Uzay said he did not know, but that H Erliinoglu also owed him money and that the partnership was over.

2.24 H Huner met H Erliinoglu in or about February 2001 to discuss the lack of progress with the works and the quality of the works. A short time later H Erliinoglu gave H Huner a lock-up payment claim. H Huner didn't consider that lock-up had been reached as there were external doors which had not been fitted and he refused to pay the balance of the lock-up claim. Near the end of February 2001, H Erliinoglu informed H Huner that unless he was paid he would not be performing any further work. H Huner gave H Erliinoglu a further $10,000.00 advance by bank cheque against the completion of the lock-up stage.

2.25 About March 2001 H Huner discussed a housing loan with the Commonwealth Bank to fund the completion of the contract works. The lending officer at the bank said that any progress payments claimed by the builder should be made in the name of the contractor named in the major domestic building contract, i.e. Uzay Pty Ltd. H Erliinoglu said H Huner told him any progress payment claim for lock-up stage would have to be in the name of Uzay Pty Ltd so that he could present it to the bank. H Erliinoglu said he had his stepdaughter prepare this invoice. F Uzay had no knowledge as to this invoice. H Erliinoglu maintained H Huner was making a loan application as he was running short of funds to complete the works. H Huner denied this but acknowledged that he had been told by the bank that progress payments should be made in the name of the builder on the domestic building contract.

2.26 In April 2001, H Huner sought legal advice due to the lack of progress on the building works. In August 2001, H Huner's solicitor sent Notices of Intention to Terminate under Clause 20 of the domestic building contract to Uzay Pty Ltd and Verdi Constructions Pty Ltd.

2.27 On 18 September 2001, H Huner's solicitor served a Notice of Termination of the Contract on Uzay Pty Ltd.

2.28 After obtaining quotations from builders, H Huner decided to carry out the completion of the works and the rectification of defects as an owner/builder. He resigned from his employment to supervise such work. H Huner gave evidence that the completion of the building works and the rectification of the defects were near to being finished.

2.29 The Huners lodged a complaint with the HGF on 20 November 2001. This complaint was subsequently rejected by the HGF in its letter to the Huners of 18 March 2002.

2.30 During the owner's completion of the works and rectification they found it necessary to move out of their dwelling and lease a property at 21 Lincoln Crescent, Roxburgh Park, at a rental of $190.00 per week; commencing on 28 May 2001, and ending on 1 May 2002.

2.31 At the time of hearing of these proceedings the contract works have largely been completed by the Huners and comparatively few completion and rectification items remain to be carried out.

3 FACTUAL DISPUTES

H Erliinoglu Signing the Contract

3.1 F Uzay's primary defence was that H Erliinoglu had no authority to sign the major domestic building contract with the Huners without himself countersigning the contract. F Uzay submitted that it was the partnership arrangement that domestic building contracts would only be entered into

when signed by both of the partners, F Uzay and H Erliinoglu. F Uzay said that all other contracts entered into by the partnership had been under joint signature. H Erliinoglu gave evidence that, and this was not contradicted by F Uzay, that it was normally he (as he had an unlimited domestic building registration) who sought out clients, gave quotations and arranged the domestic building contracts. H Erliinoglu gave evidence, which was not contested by F Uzay, that normally the company business was carried on at F Uzay's premises and this included the preparation of the contract documents. The records of the partnership in the name of Uzay Pty Ltd were normally retained by F Uzay at his dwelling; although some were in H Erliinoglu's possession. H Erliinoglu gave evidence that the contracts for the Huner contract were prepared at F Uzay's premises. The problems with discovery by F Uzay and H Erliinoglu have been alluded to; F Uzay was requested to produce any other domestic building contracts that were carried out by the partnership but none were produced. F Uzay's explanation for his failure to produce any other domestic building contract entered into by the partnership as builders was not satisfactory.

3.2 The partnership was a verbal agreement and on the evidence presented before me I do not consider that it was a term of the partnership agreement that both partners must sign every major domestic building contract that the partnership entered into. F Uzay acknowledged that H Erliinoglu had the unlimited registration as a domestic builder and it was H Erliinoglu's name and registration that would have to go on any domestic building contract to authenticate the authority of Uzay Pty Ltd to build the residence. Further, F Uzay did not dispute that H Erliinoglu had and was using business cards naming him as the manager of Uzay Pty Ltd.

3.3 I do consider it was an express term and it would also be an implied term of the partnership that the partners would co-operate and inform each

other of their actions. I consider that H Erliinoglu did inform F Uzay that he had signed a major domestic building contract to construct the Huners' dwelling at the time he gave the deposit cheque of the Huners to F Uzay to be put into the joint account.

3.4 F Uzay claimed that he did not know about the Huner contract until he was asked to obtain domestic building insurance for it in September 1999. H Erliinoglu submitted that he had told F Uzay at the time he went to F Uzay's home and gave him the deposit cheque for the Huner contract. F Uzay acknowledges receiving the deposit cheque drawn on H Huner's account for $8,750.00 and putting it in the Uzay Pty Ltd joint account, but claims that he did not ask what contract it related to; he acknowledged that he was aware that it was a deposit. I do not accept F Uzay's evidence, knowing that the cheque was for a major domestic building contract deposit and I was not convinced by his evidence that he did not request the identity of the parties to the contract. Further, to his first claim that H Erliinoglu had no authority to sign the contract with the Huners was ineffective as regards Uzay Pty Ltd, you would expect him to immediately contact the Huners and tell them that their major domestic building contract was ineffective. This he did not do. Therefore, I do not accept that he did not know about the Huner contract. I consider that F Uzay was aware of the Huner contract from the time he was given the deposit cheque and had full knowledge that, as he had not signed the contract, it could only have been signed solely by H Erliinoglu; and subsequent to that knowledge, he made no attempt to contact the owners.

3.5 At the time of H Erliinoglu signing the domestic building contract with the Huners F Uzay was the sole director of Uzay Pty Ltd, having had H Erliinoglu removed as a director a short number of months after the partnership was formed.

3.6 In such circumstances, I consider that F Uzay, being aware that a new contract was entered into in the name of Uzay Pty Ltd and not contacting the other party to that major domestic building contract, i.e. the Huners, has thereby ratified the major domestic building contract with the Huners with Uzay Pty Ltd as principal; *Wilson v Tumman* (1843) 134 ER 879 at 882: I consider F Uzay knew that H Erliinoglu had entered a major domestic building contract with the Huners when H Erliinoglu presented him with a cheque for $8750.00 for the deposit, F Uzay did not contact the Huners and inform them that the contract was invalid, but stayed silent and thereby acquiesced with the conduct of H Erliinoglu; *Bank Melli Iran v Barclays Bank* [1951] Lloyds Rep 367..

3.7 Notwithstanding ratification, I consider the silence of F Uzay, when he would be aware that the contract had been entered into solely by H Erliinoglu in breach of what he claimed were the terms of the partnership, would give rise to an estoppel in the hands of the owners, upon him trying to deny that Uzay Pty Ltd was the principal of the contract at the time of its formation; *Grundt v Great Boulder Goldmines Pty Ltd* (1937) 59 CLR 641 at 674 and *Thompson v Palmer* (1933)49 CLR 507 at 547 per Dixon J.

3.8 For these reasons I consider that there was a valid domestic building contract between the Huners, as owners, and Uzay Pty Ltd, as builder.

Uzay Pty Ltd Assigned or Novated the Domestic Building Contract with the Huners to Verdi Constructions Pty Ltd

3.9 It was a principal submission of the HGF that the major domestic building contract between Uzay Pty Ltd and the Huners was assigned or novated to Verdi Constructions Pty Ltd, as only Mr H Erliinoglu carried out the domestic building work and F Uzay did not contribute to the works under the Huners contract; and, all progress payment claims, except one, the last one for lockup towards the end of the builder's

participation, were in the name of Verdi Constructions Pty Ltd.

3.10 There was no express assignment of the Huners domestic building contract under the signature of the parties. The HGF submits that such assignment can be seen from the actions of the parties; firstly, in filling out the application for the second building permit the builder was named as Verdi Constructions and this indicated that both the Huners and H Erliinoglu were transferring the Huner contract to Verdi Constructions as builder. H Huner and H Erliinoglu both deny this, H Huner on the basis that he wasn't aware H Erliinoglu had put down Verdi Constructions as the builder. The application for the second building permit was made shortly after the discussion between H Erliinoglu and F Uzay when they had agreed to end their partnership and H Erliinoglu said that he put Verdi Constructions' name on the application by mistake. The only way that this could result in an assignment of the Huner contract is if the Huners agreed and there is no evidence that they did. Even if H Erliinoglu intended at the time of the application for the second building permit to take over the Huner contract this intention had disappeared by the time he had returned from Cypress and the need for domestic building insurance was pressing and only F Uzay could organize the required insurance which H Erliinoglu requested F Uzay arrange.

3.11 Secondly, in relation to the progress payment claims H Erliinoglu and H Huner are in agreement that H Huner queried the first progress payment claim for the base-stage when it was rendered in the name of Verdi Constructions Pty Ltd and not in the name of Uzay Pty Ltd. They also agree that H Erliinoglu informed H Huner that the partnership relationship had broken down, but the partners had apportioned the existing works of the partnership between them and would complete such works in the name of the partnership, i.e. Uzay Pty Ltd. H Erliinoglu further informed H Huner that F Uzay had removed his signature from the partnership's joint account in the name Uzay Pty Ltd

and he could not get money for materials or to pay labour and thereby he was retaining the Huner payments under his own control so that he could satisfactorily carry out the required building works under the Huner contract.

3.12 The HGF countered H Erliinoglu's assertion by submitting that he agreed he could have received money from Uzay Pty Ltd between June and December, 1999. Such sum totalling approximately $10,000.00 was in a number of payments and he also received approximately $60,000.00 from Uzay Pty Ltd to fund the work at another partnership contract at Newcombe Drive. Accepting that these sums were paid to H Erliinoglu, I do not consider this is sufficient evidence to establish that H Erliinoglu's evidence on this aspect should not be accepted. No evidence was given as to the contract sum of the Newcombe Drive contract or at what stage the contract was at when the funds were made available. The evidence of payments from Uzay Pty Ltd does not establish that H Erliinoglu could get sufficient funds at the time required to properly manage the construction of the works under the Huner contract. Once his name was removed from the joint account he could receive funds to manage the Huner contract only at the discretion of F Uzay and the use of the joint account was one of the main issues in the breakdown of the partnership. In his evidence, Mr F Uzay agreed that he had removed the signature of H Erliinoglu from the joint account about late June or early July 1999. Further, there is the letter of F Uzay to Home Owner's Warranty informing it that, by implication, the partnership had ceased in July 1999, but that the works contracted under the partnership would be completed.

3.13 I consider these facts sufficient to show that there was no novation or assignment of the Huner domestic building contract from Uzay Pty Ltd to Verdi Constructions Pty Ltd. Importantly, if the HGF wished to establish that there was novation, it would have to establish on evidence

that such novation had the consent of all parties, including the Huners; *The Aktion* [1987] 1 Lloyd's Rep. 283 at 310. There is no such evidence of consent and I do not consider that it can be implied from what I accept as the fact situation. I accept Mr H Erliinoglu's explanation, which was not denied by F Uzay, that he was taking and using the money through the corporate vehicle of Verdi Constructions Pty Ltd until such time as there was the partnership accounting between himself and F Uzay as alluded to in F Uzay's letter to H Erliinoglu of 25 June 2001. Therefore, to put a legal construction upon it, I consider that Verdi Constructions Pty Ltd was holding the money on trust for Uzay Pty Ltd until there was the final partnership accounting at the completion of the work the partnership had contracted to carry out at the start of July 1999.

The Relationship of F Uzay and H Erliinoglu

3.14 Both F Uzay and H Erliinoglu agreed that they made an agreement to co-operate and carry out joint ventures in erecting, under contract, dwellings. I would categorise their relationship as a partnership. They had agreed to co-operatively construct dwellings and to account for the profits equally between each other, acknowledging that H Erliinoglu owed some $17,000.00 to F Uzay at the time of forming their partnership for previous plumbing works carried out by F Uzay at the request of H Erliinoglu. I find that this formation took place some time in 1998. I find that the relationship between F Uzay and H Huner was a partnership between July 1998 and July 1999, utilising Uzay Pty Ltd as the corporate vehicle as set out in F Uzay's letter to Home Owners Warranty of July 1999: *Harvey v Harvey* (1970) 120 CLR 529.

3.15 I also find that a major reason for the creation of the partnership was that F Uzay only had registration as a limited domestic builder and was confined to erecting two (2) houses per year. H Erliinoglu's registration was unlimited; however, for reasons that were never explained

satisfactorily or in detail, H Erliinoglu was limited in the domestic building insurance he could obtain, whereas F Uzay had a greater capacity to arrange domestic building insurance. This is apparent from the fact that F Uzay arranged the Certificate of Insurance through HIH and, further, that he had been informed on 17 July 1998 that he was eligible to take out insurance under Home Owners Warranty, albeit that it was only limited to two (2) projects at any one time.

3.16 I accept that F Uzay and H Erliinoglu came into dispute in about June 1999 and agreed to dissolve their partnership and take an account of profits and losses once they had completed all of the work then in hand. There is a difference between the partners as to what the completion of their work meant. F Uzay maintained it was limited to domestic building contracts where work had commenced. H Erliinoglu maintained it was for where contracts had been signed. I accept H Erliinoglu's evidence. If F Uzay was right the partnership would in fact be repudiating any signed contracts where work had not begun, unless there was an express novation of the contract. As explained previously there was no express assignment of the Huner contract. To repudiate a valid contract without starting work would have potentially exposed the partnership to substantial damages. Also in his own words, in his letter to Home Owners Warranty of July 1999, F Uzay said that the partnership were completing contracted works.

3.17 I accept that F Uzay and H Erliinoglu agreed to separate the specific projects, with each individual taking responsibility for specific Uzay Pty Ltd projects; and, I accept that H Erliinoglu accepted responsibility to carry out and complete the Huner contract.

The Certificate of Insurance

3.18 There is no disagreement between the parties that, immediately upon his return from Cyprus, H Erliinoglu visited F Uzay at his home and

requested him to arrange for domestic building insurance and the issue of a certificate of insurance so that this could be presented to the Council and the building permit issued for the construction of the Huners dwelling. The next day or thereabouts, 20 September 1999, F Uzay faxed an application form to the MBAV, applying for domestic building insurance in the Huners' name. The same day, the MBAV forwarded by facsimile transmission to F Uzay, a "Certificate in Respect of Insurance", issued by HIH Casualty and General Insurance Limited on 20 September 1999, naming as the builder, Uzay, F. F Uzay signed the certificate in respect of insurance at the location marked "Builder's Signature and Date". The date he placed upon it was 20 September 1999.

3.19 Subsequent to the Certificate of Insurance, a schedule was forwarded to F Uzay regarding the insurance, the date of the policy is set out as 20 September 1999, the builder is stated to be Uzay F, with Hasan Erliinoglu as Project Manager under Builder's Registration No. DB-U13461 and Builder's Insurance No: B300600197. The premium, together with stamp duty, amounted to $355.00.

3.20 It was H Erliinoglu's evidence that F Uzay took out the Certificate of Insurance and gave it to him so that he could present it to the Hume City Council to obtain the required building permit and allow the contract works to commence.

3.21 F Uzay's evidence was directly opposed to H Erliinoglu's evidence; F Uzay averred that he took out the insurance because, upon H Erliinoglu's request, he considered that he would undertake the responsibility to carry out the work under the Huner contract, in effect take an assignment of that contract. He considered he would do this in his own name and thereby take the Huner contract outside of the partnership works. To this end, he obtained (or he had previously obtained, it was never made precise as to which) a copy of the drawings of the Huner dwelling and he

took out the domestic building insurance policy with HIH. The next day he visited the site, together with H Erliinoglu, and when he inspected the drawings and the site and compared it to the price of the Huner contract, he considered that the work could not be carried out for the contractual sum. It was his evidence that he declined to take over the Huner contract from the partnership and, whilst on site, he gave back the drawings of the Huners' dwelling to H Erliinoglu, which documents, he maintained, mistakenly contained amongst them the Certificate of Insurance. He gave evidence that, unbeknown to himself, H Erliinoglu took the Certificate of Insurance to the Hume City Council and obtained the building permit.

3.22 When asked why he did not request H Erliinoglu to return the Certificate of Insurance to him, F Uzay answered that he had forgotten the Certificate of Insurance. When asked why, after deciding not to undertake the Huner contract, he did not seek to redeem the useless Certificate of Insurance which had cost him $355.00, his answer was that he did not think he would get any reimbursement. When asked why he did not inform the Insurer that the Certificate of Insurance had been misplaced, he answered that he did not consider it mattered.

3.23 I find this aspect of F Uzay's evidence to be most troubling. For domestic builders to obtain authorization to take out domestic building policies they must agree to indemnify the insurer for any successful claim made against them and the insurer recovers such money from the builder. For F Uzay to take out an insurance policy in the name of the Huners, knowing that there was a domestic building contract in existence between themselves and Uzay Pty Ltd, and not be concerned when he mislaid the policy or to try to cancel such policy, exposed himself and Uzay Pty Ltd to a probable substantial money claim by the insurer in the event that the contract building works were not satisfactorily carried out under the management of H Erliinoglu. This has turned out to be the

case and gives rise to this proceeding. I accept that F Uzay's knowledge of domestic building contracts and insurance policies is not great but I consider he would be aware at the time of the issue of the policy that he could face a substantial recovery claim from the insurer. Therefore, I do not accept that he remained unconcerned as to the fate of the insurance policy I find that he agreed to apply for any take out the insurance policy for the Huners so that a building permit could issue and Uzay Pty Ltd meet its contractual obligations under the existing domestic building contract.

3.24 I do not accept that F Uzay took out the insurance to carry out the work himself; he applied for the insurance without initiating any discussion with the Huners regarding the assignment of the contract.

3.25 By not informing the HGF that the Certificate of Insurance was mislaid, he was in fact allowing a representation to be made to the Huners that Uzay Pty Ltd was the domestic builder for the construction of their house and he had taken out the domestic building insurance required under the *Building Act*. The Huners accepted this representation and allowed the contractual works to commence and proceed. I find that Uzay Pty Ltd is estopped from denying that it was the domestic builder under the Huner contract and that it had taken out the appropriate domestic building insurance as evidenced by Certificate of Insurance No. 1808150860 via its agent, F Uzay, its director: *Grundt* (supra), *Thompson* (supra) and *Walton Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 397, 427-28, 443.

3.26 On a purely factual basis, given that I do not accept F Uzay's complicated explanation for why he took out the Certificate of Insurance and how it came to be in the hands of H Erliinoglu and used without his complaint, I find the that F Uzay knowingly took out the Certificate of Insurance in his own name for the benefit of the Huners and gave such

Certificate of Insurance to be produced by H Erliinoglu to the Hume City Council in order to obtain the required building permit to permit the work to be carried out under the contract between the Huners and Uzay Pty Ltd.

3.27 This ends my analysis and findings of the factual differences between the parties. As a general comment, I do not consider any of the witnesses directly involved in the domestic building contract to be completely reliable; at various stages each of them gave inconsistent evidence in varying degrees. That is why I have attempted to analyse the factual structure of their evidence, taking into account any extraneous material that would throw light upon the factual matrix and also to consider whether the structure of their facts is consistent on the balance of probabilities. I will now examine the legal contentions of the parties.

4 WAS THE CERTIFICATE OF INSURANCE VALID?

4.1 The HGF claimed that the Certificate of Insurance and the Policy Schedule identified "Uzay F" as "the Builder" and as such, the policy could only relate to a contract between the Huners and Uzay F and there is no such domestic building contract. Therefore, the HGF submits there is no valid domestic building insurance policy agreeing to indemnify the Huners for any default of Uzay Pty Ltd.

4.2 The Huners submit that there is a valid certificate of insurance between them and Uzay Pty Ltd notwithstanding that the policy names the builder as "Uzay F" and they seek to establish this contention on a number of grounds:-

(a) Uzay Pty Ltd, via the actions of F Uzay, was an agent of the HGF for the purposes of procuring warranty insurance for the Huner project, and under Section 9 of the *Insurance (Agents and Brokers) Act 1984 (Commonwealth)* an insurer is responsible as

between the insurer and the insured for the conduct of the insurer's agent;

(b) the appropriate Ministerial Order, Number S122 of 30 October 1998, governing domestic building insurance policies requires that the HGF cannot avoid the policy or refuse to make payment on the grounds that, *inter alia*, the builder made misrepresentations to the insurer; and,

(c) the HGF is estopped from denying liability on the basis that the Huners acted in reliance on the HIH insurance policy: *Waltons Stores Ltd v Maher* (supra).

Facts of the Domestic Building Insurance Certificate

4.3 Under the *Building Act* 1993, a domestic builder cannot build a residence for an owner under a major domestic building contract unless that domestic builder holds domestic building insurance in accordance with the *Building Act*; such certificate of domestic building insurance indemnifying the owners against the builder's default is required to be produced to the building surveyor prior to that surveyor issuing the building permit for the construction of any dwelling.

4.4 At the time of F Uzay's application to the HIH, the partners, F Uzay and H Erliinoglu, had agreed that they would wind up their partnership and that they would finish all works for which they had entered a domestic building contracts. Therefore, I find that if F Uzay was acting on behalf of the partnership in applying for a domestic building insurance policy for the construction of the Huner residence by Uzay Pty Ltd, this means that in so acting F Uzay was, at the time of the application, acting as an agent of Uzay Pty Ltd.

4.5 At the time of applying to HIH for the Huner insurance policy, F Uzay must have been authorized by HIH at that time to make an application

for domestic building insurance as HIH issued a policy to the Huners. In its discovery Uzay Pty Ltd produced a letter from Home Owners Warranty Pty Ltd, another domestic building insurer, of 17 July 1998 addressed to F Uzay Pty Ltd which appears to authorize both F Uzay personally and the company to apply for domestic building insurance policies but limiting such applications to two contracts at any one time. This letter is dated around the same time as the creation of the partnership. No similar authorization was produced in relation to HIH but I would consider that on the balance of probabilities a similar authorization would have been given by HIH. I find, therefore, that at the time of making the application F Uzay was acting as an agent of the domestic building insurer, HIH, for the purposes of it entering a domestic building insurance policy.

4.6 A principal, in this case HIH, is bound by the acts of its agent, in this case F Uzay, and is liable for any loss caused by the acts of the agent: *Blackley v National Mutual Life Association of Australasia Limited* [1972] NZLR 1038; Bowstead on Agency, 15th Edition, page 413. Therefore, I consider the HIH is bound by the contract of domestic building insurance issued to the Huners notwithstanding that F Uzay is named as the builder instead of Uzay Pty Ltd. As such Uzay Pty Ltd is the undisclosed principal to the application via its agent, F Uzay, who is also the agent of that insurer, HIH which is bound by the act of its agent, notwithstanding that it had no knowledge.

4.7 Notwithstanding that F Uzay maintained that he had applied for the insurance in his own name as he intended to take over the Huner contract in his own name, I have previously found, as a matter of fact, that this was not the case and F Uzay was acting as agent for Uzay Pty Ltd. He misdescribed the name of the builder on the application and in effect he should have submitted that Uzay Pty Ltd was the builder.

4.8 The relevant Ministerial Order at Clause 8.4 states that the insurer cannot avoid the policy or refuse to make payment on the ground that inter alia, the builder made misrepresentations to the insurer. Accordingly, I find that the insurer, HIH, is bound by the contract of insurance it made with the Huners.

4.9 If the insurer, in this case HIH, and the misdescribed builder, in this case Uzay Pty Ltd, could avoid the insurance contract with the Huners because of F Uzay's misdescription of the builder in his application this would entirely defeat the purposes of domestic building insurance and would allow an insurer via the misdescription by its agent to avoid the insurance contract altogether. I consider that this is in breach of the equitable principle that a party cannot benefit from its own wrong.

4.10 This principle is illustrated by *Alghussein Establishment v Eton College* [1998] 1WLR 587 at 594 and *TCN 9 Pty Ltd v Hadden Enterprises Pty Ltd* (1989) 16 NSWLR 130 at 147. In the decision of *Drinkwater v Caddyrack Pty Ltd* (unreported, Young J, NSWSC, 25 September 1977) Young J looked at the underlying principles of law upon which it relies. He denominated some eight areas where it had application.

4.11 I do not consider that these areas should be strictly limited. In this case the HGF is seeking to argue that there is no contract in existence as the builder is incorrectly named, such misnaming being the act of the insurer's agent: I consider therefore that the insurer is attempting to benefit from the wrong of its agent, a wrong which it is bound by. I do not consider it can maintain such a case and is in effect estopped from alleging the invalidity of the insurance contract: *New Zealand Shipping Company Limited v Société des Atelieret Chantiers de France* [1917] 2 KB 717 per Scrutton LJ at page 574:

"A *party shall not take advantage of his own wrong, and therefore is estopped from alleging invalidity of his own breach of contract is the*

cause".

4.12 I also accept the Huners contention that the HGF is estopped from denying the existence of the contract of insurance with them on the general principles of estoppel by representation: *The Commonwealth v Verwayen* (1990) 170 CLR 394. The HGF is bound by the actions of its agent, F Uzay, in making an applications for the insurance policy with the misdescription of the builder as himself and not as Uzay Pty Ltd, where the Huners understood that F Uzay was to make an application for a policy of domestic building insurance which would cover them, as required by law, in their domestic building contract with Uzay Pty Ltd: see also *Waltons Stores Pty Ltd* (supra).

4.13 I do not accept the Huners' contention that F Uzay was an insurance intermediary within the definition at Section 9 of the *Insurance (Agents and Brokers) Act 1984 (Commonwealth)*; an insurance intermediary in that Act is defined as a person who undertakes such work for reward. I take reward to mean a positive payment for acting as an insurance intermediary and there is no evidence that this was so in the case of F Uzay.

4.14 Therefore, I find that there is a valid contract domestic building insurance between HIH, thereby binding the HGF under the relevant legislation, and the Huners.

5 QUANTUM: GENERAL

5.1 The only evidence as to quantum was called by the Huners. They called evidence of the cost to complete the incomplete works remaining under the scope of the domestic building contract after the builder's abandonment of the site and the cost to rectify defects. The evidence was in the form of costs already expended and estimates of costs to complete. To sustain their evidence on quantum, the Huners called Mr R

Arends, Building Consultant, and Mr W Lennon, Building Consultant.

5.2 As the Huners' evidence of quantum is uncontested, I consider that I must accept it, unless it has been effectively challenged in cross-examination or, alternatively, the evidence itself is factually unconvincing when considered together with all of the other evidence in the proceeding; *Heath v Minister* (1939) 57 WN 51, *Minister v Ryan* (1964) 9 LGRA 112 and *Middleton v R* [2000 WASCA 213] at para. 38.

5.3 In relation to the liability of Uzay Pty Ltd and Verdi Constructions Pty Ltd, it follows from my findings of fact that I consider that Uzay Pty Ltd, as builder, is liable for the incomplete and defective works and that I do not consider that Verdi Constructions Pty Ltd is liable to make good these deficiencies under the domestic building contract.

6 LIABILITY OF THE BUILDER, UZAY PTY LTD

Balance of Contract Sum

6.1 In relation to the major domestic building contract between the parties it is agreed that the contract sum stated in the appendix of the general conditions was in the sum of $175,000.00. I have previously found that there was a variation agreement made at the same time described by the Huners as upgrading works, but which I found formed part of the overall consideration flowing from the owners to the builder giving a total contract price of $195,000.00. In their final submissions the parties agreed that variations totalled $8550.00. This gave a total contract sum of $203,550.00. The parties agreed that the owners had paid the builder the sum of $108,050.00. This leaves a balance of the contract sum of $95,550.00.

6.2 It is a term of the contract between the parties at Clause 11.8 that;

"*The owners will make progress payments to the builder in accordance*

with the agreed and completed progress payment table as set out in Item 23 of the Appendix".

6.3 At the time the builder abandoned the site lockup had not been reached and the Huners had refused to make the lookup payment on the basis that that the stage had not been completed. I accept the evidence of R Arends, Building Consultant for the Huners, that the external doors remained to be installed at the time the builder abandoned the site, and, therefore the lockup payment was not due. Including the $10,000.00 paid as first payment of the variation agreement this would mean that the Huners should have only paid the builder $61,050.00 under the domestic building contract. Therefore, Uzay Pty Ltd could claim that the Huners have breached the domestic building contract by paying more than the required proper payments and that the balance of the contract sum applicable should be $203,550.00 less $61,050.00 being $142,500.00.

6.4 However, it was Uzay Pty Ltd, via H Erliinoglu, who claimed the additional payments from the Huners, payment claims that were not in accordance with the progress payment claims for completed stages as set out in the appropriate table at Item 23 of the Appendix to the general conditions of contract. To allow the builder to maintain such an argument would be another case of allowing a person to benefit from his own wrong, *Alghussein (supra).* As noted by Young J in the decision of *GHI Leisure Corporation Limited (In Liquidation) v Yuill and Ors (unreported 1994, 6 August 1997)* at Point 6 on page 11 of 13:-

"*A party may not in conscience rely on that parties non-performance of a condition precedent under the rule that no one can take advantage of his own wrongs. Where justice can be done by simply disallowing an offence founded on the failure of compliance with a condition precedent, a court of law had concurrent jurisdiction with a court of equity to do justice:* Edwards v Aberayson Mutual Ship Insurance Society (1876) 1

QB 563 at 581."

6.5 Therefore Uzay Pty Ltd would be estopped from seeking to make a claim that the Huners were in breach and had overpaid the builder: *New Zealand Shipping* (supra) at p 724.

Rectification and completion costs

6.6 The respondents only challenged the Huners assessment of quantum in two areas:-

(a) the amendment of the flooring from chipboard and carpet to timber strip and timber parquetry flooring; and,

(b) the quantum of the remaining expenditure to complete the works.

6.7 Dealing with the floor first, the domestic building contract called for a chipboard floor upon which carpet was to be laid. There was a carpet allowance under the domestic building contract of $22.22 per square metre. In carrying out their rectification works and completing the residence the Huners installed timber strip flooring and timber parquetry at a total cost of $16,550.00. The respondents submit that there is no itemisation of the timber flooring cost in the assessments which would allow the parties or the Tribunal to assess what were rectification works i.e. removing and replacing defective chipboard, and what were completion works. It is recognized that the supply and laying of the carpet is a completion item. I will address this problem when I finalise my findings in relation to the flooring costs.

6.8 The Huners and the HGF addressed the costs of removing and reinstating the chipboard floor and their cost assessments largely agree, such cost coming from the cross-examination of W Lennon, a Building Consultant for the Huners. The only item of about which they disagree is the cost of removing the existing decayed chipboard. The Huners allowed $14.00

per square metre for removal and the HGF allowed $2.88 per square metre for removal. As the cost of supplying and laying replacement chipboard in both assessments is accepted at $21.00 per square metre I consider the Huners estimate for the removal of the chipboard is too high. I consider this item of work for an area of 200 square metres would take two men two days to remove and clean up the sub-floor structure ready for new chipboard to be laid. This would be about $6.00 per square metre giving a removal cost of $1200.00. Together with the agreed costs it would give a rectification cost of removing and replacing the chipboard of $5700.00. The cost to complete would be the cost of sanding the chipboard, which had not previously been carried out, and the supply and laying of the carpet at its allowance rate of $22.22 per square metre. This sum is $5044.00.

6.9 In relation to both of the parties' analysis of this aspect of the Huners damages I do not follow the reasoning of either of their final submissions and I have undertaken my own analysis as follows.

6.10 As there is no apportionment of the $16,550.00 the Huners spent to replace the damaged chipboard flooring with strip timber and timber parquetry flooring I consider the most logical course is to assume that the estimate of cost above for the removing and reinstating of the chipboard flooring of $5700.00 is correct, by deducting this sum from the $16,550.00 it gives a cost to complete the timber strip and parquetry flooring of $10,850.00. The estimate to complete the floors in accordance with original contract by laying a chipboard substrate and allowing the carpet at the allowance given in the contract is $5044.00. Thus, I consider that the costs to complete allowing for the floor covering as per the contract should be reduced by the difference between $10,850.00 and $5,044.00, being $5,806.00; this would reduce the cost to complete for works carried out from $108,862.00 to $103,057.00.

6.11 The second aspect of this part of the analysis is to assess the remaining cost to complete as set out at Table 5 of Mr Lennon's report "for work not yet completed". The Huners submitted that there was no proof that they had paid for the work described in the table that Mr Lennon observed to be completed; they submit his conclusions as to the total sums to complete the work should be accepted. This would mean ignoring the comments in Table 5 of Mr Lennon's report regarding the external render and the tiling items in which he gave the opinion that the amount of work remaining was substantially less than that shown in the concluded sum column for those items.

6.12 The HGF submits that Mr Lennon's comments should be adopted and not the amount shown in the concluded estimate column. I accept the HGF's position because Mr Lennon agreed in cross-examination that although he had put in a cost $9,000.00 to complete the external render, from his inspection he estimated that only $2,000.00 of external render remained to be completed. In relation to the tiling of the balconies and the stairs which had a cost to complete against it of $2,000.00 his inspection showed that this work had already been completed. The HGF submitted that therefore $9,500.00 should be deleted from the estimate from works remaining to be completed.

6.13 The estimate of the expenditure of work to be completed was prepared by the Huners and I consider the burden the proof is on them to establish that the amounts in the concluded sums column of the Lennon report were not paid. There was no evidence in relation to these amounts not being paid and I accept the evidence of Mr Lennon from his report and in cross-examination that the cost for this aspect of the work should be reduced to the amounts given in his comments.

6.14 Therefore, the Huners cost to complete estimate of $21,150.00 will be reduced to $11,650.00.

6.15 By accepting that the removal and replacement of the decayed chipboard was a rectification item and carried out for the estimate of $5,700.00, I do not accept the HGF's submission that there needs to be adjustments to the Huners estimate of the sum of the incurred and future rectification costs of $43,522.00.

Liquidated damages

6.16 Notwithstanding that H Erliinoglu claimed there were dimensioning errors in the drawings resulting in lengthy delays in rebuilding the roof trusses and the delivery of roof tiles, the builder did not apply for an extension of time in accordance with Clause 15 of general conditions of the domestic building contract and under the contract is not entitled to an extension of time. Therefore I accept the Huners assessment of liquidated damages in the sum of $10,727.80.

Alternative Accommodation

6.17 I accept the Huners evidence that they required alternative accommodation while rectification and completion works were being carried out and on their evidence of payments for the rental property I accept they rented the alternative accommodation for 224 days post the date of termination at a rental of $190.00 per week giving a sum for alternative accommodation of $6048.00.

Damages for Lost Income

6.18 The Huners claim that Mr Huner left his employment to supervise the rectification and completion work after the abandonment of the contract works by Uzay Pty Ltd and that in doing this they mitigated their damage. Mr Huner claimed that he supervised the rectification and completion works for 32 weeks and in his previous regular employment he had earned a gross amount of $1,000.00 per week. He gave evidence that his employer, South Pacific Tyres, was shutting down its

establishment in Thomastown and relocating to Somerton. Mr Huner decided he wanted to finish the house and so he took a retrenchment package so he could complete the house. Mr Huner gave evidence that he considered he could get another job when he wanted it. I did not find his evidence to be convincing that find he left his employment to supervise the finishing of his dwelling; rather I consider he did not want to relocate and he wanted to take the package. If I am wrong in this, I consider the size of the package should be credited against his loss of income for the period of supervision as this was not a loss to him and in his own evidence he can obtain a job when required.

Damages for Loss of Amenity

6.19 The Huners claim that works were not performed in accordance with the architectural plans in that the garage is larger than is dimensioned on the amended architectural plans and some of the rooms in the house are consequently smaller. To achieve a layout in conformity with the architectural plans at this stage would require demolition and re-building of the Huner dwelling. The Huners acknowledged that this is not reasonable and submit that they should be given compensation for the Uzay Pty Ltd failure to build in accordance with the architectural plans.

6.20 Uzay Pty Ltd constructed the Huners dwelling to plans provided by themselves. As described in the facts above, the owners' original plans were significantly wrong with respect to allowable set backs and had to be redrawn and resubmitted to the Hume City Council. It was to these amended plans, for which the second building permit was issued, that the Uzay Pty Ltd had to build.

6.21 H Erliinoglu maintained that there were inconsistencies between the second architectural and second structural plans that meant he could not build to the dimensions shown on the architectural plans if the building as laid out on the engineering plans was to be structurally sound. He

gave evidence that he told H Huner of this when it became apparent.

6.22 Both of the building consultants for the Huners, Mr R Arends and Mr W Lennon gave evidence that they had not been requested to check the dimensional consistency of the plans themselves or as between the architectural and structural plans.

6.23 I accept that the dwelling is not in dimensional accord with the architectural plans but I am not convinced these inconsistencies arose as a result of defective work by Uzay Pty Ltd; therefore the builder is not liable for these inconsistencies. This aspect of the Huners claim fails.

Claim against the Builder, Uzay Pty Ltd

1.	Damages for defective and incomplete work.	
	(a) Costs of rectification works	$ 35,893.53
	(b) Costs of rectification works to be done	$ 7,628.50
	(c) Costs of completion work	$103,057.00
	(d) Costs of completion work to be done	$ 11,650.00
	Total Cost to rectify & complete	$158,229.00
	Less balance remaining in the contract	$ 95,500.00
	Damages for Defective & Incomplete Work	$ 62,729.00
2.	Liquidated Damages	$ 10,728.00
3.	Alternative Accommodation	$ 6,048.00
4.	Lost income	Nil
5.	Loss of amenity	Nil
6.	Construction Insurance	$ 2,157.00
7.	Renewal of Building Permit	$ 144.00
8.	Temporary Fencing	$ 999.00
	Damages due from Builder, Uzay Pty Ltd	**$ 82,805.00**

7 CLAIM AGAINST THE INSURER

General

7.1 The Huners and the insurer are in agreement as to what heads of damage the owners could claim against the insurer. The only points of variance are in relation to the allowance for the cost of rectification works and the capped cost of completion. Liquidated damages and consequential losses such as loss of income are expressly excluded as compensable items under the domestic building insurance policy.

7.2 From results of my analysis above of the allowable rectification costs I accept the Huners' rectification costs of $43,522.00.

Damages for costs of completion

7.3 Both parties' calculations of the Huners appropriate damages for costs of completion assumed that the Huners were entitled to 20% of the contract price as it was obvious that their costs of completion from the time of the Uzay Pty Ltd's abandonment to the completion of the contract works was well in excess of 20% of the contract price. Both parties submitted that they had based their computations upon the decision of *Housing Guarantee Fund v Dore* [2003] VSCA 126.

7.4 On my reading of *HGF v Dore* (supra) I am not sure that they are correct. Under the accepted principles of contract law a party is entitled to recover from the party in breach of the contract what is necessary to put the innocent party in the same position as if the contract had been performed: *Robinson v Harman* (1848) 1 Exch 850 at 855; and, where the builder abandons the site with work remaining the innocent party can recover the price it had paid the builder plus the cost of completing the work within the scope of the contract less the contract price at the time the builder abandoned the contract: *Mertens v Home Freeholds Coy.* [1921] 2 KB 526.

7.5 In relation to the domestic building insurance policy between the Huners

and HIH, the common law position has been modified by the Ministerial Order of October 1998 which, under the policy, limits the amount an owner can recover for completion costs; sub-clause 5.5 of the Ministerial Order states "*Subject to clause 5.2, the policy may exclude or limit claims under the policy:.5.6 made under the indemnity for non-completion of domestic building work required by clause 5.1.3 to the extent that the cost of completing the domestic building work (excluding the cost of rectifying any defective building work) exceeds the contract price under the relevant major domestic building contract by more than 20%*": see Victorian Government Gazette of 12 November 1998.

7.6 In the insurance policy between the HIH and the Huners the limitation at clause 5.5.6 in the Minister's Order is set out at clause (b) of the "Limit of Indemnity Applicable to this Policy" as:-

"*The insurer shall bear no liability for claims arising from non-completion of domestic building work for any reason listed in Item (2) of the definition of Prescribed Cause to the extent that the cost of completing the domestic building work (excluding the cost of rectifying any defective building work) exceeds the contract price specified in the Schedule for the Major Domestic Building Contract by more than 20%.*"

7.7 This limitation on recovery has been the subject of a number of proceedings in the Tribunal: *Bulboa v Royal and Sun Alliance Insurance Australia* [2002] VCAT 316 and *Dore v Housing Guarantee Fund* [2002] VCAT 1495. *Dore (supra)* was the subject of appeal to the Court of Appeal: *Housing Guarantee Fund Limited v Dore* [2003] VSCA 126 The leading judgment was delivered by Phillips JA with whom Ormiston JA agreed, with Ashley AJA dissenting.

7.8 The parties maintained that the costs of completion on the basis of the Court of Appeal's decision meant that the Huners should recover 20% of the contract price as the allowable damages for the cost of completion.

7.9 As I have said above I am not sure they are correct. Firstly, to adopt 20% of the contract price as the damage for non-completion does not accord with the logical assessment of the Huners loss for non-completion. Further, it does not accord with the accepted principles of contract law I have set out above; and, I do not consider it accords with the decision of Phillips JA.

7.10 Accepting the principle in *Mertens* (supra) the Huners' damages for non-completion is the total of the sums they have paid the builder and the costs of completion and rectification less the cost of the contract; or the cost of completion and rectifying defective works less the balance of contract sum. If the costs of rectification work is left out of the assessment, as it is excluded by the Ministerial Order, the damages for non-completion taking into account the balance of the contract sum, is $114,707.00 less $95,500.00 as being $19,207.00. This is substantially less than 20% of the contract sum which is in the order of $35,000.00; thus, to use 20% of the contract sum as the Huners damages for non-completion overcompensates them on an actual assessment of their loss according to accepted contractual principles.

7.11 This is also obvious from an example: if a builder repudiates his obligation under a building contract close to the start and before any progress payment is due and the owner obtains a price to complete less than the original contract sum, the owner has suffered no actual loss but under the position maintained by both parties the owner would be entitled to 20% of the contract sum for loss on the completion costs.

7.12 Turning to the relevant authorities, the competing views as to the construction of limitation (b) in the *Dore* (supra) was, on the one hand, "the cost of completing the building contract" meant the cost to the owner from the time the builder abandoned the contract until the completion of the works under the contract could not exceed 120% of

the original contract price, regardless of what moneys had been paid to the builder under the contract.

7.13 The alternate view was that "the cost of completing the building contract" meant the total price to the owner starting with the progress payments made to the defaulting builder, plus all of the costs to the owner associated with completing the contract works after the defaulting builder's abandonment of the site; such that the damages for this head, being the total price less the contract sum, could not exceed the contract price by 20%. In other words, the total cost to the owner from the start of the contract until all of the contract works by whichever means had been completed could not exceed 120% of the contract price of the original builder if the owner was to recover his actual losses for non-completion.

7.14 I consider it is the second view that found favour with Phillips JA; His Honour reasoned at paragraphs 21 and 22 of his decision:

"*To my mind, the lack of a sound reason for comparing the cost of completing a part with the contract price for the whole, and especially the contract price plus a further 20%, provides a compelling reason for rejecting the construction which would permit, and indeed require, this comparison otherwise than of like with like.*

Given the forgoing, I see nothing against, and everything in favour of the construction adopted by the Tribunal. According to the Tribunal, "the cost of completing the … work" meant the cost of the whole, not merely the cost of finishing the uncompleted portion of the work."

7.15 And as His Honour set out at paragraph 24 of his decision:

"The simplest solution to both problems was by comparing the total contract price of building the project to completion with the actual cost to the insured, again, of completing the project as a whole (and not just

in part) - which is how the limitation provisions is drafted. And to select the one fixed amount (20% of the total contract price) as a maximum irrespective of how much work was left unfinished, while it may be an arbitrary limited, is none the less explicable as fixing that highest amount by which default on the part of the original builder is to be remedied by the insurer. If there is little of the work left unfinished when the builder (as here) becomes insolvent, the limited may not be called into play. If there is a great portion left unfinished, the limit will surely bite, but so be it; it provides the maximum measure of the insurance and a measure which is very fairly made referrable to the total contract price in the first place. In all cases the insured is entitled to no more than the additional 20% over and above the contract price."

7.16 I consider the Court of Appeal's decision requires not a comparison of the cost to the owner of completing the building work from the time of the builder's abandonment to the completion of the contract works to 120% of the contract price; rather, it requires the comparison of the total cost to the owner of the cost of completing all of the contract works no matter how they are carried out against the original contract price with the defaulting builder plus 20%; the limitation being that under the policy an owner cannot recover more than the contract price plus 20% as damages for non-completion.

7.17 Limitation clause (b) in the *Dore (supra)* decision is the same clause in the subject domestic building insurance policy under consideration in this proceeding. I note Phillips JA's observation that limitation (b) in the subject insurance contract does not accord with the Ministerial Order, in that the order requires the 20% of the "contract price under the relevant major domestic building contact", whereas limitation (b) required 20% of the "contract price specified in the Schedule for the Major Domestic Building Contract". As His Honour further observed at paragraph 11 of the decision, both of the Ministerial Order and the insurance policy at

Clause 3 of the "General Provisions" require that all provisions in the insurance contract be read as if they comply with the Ministerial Order. I consider that "the contract price under the relevant major domestic building contract" should be the contract price at the time of the abandonment of the contract by the builder. Thus any agreed variations at this time should be included in the contract price. I have found that the contract price at the time the builder abandoned the contract was $203,550.00. Under limitation (b) 120% of this sum is $244,260.00. This is more than the total cost of completion to the owners; therefore limitation (b) has no effect on the Huners damages for cost of completion and the Huners damages for non-completion are the same for the builder, Uzay Pty Ltd, and the HGF, being $19,207.00.

Deductions for payments being made not in accordance with Sections 11 and 40(2),(3) and (4) of the *Domestic Building Contracts Act*.

7.18 The HGF maintains that the Huners damages for non-completion should be reduced by the amount of progress payments that the Huners made to Uzay Pty Ltd in excess of the progress payment schedule set out in Section 11 and in the Table to Section 40 of the Act. The HGF submits that such excess progress payments are in breach of limitation (e) of the domestic building insurance policy, which states:-

"*The insurer shall not be liable for any monies paid to the builder or for the builder's benefit in relation to the Major Domestic Building Contract which exceeds the amounts that ought to have been paid in accordance with Sections 11 and 40(2), 40(3) or 40(4) of the DBC ACT."*

7.19 On the basis of normal contractual principles in the circumstances of these proceedings I do not see why this limitation should apply. I accept that limitation (e) would operate if the owners were seeking direct recompense under the policy for progress payments made to the builder in excess of either Sections 11 or 40 of the Act, such that a head of

damage in the Huners claim was for overpayments to the builder. However, that is not the case, the Huners are not seeking any damages for overpayment. They are seeking the cost of completion which is subject to limitation (b), which protects the insurer to an excess of no more than 20% over the contract price for damages for non-completion.

7.20 Further, I consider that to impose limitation (e) would be to act unfairly to the Huners. If the obverse situation is considered, if the owners had repudiated the contract the builder would be entitled to take into account all the work he had carried out on the lockup stage at contract rates, notwithstanding that it was not complete and the progress payment for that stage was not due: *Felton v Wharrie* (1906) HBC (4th Ed), Volume 2, page 398. Likewise, I consider that the owners are entitled to take into account all of the payments they have made to the builder in assessing their claim under the policy for non-completion, subject always to limitation (b) on the recovery for the cost of the completion of the works. Therefore, I consider that limitation (e) has no application to the Huners claims under the insurance policy that are in issue.

7.21 If I am wrong in this I consider that the application of limitation (e) could only reduce the damages applicable for the cost of completion. Limitation (e) would have no effect on the quantum of damages recoverable for rectification works, alternative accommodation, or the other heads of damage. To find otherwise, I consider, is not to compare like with like and allows for the diminution of the Huners claim against the HGF where the HGF was not liable to be pecuniarily affected by a breach by the owners of the requirements for progress payments set out under the *Domestic Building Contracts Act*.

The Huners claim against the HGF

7.22 Therefore, based on my analysis I find that the HGF should indemnify the Huners for the following heads of damage and their amounts:-

Rectification costs	$43,522.00
Completion costs	$19,207.00
Alternative accommodation	$ 1,629.00
Construction insurance	$ 2,157.00
Building permit renewal	$ 144.00
Temporary fencing	$ 999.00
Indemnity due to Huners from HGF	**$67,658.00**

8 CONCLUSION

8.1 I make no orders against the third respondent, Verdi Constructions Pty Ltd.

8.2 I find that the second respondent, Uzay Pty Ltd, as the builder in the domestic building contract with the Huners to construct 61 Ravenhill Boulevard, Roxburgh Park, is to pay the applicants, Huners, the sum of $82,805.00 for incomplete and defective building work.

8.3 I find that the applicants, Huners, review of the first respondent's, HGF, decision to refuse to indemnify them should be upheld and the HGF is directed to reverse its decision and to indemnify the Huners in the sum of $67,658.00 together with the reasonable legal costs of the Huners associated with the enforcement of their claim.

8.4 I have had the Registry set this proceeding down for and requests for consequential orders and further submissions the parties may wish to make, this hearing will take place at 9:30 am on 21 July 2004 at 55 King Street, Melbourne.

SENIOR MEMBER R YOUNG