VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. D411/2014

CATCHWORDS

Domestic Building Contracts Act 1995 - s.40 - contract price payable otherwise than as specified in Act - *Domestic Building Contracts Regulations* 2007 - regulation 12 acknowledgement must be signed by owner - initials on page not signature – excess payments to be returned by builder if requirement is not satisfied - where excess repaid unpaid proportion of contract price correspondingly increases - whether owner estopped from relying upon the Act - whether contract novated - variations - whether allowable - extension of time claim by builder - when claimable under HIA contract - no delay damages for extension of time due to variation - use of alternate materials - onus of proof on builder that rectification unreasonable - calculation of damages – "substantial breach" – meaning - whether termination unreasonable

APPLICANT	Imerva Corporation Pty Ltd (ACN 124 486 308)
RESPONDENTS	Anton Kuna and Jaga Kuna
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	1 - 11 June 2015. Written submissions received by 23 September 2015
DATE OF ORDER	27 November 2015
CITATION	Imerva Corporation Pty Ltd v Kuna (Building and Property) [2015] VCAT 2058

ORDER

1. The Applicant's claim is struck out.
2. Order on the counterclaim that the Applicant to pay to the Respondents $97,858.33.
3. Costs reserved.

SENIOR MEMBER R. WALKER

Appearances:

For the Applicant	Mr J. Forrest of Counsel
For the Respondents	Mr S. Stuckey of Counsel

REASONS FOR DECISION

Background

1. The applicant ("the Builder") is and was at all material times a builder. Its director Mr Schachter is a registered builder.

2. The respondents ("the Owners") are the owners of land in Brighton. In early 2011 they decided to demolish an existing house on the land and build two connected units. They intended to live in one unit and rent out the other.

3. The Owners' daughter, Marina Kuna Paritsi ("Ms Kuna") and their son-in-law, Mr Paritsi, are former business associates of Mr Schachter. Ms Kuna is a former solicitor but has not practised for many years.

4. By a building contract dated 13 January 2013 ("the Contract") the Builder agreed to construct the units for the Owners for a price of $1,983,024 inclusive of GST.

5. There is an issue as to the manner in which instalments of the Contract price were to be paid. There was a list of instalments prepared by the Builder on page 10 of the Contract and on page 9 it is provided that the price will be paid in the proportions set out in s.40 of the *Domestic Building Contracts Act* 1995 ("the Act").

6. Progress claims made by the Builder appear to have been made in accordance with the list that it had provided and not in accordance with s.40 of the Act. The project was to be funded by the Owners' bank and as the progress claims were made they were duly paid.

7. Work commenced on or about 3 February 2013. There were a number of variations to the scope of works. The Owners acknowledge they requested and are responsible for variations, 1 to 6 but the other variations claimed are disputed.

8. As work proceeded disputes arose between the parties as to the quality of the work, particularly in regard to the construction of the party wall between the two units.

9. In early April 2014 the Owners engaged Mr Lorich, a building expert, who inspected the work and provided a short report detailing a number of defects. They also engaged Integrated Fire Services to inspect the party wall which was found to be non-compliant.

Termination notices

10. On 7 April 2014 the Owners served a notice to remedy a breach of Contract on the Builder, purportedly pursuant to Clause 43.2 of the Contract, providing the Builder with 10 days to remedy the breaches identified in the notice.

11. On 11 April 2014 the Builder served a notice to remedy breach, purportedly pursuant to Clause 42 of the Contract, complaining of non-payment of progress payments 8, 9 and 10, totalling $356,144.00.

12. Attempts to negotiate resolution of the dispute failed and on 24 April 2014 the Owners served a notice on the Builder purportedly ending the Contract pursuant to Clause 43.3. On the same day they changed the locks and excluded the Builder from the site.

13. On 29 April the Owners received from the Builder a notice purporting to end the Contract pursuant to Clause 42. Thereafter there was no further work done on the project by the Builder.

This proceeding

14. On 6 May 2014 the Builder commenced these proceedings claiming the sum of $529,820.62. The Owners counterclaimed seeking unspecified damages. By their amended counterclaim filed 27 February 2015 they also claimed repayment of the sum of $634,568.12 said to have been an overpayment of progress payments made under the Contract.

The hearing

15. The matter came before me for hearing on 1 June 2015 with 10 days allocated. Mr J. Forrest of Counsel appeared on behalf of the Builder and Mr S. Stuckey of Counsel appeared on behalf of the Owners.

16. In his opening Mr Forrest said that the Builder was claiming the following amounts:

    (a) $356,944.00 for three unpaid progress claims, numbered 8, 9 and 10;

    (b) $79,319.07 for variations;

    (c) $69,260.00 for "delay costs";

    (d) Interest under the Contract;

    (e) A 10% Builder's margin on the unpaid progress claims and variations; and

    (f) GST.

17. The Owners' claim is for the following amounts:

    (a) $634,568.00, being the return of all of the progress claims that they had made after the base stage;

    (b) $1,103,476.00, being the additional cost to complete the units;

    (c) $82,704, being the cost of rectification and incomplete works.

Evidence

18. Evidence was given on behalf of the Builder by Mr Schachter and a building expert, Mr L Mitchell.

19. Evidence was given on behalf of the Owners by Mr Anton Kuna and his daughter, Ms Kuna. Expert evidence was given on behalf of the Owners by Mr

R. Lorich, their building expert, and by Mr Brown, a technical manager from Boral, which designed the system and manufactured the components of the firewall system, which forms part of the party wall.

20. The Owners' son-in-law, Mr Paritsi, was not called. Mr Paritsi works as a project construction manager for a company involved in commercial construction and has some building expertise. He was closely involved in the construction, advising the Owners and giving instructions to the Builder. Mr Forrest invited me to infer that he did not give evidence in order to avoid being cross-examined. He pointed to the evidence given by Mr Kuna who has no knowledge of building matters and said that much of his evidence appears to have been second hand.

21. It is clear from the documents and the evidence of the other witnesses that Mr Paritsi would have been able to give evidence as to many matters to do with the construction but the same could be said about the Builder's supervisor, Mr Lewis, who was also not called. In the end, it is a matter for each party to determine who shall be called and who shall not. The disadvantage suffered by the Owners from not calling Mr Paritsi is that some of Mr Shachter's evidence could not be contradicted.

22. During the course of the hearing I visited the site with the parties and their representatives and experts. Following the conclusion of the evidence the proceeding was adjourned for oral submissions but, due to the delay in obtaining transcript it needed to be further adjourned more than once. Finally, because of difficulties in obtaining a mutually convenient date for oral submissions, directions were given for the filing and serving of written submissions which were ultimately received by 23 September 2015.

The issues

23. The main dispute between the parties was as to the manner in which progress payments under the Contract were to be made.

24. The Owners rely upon s. 40(2) of the *Domestic Building Contracts Act* 1995, which provides as follows:

> "40 (2) A builder must not demand or recover or retain under a major domestic building contract of a type listed in column 1 of the Table more than the percentage of the contract price listed in column 2 at the completion of a stage referred to in column 3.
>
> Penalty: 50 penalty units."

25. There follows a table setting out various percentages claimable at various stages of contracts to build to particular stages of construction. For a contract to build to all stages the required percentages are 10% for base stage. 15% for frame stage, 35% for lock-up stage and 25% for fixing stage with the final 15% to be paid upon completion.

26. Subsection (4) provides that the restriction does not apply if the parties agree that it is not to apply and do so in the manner fixed by the regulation. The

relevant regulation is Regulation 12 of the *Domestic Building Contracts Regulations* 2007, which provides as follows:

> "For the purposes of section 40(4) of the Act, when parties to a major domestic building contract agree that sections 40(2) and (3) of the Act do not apply to that contract, the manner of agreement is to include in the major domestic building contract—
>
> (a) a warning in the form of Form 1 in the Schedule which is signed by the building owner before the execution of the contract; and
>
> (b) a Clause in the form of Form 2 in the Schedule." (*my emphasis*)

27. The Contract was prepared by Mr Schachter. On page 9, there is provision for progress payments to be made in accordance with the section. On the following page there is a highly detailed schedule of progress payments listing 20 such payments including the deposit. On the following page is a printed form in accordance with the regulations with provision for the Owners to sign. However there is no signature on the line provided for the purpose. They have placed their initials in the bottom right-hand corner of the page in a manner identical to the initialling that appears on all the other pages of the Contract.

28. Two of the stages for payment in Mr Schachter's Method 2 are First Floor Framing Stage I and First Floor Framing Stage II. Neither of these terms is defined in the Contract and the evidence does not permit me to make any finding as to what they mean. Mr Stuckey submitted that, if that clause does form part of the Contract, it is too uncertain to be enforced. However the principal defence taken is that the Owners have not signed the requisite form as required by the regulation.

29. There was a dispute as to how the Contract came to be signed. In this regard Mr Schachter gave inconsistent accounts in his various witness statements and in his oral evidence. On this issue I prefer the evidence given by Ms Kuna on behalf of the Owners.

30. According to Ms Kuna's evidence, which I accept, her parents signed the Contract at their home and there was no discussion at the time concerning the special schedule of progress payments found on page 10 of the Contract. However I also accept that the payments billed by the Builder and paid by the Owners were in accordance with that detailed schedule of progress payments.

31. Mr Forrest submitted that, in cross examination, Mr Kuna acknowledged that there was some discussion with Mr Schachter concerning payment up front for substantial work to be done early in the job. I am uneasy about this evidence. Mr Schachter did not give evidence in chief concerning these matters and most of the detail relied upon by Mr Forrest in his submission was contained in his questions and not in Mr Kuna's brief answers. Mr Kuna's English was quite poor. It does appear that the Owners were content to pay Mr Schachter according to this detailed schedule although it is not established that they turned their mind to it at the time they signed the Contract.

32. Mr Stuckey submits that, since the warning required by the regulations was not signed by the Owners before the execution of the Contract, the regulation has not been complied with and as a consequence, by reason of s. 40(2), the Builder cannot retain any of what it has received beyond that to which it would have been entitled in accordance with the progress payment schedule set out in the Act.

33. Mr Stuckey pointed out that the Contract contained both methods of payment, neither having been struck through, and there is no reason to objectively prefer one method over the other. On page 10 of the Contract, underneath the line where the Owners are to sign, there are the words:

> "When Method 2 is to be used for progress payments all Owners must sign."

34. He said that as a matter of objective construction this direction indicated that, if all Owners had not signed where required, Method 2 was not to be used.

35. Both counsel agreed that, as a matter of law, where there is a written Contract that appears on its face to contain the entire agreement between the parties and contains no ambiguity then (apart from evidence as to surrounding circumstances) it is not generally permissible to lead parol evidence to add to, vary or subtract from the terms of that document (see *Codelfa Constructions v. State Rail Authority of New South Wales* [1982] HCA 24 per Mason J.). The Contract is to be construed objectively without regard to the subjective intentions of the parties. I accept that is the case.

36. Mr Forrest referred to Special Conditions 2 and 3 of the Special Conditions that were drafted by Ms Kuna for inclusion in the Contract. They were as follows:

> "Any progress claims made by the Builder under the Contract are subject to the lending body's approval. The Owner will not be in breach of the Contract if a delay in payment to the Builder is attributable to the lending body's certification procedures.'

and

> "The Owner will not delay any payment to the Builder under the Contract, unless it intends to dispute the work or money claimed in the progress or final claim. In this circumstance, the parties will be regarded as being in dispute under the Contract. The parties will use their best efforts to resolve any dispute quickly and amicably."

37. He said that neither of the Special Conditions included a prohibition against the Builder submitting a claim for a progress payment other than in accordance with Method 1. He also suggested that, by these special conditions, the Builder was entitled to submit its claim for a progress payment in accordance with the stages set forth in Method 2.

38. As to the first of these, the question is not whether the Builder was prohibited from submitting a particular claim but rather, whether it was entitled under the Act and under the Contract to do so. As to the second, the Special Condition

makes it clear that the progress claim must be "under the Contract". If the terms of the Contract do not permit a particular claim then it cannot be made.

39. The Owners were aware, or at least, their representative Mr Paritsi was aware, of the schedule of payments sought to be relied upon by the Builder. A draft of the Contract was sent to Mr Paritsi by Mr Schachter on 14 September 2012. In a later email dated 25 September 2012 Mr Paritsi, after referring to financial matters continued:

> "Contract format should be fine, I will confirm if we have any issues with it. On first glance I would like to discuss the progress payment amounts."

40. Mr Forrest also referred to a draft Special Condition 5 prepared by Ms Kuna which stated that the parties' agreement as to which method would be used for progress payments under the Schedule 3 would be subject to approval by the lending body. Mr Forrest submitted that I should take these matters into consideration in determining that the correct construction of the contractual provisions was that the Builder was entitled to submit a written claim in accordance with Method 2.

41. I do not accept that submission. The emails between the parties predated the Contract as did the draft Special Condition 5, which ultimately did not form part of the Contract.

42. Some care has clearly gone into the preparation of the Method 2 schedule of payments and that method was much more favourable to the Builder than the schedule of payments provided for in the Act. I am satisfied that the Owners were aware of it and paid the first five progress payments in accordance with this schedule. Indeed, an email from Mr Paritsi dated 7 October 2013 includes the words:

> "... Progress payments will be made to ensure that you do not need to fund the cost of the project yourself, plus a $50k buffer. As with the other progress payments you can forward a breakdown of all payments made to date, so that we can review prior to payment".

43. These factors would all suggest that it was the Builder's intention that payment should be made according to this schedule and not in accordance with the schedule in the Act and that the Owners were content to pay the Builder in this way. They do not assist me however in interpreting the Contract and they do not remove the requirements of the Act.

44. Mr Forrest submitted that the initials appearing in the bottom right hand corner of page 10 constituted a signature by the Owners of the form on that page. He referred to a number of authorities, the general thrust of which is that the word 'signature' is to be interpreted according to the language and context of the particular statute (see *Campbell v. The Director of Public Prosecutions* [1995] 2VR 654 at 660). He submitted that the essential requirement was that the name or initials is the personal authentication of the document by the individual signing it. He said that a signature identifies the person signing it and its presence on the document evidences his or her intent to be bound by its contents.

45. These principles are well-settled but in the present context the intention of the legislature appears to have been that the parties who are to pay for the work are to turn their minds to the consequences of agreeing to a form of payment other than that set out in the Act. This is to be done in the prescribed manner and it is also required to be verified by a signature which indicates that they have a read and agreed to the wording giving rise to the significant change that is being made. I do not think that initials in the bottom right-hand corner of the page, which are, practically, identical to the initials on the bottom right-hand corner of every other page of the Contract meet this requirement. I also do not believe that a reasonable bystander would interpret these initials in this way.

46. Since I am not satisfied that the warning has been signed, it is not necessary to consider Mr Forrest's detailed submission about the relative timing of the initialling and signing of the Contract.

Novation

47. Mr Forrest submitted that the parties by their conduct novated the building Contract by invoicing and paying in accordance with the Method 2 schedule. For a novation I would need to find that the parties agreed to substitute a new contract in different terms in the place of the existing Contract. I cannot infer such an agreement from the mere non-compliance with the Act and payment by the Respondents of the amounts that the Builder claimed. The Act contemplates such a situation and says in s. 40(2) that the amounts overpaid cannot be retained by the Builder.

Estoppel

48. Mr Forrest submitted that the Owner's reliance on the act is unconscionable. He relied upon the following well-known summary by Brennan J in *Waltons Stores (Interstate) Ltd v Maher* [1988] HCA 7 of the principles of equitable estoppel:

> "In my opinion, to establish an equitable estoppel, it is necessary for a plaintiff to prove that (1) the plaintiff assumed that a particular legal relationship then existed between the plaintiff and the defendant or expected that a particular legal relationship would exist between them and, in the latter case, that the defendant would not be free to withdraw from the expected legal relationship; (2) the defendant has induced the plaintiff to adopt that assumption or expectation; (3) the plaintiff acts or abstains from acting in reliance on the assumption or expectation; (4) the defendant knew or intended him to do so; (5) the plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled; and (6) the defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise."

49. Mr Forrest submitted that in the present case the Owners had agreed that the Builder could submit claims for progress payments in accordance with either method in the Contract, that they would not reject any claim for a progress payment that the Builder submitted on the basis that it did not comply with the Act, that they would not stop the bank from paying any such claim or refuse to pay any claim for progress payments submitted on this basis. He said that these

were representations that induced the Builder to assume that it could submit its progress claims on this basis and that acting in reliance on that assumption it executed the Contract in circumstances where, had it known that it could not submit claims for progress payment in accordance with Method 2, it would not have done so.

50. Mr Forrest referred to a number of authorities where parties were estopped from reliance upon the Statute of Frauds. Walton's stores was such a case.

51. Mr Schachter said in his witness statement that within a few days of signing the contract he noticed that the Builder's copy did not have the signature on the designated line, that he telephoned Mr Paritsi who told him that the Owners had signed those pages and that he would forward a copy. Since Mr Paritsi did not give evidence, this evidence is uncontested. However even if the Owners were estopped from denying that they signed the attachment that would not assist the Builder because the Act requires that it be signed before the Contract is signed.

52. Contrary to Mr Forrest's submission, there was no evidence, nor was it is not suggested, that the Owners made any representations in the terms alleged or specifically represented that they would not rely upon their rights under the Act. I cannot spell out from the facts referred to any representation which would make it inequitable for the Owners to rely upon the protection that the Act intended to give them. Moreover, the argument raised by Mr Forrest would apply to virtually every case in which the section applied.

53. Mr Forrest submitted that there was no evidence led by the Owners to the effect that they did not read the warning on page 10 of the Contract. He said that, although Mr Kuna denied in his witness statement that he had read it his evidence on this and other issues was second hand. Although it seems doubtful whether everything Mr Kuna said in his witness statement was from his own recollection I think he would have known whether or not he had read the warning. In any case, whether the Owners read it or not, the critical issue is whether they signed the acknowledgement and it is clear that they did not.

The consequences of failing to comply with section 40

54. By s. 40 (2) the Builder must not retain under the Contract more than the percentage of the Contract price listed in the Table. Its entitlement to payment must therefore be assessed in accordance with that table and the amount to which it is entitled must then be deducted from the total that it has received and the balance refunded to the Owners.

55. What that will mean is that, when the money is repaid to them, the Owners will have paid to the Builder correspondingly less of the Contract price which will be important in assessing any damages payable to them.

56. The further consequence of the section is that progress claims 8, 9 and 10, which are made pursuant to Method 2, are not recoverable and so that part of the Builder's claim must fail.

Variations

57. The Contractual provisions relating to variations reflect ss. 37 and 38 of the Act and are in similar terms. Section 37 deals with variations by the Builder and is as follows (where relevant):

> **"S.37 Variation of plans or specifications—by Builder**
>
> (1) A Builder who wishes to vary the plans or specifications set out in a major domestic building contract must give the building owner a notice that—
>
> (a) describes the variation the builder wishes to make; and
>
> (b) states why the builder wishes to make the variation; and
>
> (c) states what effect the variation will have on the work as a whole being carried out under the contract and whether a variation to any permit will be required; and
>
> (d) if the variation will result in any delays, states the builder's reasonable estimate as to how long those delays will be; and
>
> (e) states the cost of the variation and the effect it will have on the contract price.
>
> (2) A builder must not give effect to any variation unless—
>
> (a) the building owner gives the builder a signed consent to the variation attached to a copy of the notice required by subsection (1); or
>
> ……..
>
> (3) A builder is not entitled to recover any money in respect of a variation unless—
>
> (a) the builder—
>
> (i) has complied with this section; and
>
> (ii) can establish that the variation is made necessary by circumstances that could not have been reasonably foreseen by the builder at the time the contract was entered into; or
>
> (b) the Tribunal is satisfied—
>
> (i) that there are exceptional circumstances or that the builder would suffer a significant or exceptional hardship by the operation of paragraph (a); and
>
> (ii) that it would not be unfair to the building owner for the builder to recover the money.
>
> (4) If subsection (3) applies, the builder is entitled to recover the cost of carrying out the variation plus a reasonable profit."

58. Section 38 deals with variations by the owner and is as follows (where relevant):

"Variation of plans or specifications—by building owner

(1) A building owner who wishes to vary the plans or specifications set out in a major domestic building contract must give the builder a notice outlining the variation the building owner wishes to make.

(2) If the Builder reasonably believes the variation will not require a variation to any permit and will not cause any delay and will not add more than 2% to the original contract price stated in the contract, the builder may carry out the variation.

(3) In any other case, the builder must give the building owner either—

(a) a notice that—

(i) states what effect the variation will have on the work as a whole being carried out under the contract and whether a variation to any permit will be required; and

(ii) if the variation will result in any delays, states the builder's reasonable estimate as to how long those delays will be; and

(iii) states the cost of the variation and the effect it will have on the contract price; or

(b) a notice that states that the builder refuses, or is unable, to carry out the variation and that states the reason for the refusal or inability.

(4) The builder must comply with subsection (3) within a reasonable time of receiving a notice under subsection (1).

(5) A Builder must not give effect to any variation asked for by a building Owner unless—

(a) the building owner gives the builder a signed request for the variation attached to a copy of the notice required by subsection (3)(a); or

(b) subsection (2) applies.

(6) A builder is not entitled to recover any money in respect of a variation asked for by a building owner unless—

(a) the builder has complied with this section; or

(b) the Tribunal is satisfied—

(i) that there are exceptional circumstances or that the builder would suffer a significant or exceptional hardship by the operation of paragraph (a); and

(ii) that it would not be unfair to the building owner for the builder to recover the money.

(7) If subsection (6) applies, the builder is entitled to recover the cost of carrying out the variation plus a reasonable profit."

59. It is common ground that neither party complied with these requirements. The Owners admit that they approved the first six claims for variation, totalling

$14,522.18. With the builder's margin of 10% plus GST that becomes $17,571.84. They also admit that they instructed the Builder to carry out the work which was the subject of Variations 8, 9, 10 and 13 but deny that those were variations. Otherwise they deny the Builder's claim for variations.

60. I must see first whether the variations claimed are proven and then see whether they are claimable having regard to the sections of the Act and the provisions of the Contract referred to.

Variation 7

61. This variation was for the revision of engineering drawings and work to relocate the upper storey load onto piles

62. The engineering drawings show four concrete pads, 650 mm square and 1,000 mm deep, supporting structural steel. After excavating the holes for the concrete pads the Builder encountered water in the excavations which were near the site of a former swimming pool. After some discussion between Mr Schachter and Mr Paritsi it was agreed to install some extra steel columns and support the upper roof load on the existing piles forming the basement walls. Mr Schachter informed Mr Paritsi that the cost of the variation would be "approximately $2,000". There was no prior documentation of the variation before the work was carried out and the cost (before GST) claimed by the Builder was as follows:

Engineer's fees	$ 600.00
Additional steel	$ 963.00
Additional timber	$ 700.00
Total	$2,263.00

63. A variation was sent by the Builder claiming these figures and it was not disputed. However the procedures set out in the Contract and the Act relating to variations were not followed.

64. The Owners now contend that this is not a real variation. They say that Mr Schachter proceeded to modify the method of construction of the units unilaterally because it made it easier for the Builder to construct them. Mr Stuckey submitted that where there was an unconditional promise to perform works and no warranty was given by the Owners about the conditions, the Builder is not entitled to recover the cost of unforeseen obstacles. He relied upon the case of *Re an arbitration between Carr and the Shire of Wodonga* [1925] VLR 238. As a matter of legal principle that is correct.

65. Mr Paritsi has not given evidence to contradict the evidence of Mr Schachter and so I accept that there was discussion about this work and that the Builder was authorised to proceed in this way. However I accept Mr Stuckey's submission that no credit has been given, in the figure claimed for the variation, for the money saved by the Builder in not having to follow the original design. I was not satisfied with Mr Schachter's explanation of this, which was that the concreter would not have charged him for the concrete and that the cost of refilling holes negated any benefit. Although there was an expense in implementing the altered

construction I am also satisfied that there was a substantial saving from abandoning the other method and the credit for this should have been given. Since no evidence has been given of the saving made I am unable to calculate or make any finding as to the net effect of this variation on the Contract price and so I am unable to allow this claimed variation.

Variation 8

66. The Builder claims $1,806.00 plus a margin and GST for the provision of additional scoria adjacent to the external basement walls. Mr Schachter said that he was instructed by Mr Paritsi to place scoria to a height of 2000 mm, which he said was 1,500 mm high in the engineering drawings. He sent a request for information to Mr Paritsi on 8 August 2013. On 25 August Mr Paritsi asked Mr Schachter to confirm the approximate cost. Mr Schachter told him that it would cost approximately $1,400 for the extra scoria which he confirmed in an email.

67. In evidence he said that the additional cost was $1,806 plus margin plus GST. He said that he had to pay a labourer $220 to spread the additional scoria and he produced three invoices from the supplier of the scoria, totalling $1,745.12 inclusive of GST. If one subtracts the GST from the material cost and adds the labour, one arrives at the figure of $1,790.60, which is close to the figure claimed.

68. This is work that was specifically requested by the Owners and so this is an Owner's variation. It is not suggested that it caused any delay, it would not have required any change to the building permit and it was less than 2% of the Contract price. The Builder was therefore entitled to implement the variation and is also entitled to be paid for it. The figure claimed of $1,806.00 will be allowed, plus Builder's margin and GST, which becomes $2,185.26.

Variation 9

69. The specifications required the roof tiles to be "Uno" roof tiles. Mr Paritsi requested the Builder to use instead a product called "Nu-Lok" on the external faces of the roof of each unit with the internal part of the roof to be Colorbond.

70. Mr Schachter said that the additional cost of supplying and installing the tiles including the extra cost of tiles used, was $15,905. With the Builder's margin of 10% plus GST it becomes $19,245.05.

71. Only the upper roof has been installed and so not all of the roofing tiles have been paid for. However since there is a claim for the cost of completion which will include the cost of providing the remaining tiles, if that claim is allowed, any allowance for this variation must include the whole excess because that cost for the remaining tiles will form part of the completion cost claimed by the Owners.

72. These more expensive tiles were requested by the Owners and so this is an Owner's variation. It is not suggested that it caused any delay, it would not have required any change to the building permit and it was less than 2% of the

Contract price. The Builder was therefore entitled to implement the variation and is also entitled to be paid for it. The amount claimed will therefore be allowed.

Variation 10

73. Consequent upon the same change of roof cladding, the Builder also claims the cost of supplying Colorbond roof for the inner roof section of each unit. This was requested by the Owners as a saving from using the more expensive tiles that were used in the outer sections of the roof.

74. The amount claimed is the cost of the Colorbond roofing, which was $4,698.00 plus the Builder's margin of 10% plus GST, amounting to $5,684.58.

75. Again, this is an Owner's variation and for the same reasons it will be allowed.

Variations 11 and 12

76. These variations related to the windows. The specifications required the Windows to be made from "…approved hardwood species". The window schedule stated that the windows were to be casement windows of specified dimensions, although it was stated in the plans that the sizes nominated were nominal only and that the actual size may vary according to the manufacturer (*Drawing A1.02*). The windows were to be flashed all around. In the window schedule, the headings above the columns for the width and height of the windows were stated to be "Rough Width" and "Rough Height".

77. On 14 August 2012 the Builder obtained a quotation from its supplier, Sette windows, for the supply of windows made from meranti timber for a price of $39,570.00 plus GST. Mr Schachter said that this quotation was based on the original contract drawings and specifications but there are differences between the two.

78. The three timber choices in the form of quotation were meranti, cedar and kiln dried hardwood. When challenged that meranti was not an approved hardwood because it was not approved by the Owners, Mr Schachter said that the statement could be read as "an approved hardwood species" meaning "a species of hardwood usually used on windows" and that meranti is such a hardwood. That is not what the specification says. I accept that the Owners did not approve the use of meranti as a timber for the windows. I also note that, according to the Sette quotation, the windows were to be supplied unprimed.

79. The dimensions of the windows set out in this quotation from Sette windows also do not match those in the window schedule. For example, windows specified in the schedule as being 2470 mm x 950 mm are shown in the order as being 2400 mm x 916 mm, which is a standard size, and so the windows are cheaper.

80. On 23 August 2013 the Builder obtained a further quotation from Sette windows for a price of $49,860 plus GST. At least some of the reasons for the increased price are set out in an email from Sette windows. The first is that the windows that are now to be 2470 mm x 950 mm are no longer the standard size previously quoted on (2400 mm x 916 mm) and so were more expensive. This made up the

majority of the windows to be supplied. In addition bi-fold doors that were previously to be supplied loose were costed in the later quotation to be hung on-site with an additional charge of $2,000 plus GST. The hanging of these doors was part of the Contract works and so was the Builder's responsibility. Two additional double door frames which are to be supplied at a cost of $560 plus GST were not included in the earlier quotation. These were to be for the front doors.

81. All of the additional items set out in the second quotation related to the correct size of the windows and doors and door frames and priming that formed part of the Contract works. Accordingly it does not seem to me that the Builder is able to claim these additional costs as a variation.

82. Mr Schachter said that, because the window schedule specified "rough" height and width for the windows, the supply of smaller sizes than the dimensions given in the schedule was warranted. I am not satisfied with this suggestion. Although the use of the word "rough" would suggest that some tolerance was to be allowed, the fact that the sizes are expressed in millimetres would suggest that any such tolerance was to be minimal. The dimensions specified were those required to be supplied in the absence of some variation or agreement to the effect that some other sizes were to be substituted.

83. Further, contrary to what Mr Schachter suggested in cross-examination, I am not satisfied that the dimensions in the window schedule were the dimensions of the openings to be left in the framework in order to accommodate the windows. The dimensions given are said to be those of the windows themselves.

84. Mr Schachter said that there was a change of dimensions of the windows as a result of revised drawings. That is borne out by an email from the architect. However, exactly how this impacted upon the original quoted price is impossible to say on the evidence.

85. In paragraph 7 of his witness statement of 4 May 2015 Mr Schachter said that, as a result of the updated drawings, 28 windows "seemed to be wider" but he did not specifically say that they were. Since these drawings are not in evidence I cannot verify whether there were any changes or what those changes were. He said that the number of frames required was increased by four extra door frames, two on the ground floor and two on the first floor but he does not say that the number of door openings was increased. Whether he ordered doorframes from the window manufacturer or constructed them himself on site was his own decision. He said that the bi-fold doors were increased in width and one would expect that to increase the cost.

86. According to Mr Schachter the Owners rejected Sette windows as the supplier and instead sent him a quotation from another company, Palermo Windows, for kiln dried hardwood windows at a higher cost. He said that he disputed that the Owners had any right under the Contract to change the Builder's window manufacturer and that is certainly the case. It was for the Builder to decide where it sourced its windows, provided that what it supplied was in accordance with the Contract documents. The hardwood also have to be approved by the Owners

87. The Builder ultimately purchased windows from Palermo Windows at a cost of $56,009.00 plus GST. There was a balance of $9,091.00 plus GST that was not paid. That was for fly screens and other components that were not delivered but, by agreement with the supplier, these were not supplied or charged to the Builder.

88. The Builder now claims the difference between what it paid to Palermo Windows and the original quotation from Sette windows, plus its margin of 10% and GST, making a total of $18,082.90. Since the original quotation did not include many items that were contracted to be supplied by Palermo Windows, the two are not comparable and the simple calculation by Mr Schachter is not justified. This claim for a variation is not established.

Variation 13

89. This claim related to the cost of bricking up window openings, two in each unit in the front guest bedroom. The base amount claimed is $1,600.00. To date only one window opening in each unit has been bricked up.

90. The variation was requested by Mr Paritsi by an email dated 7 October 2013. He asked for a quotation for the work, broken down into labour and material costs. It does not appear that such a quotation was provided before the work was undertaken.

91. The change meant that the Builder did not have to provide the four windows that would have gone into the openings that were to be bricked up. Nevertheless, no credit has been allowed by the Builder for the saving from not having to supply those windows. Mr Schachter's suggestion that the window supplier's later quote omitted these windows does not answer the Owners' objection that a credit is due. I am not satisfied that it has been demonstrated that, as a result of the omission of the windows and the bricking up of the openings, there is a net cost to the Builder.

Variation 14

92. According to Mr Schachter's evidence there was insufficient space provided in the plans for the specified mouldings to be mounted under the eaves of both the upper and lower roofs. After some discussion with Mr Paritsi, Mr Schachter was directed to raise the level of the roof trusses by 55 mm by packing them, which the Builder did.

93. The claim is for 16 hours for two men, making 32 hours at $45 per hour for the upper roof and 9 hours for two men at the same rate for the lower roof. There is also a claim for 14 hours at $45 per hour for packing up the corrugated roof area. Materials are claimed of $857.00 for the upper and lower roof sections and $421.34 for the corrugated section. The total sought is $4,158.34

94. Mr Stuckey submitted that lack of detail in the plans does not justify shifting the cost of the works to the Owners as a variation. Although I accept that the Builder is required to build what is shown on the plans, the Contract price is to build in accordance with the plans. Where the plans do not make adequate allowance for

what is to be built and they need to be altered from what is shown, the Builder is prima facie entitled to a variation for the cost of any additional work arising from the alteration.

95. The evidence produced by the Builder to substantiate the amounts claimed is less than ideal. Mr Schachter's evidence was based upon what he was told by the supervisor, Mr Lewis, who was not called. Mr Stuckey submitted that I should find that his evidence would not have assisted the Builder. That inference is often justified but in the present case it seems clear that the work was required, it was asked for, it was done and that some cost was incurred. What has been produced is a memo from Mr Lewis addressed to Mr Schachter dated 21 November 2013 which sets out the above figures. I also have some invoices from the tradesman who did the work, although these include other work as well. Mr Schachter has sworn to the genuineness of the email and the invoices and since there is no contrary evidence and nothing to suggest that the work was not done as claimed, I find that the amount of $4,158.34 is justified and with Builder's margin and GST, it becomes $5,031.59.

96. This seems to me to have been an Owners' variation and since it was less than 2% of the Contract price, would not have required any amendment of the permit and would not seem to have caused any delay the Builder was entitled to carry out the variation.

Variation 15

97. The Builder claims $8,839.05 plus GST for the cost of designing and constructing the lift shaft steel in each unit. The lift shafts are shown in the architectural drawings and in the basement. The walls of the lift shafts are shown to be reinforced core filled masonry. On the two floors above the basement, the walls of the lift shaft are shown but their construction is not detailed. In particular, no structural steel is shown, nor is it shown on the engineering drawings.

98. Page 10 of the specification provided for the construction of the lift shaft including the provision of lifting equipment in the lift store. The Builder was directed to refer to the manufacturer's requirements. The Builder's works are said to include building in of "inserts supplied by this contractor to this contractor's drawings and/or directions." The term "lifting equipment" is not defined.

99. Mr Schachter raised the deficiency with Mr Paritsi in July 2013 Mr Paritsi told Mr Schachter that the Builder should install steel columns. On 1 August 2013 he sent a request to Mr Paritsi for information as to whether the steel in the lift shaft re-design was going ahead. On 25 August Mr Paritsi told him that the structural steel was required and that the Builder should make allowance for these columns in the structural steel package. I am uncertain what he meant by that but Mr Schachter said that the structural steel for the project had already been costed and included in the Contract price.

100. Mr Schachter pointed out that there was no design in the structural engineer's drawings showing any steel for the lift shaft above basement level in order to support the lift rails which would be installed with the lift. He said that he had an engineer design lift shaft steel at a cost of $700 plus GST and that the cost of installing the steel in the lift shaft was $6,395.00 plus GST. Invoices have been produced. In addition, he claimed an amount of $940.50 plus GST for the supply and installation of plywood. The total of these amounts, plus the Builder's margin of 10% plus GST is claimed.

101. Mr Stuckey submitted that, since the provision of the lifts is detailed in the engineering drawings and architectural plans and is provided for in the Contract, it is not an extra. He referred me to the case of *Re Chittick & Taylor* (1954) 12 WWR 653 at 654.

102. The Contract required the Builder to construct the lift wells as shown on the plans. They show the lift wells to be lined and so it does not seem to me that the claim for the plywood lining is justified, unless it were to exceed the cost of alternate lining that would otherwise have been used and there is no evidence of that.

103. The steel in question was required in order to support the lift rails. The invoice from the steel fabricator describes what was done as being the supply and installation of two lift support frames. No such frames are shown on the plans. If they were part of the lift they would be part of the amount to be taken into account in determining whether the prime cost was exceeded. The provision of the lifts was a prime cost item of $90,000, being $45,000 for each lift. Since the lifts were never installed, that does not arise. However steel frames to support the lift do not seem to be part of the lift. I therefore think that this is extra work.

104. The work and materials were supplied by the Builder at the request of the Owners. It is not suggested that this caused any delay and amount is less than 2% of the contract price and so the Builder was entitled to implement the variation. The amount of $7,095.00 will be allowed which, with builder's margin GST becomes $8,584.95.

Variation 16

105. Water and sewerage were the responsibility of the Owners but Ms Kuna requested Mr Schachter to pay an application fee of $248 to South East water for fees and he did so. It is reasonable that the Owners should pay for that plus the Builder's margin of 10%, which is $272.80.

Variation 17

106. A tree in the nature strip had to be removed which required the permission of the Council. There was no provision made in the Contract for this work and according to Mr Schachter the tree had to be removed in order to enable the construction work to be performed.

107. Mr Schachter asked Mr Paritsi about the tree removal and Mr Paritsi asked him to pay for the permit and said that he would arrange for the Owners to reimburse

the cost. The Builder claims the amount paid to the Council, which was $1,458.12 plus the Builder's margin of 10%, bringing the claim to $1,603.93.

108. This money was paid by the Builder at the request of the Owners and it is reasonable that the Builder should be repaid together with its margin.

Variation 18

109. The paling fence on the south boundary of the site was in poor condition and required replacement. According to Mr Schachter he spoke to Mr Paritsi who first asked him to obtain a quote for the construction of the fence and then asked him to pay for it after the contractor threatened to remove it for non-payment. Mr Paritsi told Mr Schachter that the Owners would repay the Builder. The Builder has paid the contractor the cost of $1,600.00 and claims repayment of that sum plus its margin of $160.00.

110. This amount was paid for at the request of the Owners and it is reasonable that the Builder should be repaid together with its margin, making a total of $1,760.00.

Conclusion as to variations

111. The amount allowed for variations is $36,968.46, calculated as follows:

Variation	Details	Base figure	With margin & GST
Variation 8	additional scoria	$ 1,806.00	$ 2,185.26
Variation 9	changes to roof	$15,905.00	$19,245.05
Variation 10	colorbond roofing	$ 4,698.00	$ 5,684.58
Variation 14	packing roof trusses	$ 4,158.34	$ 5,031.59
Variation 15	steelwork for lift	$ 7,095.00	$ 8,584.95
Variation 16	South East Water	$ 248.00 (no GST)	$ 272.20
Variation 17	tree permit	$ 1.458.12 ditto	$ 1,603.93
Variation 18	paling fence	$ 1,600.00 ditto	$ 1,760.00
Total		$36,968.46	$44,367.56

Extensions of time

112. The procedure for the Builder to claim an extension of time is set out in Clause 34 of the Contract.

113. Clause 34.0 provides (where relevant) that the building period is extended if the carrying out of the building works should be delayed due to various matters which are listed.

114. By Clause 34.1, the Builder is to give the Owners a notice informing them of the extension of time and stating the cause and the extent of the delay. By Clause 34.2 the Owners must give the Builder written notice within seven days of receiving the Builder's notice in order to dispute the extension of time. Such a notice must include detailed reasons for the dispute.

115. The present application is brought pursuant to Clause 34.3, which provides as follows:

> "If there is an extension of time due to anything done or not done by the owner or by an agent, Contractor or employee of the owner, the Builder is, in addition to any other rights or remedies, entitled to delay damages worked out by reference to the period of time that the building period is extended and the greater of $250 per week or that amount set out in Item 12 of Schedule 1. Delay damages will accrue on a daily basis."

116. It is apparent from the wording of this clause that for it to apply there must not only be an extension of time but that extension of time must be due to something done or not done by the Owners or their agent.

117. The words "anything done or not done" are very wide but, since extensions of time arising from variations are dealt with elsewhere in the Contract it would seem that they do not include Owners' variations or the Owners agreeing to a Builder's variation (Clause 24).

118. Since the amount able to be claimed by the Builder is described as "delay damages" the purpose seems to be to compensate the Builder for damages arising from a breach of Contract by the Owners which causes delay to the building works. The damages would be to compensate the Builder for having to be on site during the period works were delayed. The Contract price compensates the Builder for being on site whilst carrying out the Contract works but when no work can profitably be done then the Builder has the expense of being on site without the corresponding benefit of performing the Contract works.

119. The Owners rely upon Special Condition 7 of the Contract, which is as follows:

> "The building period will be 15 months inclusive of all claims and estimates for delay, including inclement weather."

and Special Condition 8, which is as follows:

> "Any extension of time to the date of completion under the Contract must be reasonable and approved by the owner".

120. Mr Stuckey submitted that the effect of these Special Conditions is to give the Owners significant rights in respect of extensions of time and the power to insist that only claims which are reasonable and approved by them will be allowed.

121. Special Condition 7 provides for an initial building period and says how it has been arrived at. It does not say that the building period cannot be subsequently altered by other provisions of the Contract.

122. By Special Condition 1, the Special Conditions take priority over any other Contract document. Accordingly, Clause 34 must be read subject to Special Condition 8. In regard to each of the claims I must be satisfied on the balance of probabilities, not only that it is reasonable, but also that it was approved by the Owners and it is clear on the evidence that not one of these claims was approved by them. On that ground alone it would seem that any claim for an extension of

time is defeated. However for completeness, I should also consider whether the claims made are reasonable.

Claim 1

123. Claim 1 is dated 2 October 2013. The Builder claims 15 days for delay in the selection of window hardware on the basis that Mr Schachter had requested instructions on 26 August 2013 and had still not received them by 2 October 2013. He said that Mr Paritsi did not check the window hardware that needed to be selected until 13 September 2013, resulting in a three week delay that then extended to 5 weeks. An email was sent to Mr Schachter by Mr Paritsi on 3 September asking for samples of the hardware to view and stating that they would endeavour to provide comment by that weekend.

124. Mr Schachter said that he had originally programmed the installation of the windows to take place between 23 and 26 May 2013 but the plans were subsequently altered and amended drawings were provided to him in July. He said that he contacted Sette windows in mid-August to arrange the manufacture of the windows and, following a request from the supplier for further information, he provided a request for further information to Mr Paritsi on 26 August 2013 but did not receive an answer until 3 September 2013.

125. How long it should reasonably have taken Mr Paritsi to answer the request is unclear because I have great difficulty in reading it. There was then a delay because Mr Paritsi wanted to view the window hardware. Mr Schachter said that but for this, the manufacture and installation of the windows could have been done by 18 September.

126. On 13 September the Miss Kuna expressed concern about the suitability of Sette windows. Thereafter there was a great deal of communication between the parties concerning the window supplier resulting in an amended quotation from Sette windows on 23 September 2013 and then finally, a decision by Mr Paritsi communicated by email on 2 October 2013 to obtain a quotation from Palermo windows, which then became the supplier.

127. The difficulty that I have with this claim is in ascertaining the reasonableness of the conduct of the parties on both sides. I do not understand why it was left so late to seek and obtain instructions as to the window hardware and the other matters referred to in the request for information. Since Mr Schachter originally planned to install the windows in May, all the information about the windows should have been settled on well before September.

128. In any case, the window supplier was changed and so all of the time devoted to the Sette quotations was wasted. Although it was for the Builder to choose its supplier the Owners' justification for interfering is now said to be that the wrong timber was to be used. Although meranti is a hardwood it had not been approved by the Owners. The Builder, no doubt reluctantly, agreed to the change of supplier. In order for Clause 34 to apply I would have to be satisfied that the delay claimed was due to something done or not done by the Owners. I am quite

unable to make that finding because the causation of any delay is by no means clear.

Claim 1a

129. Claim 1a is dated 20 December 2013. It claims a loss of one day for the provision of a quote from Palermo Joinery on 10 March 2013, a further two days on 10 August for Palermo to provide working drawings and the Builder to confirm window heights, and a further 15 days on 30 October when the windows arrived and began installation. A total of 18 days.

130. Mr Schachter said that in the first week of October 2013 he was unable to delay commencement of the brickwork any longer and so the bricklayers laid the bricks without the windows in place. He said this required them to construct metal profiles of each door and window space to ensure that the bricks were laid straight for when the windows were installed. He said that this was more time-consuming than if they were laying the bricks up to windows and door frames that were already in place.

131. As a result, he said that instead of taking 5 days the brickwork took 10 days. I accept that evidence.

132. As a result of the change of supplier to Palermo windows the windows did not arrive on site until 30 October 2013. Mr Schachter said that, had Sette windows being used they would have been installed on 26 August 2013.

133. Even if that is so, the Builder need not have agreed to the substitution of the window supplier. All the Builder had to do was to supply and install windows in accordance with the Contract. The Builder claims a further 10 days for this delay, 6 days between 3 and 10 October 2013 before the commencement of the bricklaying, and 4 days between 25 October and 30 October when the windows were delivered to site.

134. Again, the causation of any loss of time is by no means clear. The change of supplier was agreed upon and appears to have driven much of this claimed delay. There is no reason to suppose that the concerns expressed on behalf of the Owners were not genuine and Mr Schachter appears to have done his best to accommodate them. The real problem is that these decisions were not made much earlier than they were. I am unable to make a positive finding that the situation in each case arose as a result of something done or not done by the Owners.

Claim 2

135. Claim 2 is also dated 20 December 2013. It related to the re-working of the roof trusses to allow space for the fitting of the moulding. Mr Schachter said that the packing of the roof trusses took 5 days and that there was a further 10 days delay on the moulding detail.

136. As to the first, the Contract was entered into in January and a decision as to the moulding should have been made well before this. I cannot attribute the cause of that delay to something done or not done by the Owners. The deficiency in the

Contract documents should have been apparent when the Contract was entered into and the problem addressed much earlier.

137. Further, the delay arising from the packing of the trusses was the result of a variation and extensions of time arising from carrying out a variation are dealt with under Clause 24 which does not create an entitlement to delay damages.

Claim 3

138. Claim 3 is dated 7 April 2014 and relates to the foam cladding system. Mr Schachter said that he requested information on the foam system on 4 October 2013. He said that Mr Paritsi asked him to obtain quotes on five systems on 15 October and gave instructions on 27 October for a particular system.

139. Mr Schachter said that he then contacted the architect to request details on the moulds but did not hear back. He said he did not want to order the cladding materials requested by Mr Paritsi without confirmation on the mouldings. On 21 November he received information from the architect about an alternate supplier, "Unitex".

140. He met the supplier and the architect on 22 November, he received a quote on 29 November which he forwarded to Mr Paritsi with a request for confirmation and he received the confirmation three days later on 2 December.

141. The cladding was installed between 10 and 16 December. On 17 December he sent a request for information to the architect requesting details of the moulds. Mr Paritsi asked for a meeting about the moulds on 12 February 2014 but the meeting did not occur until 25 February, when the moulds were ordered. They arrived on site 24 March 2014. For this the Builder claims 101 days delay.

142. It seems extraordinary that such basic components of the construction as the foam system and the moulds were not settled and decided upon months earlier. The problem complained of by Mr Schachter has really arisen because the parties left all these things so late. I cannot attribute the cause of that delay to something done or not done by the Owners.

What could have been done and what was done

143. Mr Schachter said that from 17 December until 24 March 2014 the Builder was unable to perform any other work on site because of inadequate documentation and instructions and gave a number of examples. It seems to be that at least rectification work could be made on the party wall and the Owners other complaints could have been attended to.

144. Both Claims 1a and 2 were sent to Mr Paritsi on 20 December 2013 by email. On 28 December 2013 Mr Paritsi said that he would send a response to the time extension claim "tomorrow". There is no evidence of any such response until 5 January 2014 when Mr Paritsi informed Mr Schachter that the Owners would extend to the Builder "a period of grace" and extend the completion date to 30 June 2014. This was said to be subject to the Builder addressing and rectifying a list of issues set out in the email.

145. Listed are a large number of alleged defects and concerns but the appropriateness or otherwise of claiming the extensions of time is not addressed in the email. This response does not appear to be in accordance with Clause 34.2 of the Contract.

146. On 7 April 2014 the Builder forwarded extension of time claim number 3, claiming delays relating to cladding and render. On the same day Mr Paritsi responded, rejecting the claim on the ground that the Builder was the cause of the delay in that Mr Schachter did not react to issues in a timely way, particular reference being made to not ordering the moulds in time.

147. The Builder claims in total, 18 working days delay for the month of October out of a total of twenty possible working days. In cross-examination Mr Schachter acknowledged that, during that month, all of the single skin brickwork was done, the first floor framing was completed, the floor went on the first roof level and the roof trusses went on. When it was put to him that in fact the job was not delayed during this period Mr Schachter said that the effect of these matters would have delayed the project completion date by that amount of time.

148. The Builder claims a further 101 working days from 1 November 2013. That period would have expired on or shortly before the time when the Owners purported to terminate the Contract. That is on the assumption that 5 days a week throughout that period are treated as working days but since Christmas and New Year intervened and it seems that the building industry ceases operation for at least part of January, the period would probably have expired some time after that. The extension therefore took up the whole of the balance of the building period prior to the purported termination of the Contract. Yet it appears that during this period foam cladding and rendering were installed.

149. I accept that something done today might cause delay at a later time but if the Builder is claiming damages for delay caused by the Owners it is necessary to prove that on the balance of probabilities. The extent to which the works have been delayed by the matters complained of and the extent to which any delays have been caused by something done or not done by the Owners is by no means clear.

150. Further, it does not appear from the evidence how the figure of 101 working days has been assessed and from Mr Schachter's cross-examination it appears to have been an ambit claim. Although it would seem that there was some delay while the foam and moulds were decided upon the extent to which this held up the work is simply unknown.

151. The same problem appears for the other claims. The emails show lengthy requests for information from Mr Schachter and later instructions from Mr Paritsi and I found it impossible to find precisely how the matters complained of delayed the progress of the work and whether and to what extent it was caused by the Builder or by something done or not done by the Owners.

152. It is for the Builder to prove on the balance of probabilities that it is entitled to an extension of time and I cannot see that that burden has been discharged.

Defects

153. In his report Mr Lorich identifies 21 defects. Most of these are minor. The major defects comprise the party wall and the basement.

154. Expert evidence was given concurrently by Mr Mitchell and Mr Lorich. In the course of discussion during the evidence Mr Lorich revised some of the figures set out in his report downwards. The defects alleged are as follows.

Supporting brackets for trusses

155. Mr Lorich said that supporting brackets including triple grips and joist hangers should have been installed to the floor trusses and on the roof trusses where they intersect with the top and bottom chords of the frame. He has assessed a cost of $1,160.00 for labour and materials to install the brackets that he says are required.

156. In his report, Mr Mitchell said that the truss layout did not provide for brackets to the trusses but stated that two effective skew nails were to be provided in each location.

157. In the course of the evidence it was agreed that the provision of supporting brackets was a good building practice but, after hearing from the experts, I am not satisfied that their omission amounts to a building defect.

Bottom plates not trimmed

158. The bottom plates in locations of doorways and cupboards have not yet been cut out. This appears to be incomplete work. Mr Lorich allowed 4 hours at $60 an hour for this work, which amounts to $240. Mr Mitchell allowed 2 hours at $55 an hour plus materials, giving a figure of $150.00.

159. It seemed to be agreed between the experts that this was not necessarily part of the frame stage and could be done later. I am not satisfied that this is a defect. Rather, I think it is incomplete work.

Straightening of walls

160. Mr Lorich said that all walls are required to be straightened. For that he allowed $360 for labour and $100 for materials. Mr Mitchell did not cost this item.

161. Both experts agreed that this was part of lock-up rather than the frame stage. I accept that evidence. I also think that this is incomplete work rather than a defect.

Floor fixing

162. Mr Lorich said that some of the screws fixing the flooring to the frame were standing proud of the floor and needed to be screwed down. Mr Mitchell agreed with this item. I find that this is defective work.

163. Mr Lorich assessed a figure of $1,920 for labour and $400 for materials for this item whereas Mr Mitchell assessed a figure of only $220, being 4 hours labour at $55 per hour. After hearing from the experts I prefer Mr Mitchell's figure and will allow $220.00.

Noggings

164. Mr Lorich said that noggings had not been provided for shower mixers, shower heads, towel holders et cetera. Mr Mitchell agreed. Mr Lorich assessed a figure of $960 for labour and $30 for materials whereas Mr Mitchell assessed a figure of $210 inclusive of materials to fit those noggings which are missing. Considering the limited scope of the work I prefer Mr Mitchell's figure.

165. I accept Mr Lorich's evidence this is part of the frame stage and in this regard the frame stage is not complete. However the omission of these noggings is incomplete work, not a defect.

Poor truss support

166. Mr Lorich said that the bottom chords of the lower roof trusses located along the east side of the kitchen and meals area have not been properly supported. He said that some have been half cut over structural steel, some have not been supported at all and had some have been connected to the beam above with hoop iron.

167. In his report he allowed 16 hours for a carpenter to do the necessary work to re-support the trusses which amounts to $960 and $150 for materials. In the course of oral evidence he said that an appropriate allowance would be two men for half a day which would reduce the labour component to $480.

168. Mr Mitchell agreed with this costing although he said that he could not locate the item during his inspection. I am satisfied that this is a defect and will allow Mr Lorich's amended figure, which is $630.00.

Floor fixings

169. Mr Lorich said that there are upper story floor fixings which have missed floor joists. Some of these were pointed out to me during the inspection. Mr Mitchell agreed with this item but said that such a minor defect would not affect frame approval.

170. I accept that this is a defect and after hearing from the experts I will allow Mr Mitchell's figure of $220 being four hours labour for a carpenter to fix all of the missing screws.

Lintels

171. Mr Lorich pointed out that four lintels had not been installed in the wardrobes and hallways to prevent sagging of the bulkhead. Mr Mitchell agreed that lintels were required in two locations. Mr Lorich costed this item at $680 inclusive of materials. His labour component is 10 hours. Mr Mitchell said that he found only two lintels missing and said that only 4 hours would be required. Allowing for materials, he assessed the rectification cost at $280. I prefer Mr Mitchell's figure but I think this item relates to incomplete work rather than a defect.

172. According to Mr Lorich that it is part of the frame stage and I did not understand that to be disputed by Mr Mitchell.

Bolts missing from steel beams

173. Mr Lorich pointed out that some connecting bolts were missing from steel beams. He allowed two hours for a tradesman at $60 an hour to replace the bolts and $50 for materials, making a total of $170.

174. Mr Mitchell agreed that the bolts were missing. I accept that this is part of the framing stage but it is incomplete work rather than a defect.

Ply bracing not nailed

175. Mr Lorich said that ply bracing under the internal stairs are not been fully nailed off and assessed a rectification cost of $265, comprising 4 hours at $60 an hour plus $25 for materials. Mr Mitchell acknowledged the existence of this defect and the amount assessed will be allowed.

Masonite Packers

176. Mr Lorich said that Masonite packers installed to straighten the walls have not been nailed at 150 mm centres as they should have been. Mr Mitchell agreed but pointed out that this is not a framing stage item.

177. I accept Mr Lorich's figure of $265 comprising 4 hours for a carpenter with $25 worth of materials to complete the nailing but since the straightening of the walls is not complete I think this is incomplete work and not a defect. I also accept Mr Mitchell's evidence that this is not part of the framing stage.

Missing corner studs

178. Mr Lorich said that there were a number of missing corner studs to pick up the plasterboard. He includes a photograph in his report as an example.

179. Mr Mitchell said that he was unable to locate this item during his inspection and pointed out that the building surveyor makes no mention of missing studs. Mr Lorich has allowed 8 hours for a carpenter and $420 to replace installed 30 studs at a total cost of $900.00.

180. I accept Mr Lorich's evidence that this is part of the framing stage but it is incomplete work rather than a defect.

Spacing of studs

181. Mr Lorich pointed out that one of the studs in the party wall exceeds 600 mm centres. That was acknowledged but this will be dealt with in the course of rectifying the party wall and so no separate allowance should be made.

Blocks to Windows

182. Mr Lorich said that blocks need to be added to the sill trimmers to provide support for the windows. Mr Mitchell said that the studs were checked out to support the trimmers and that this was sufficient. I am not satisfied that this is a defect.

Shower base recesses

183. It was agreed that the shower base recesses should be extended to the wall frame. I accept that this is a defect and I will allow Mr Lorich's assessment of $730 for this work.

Inadequate window flashings

184. It was agreed that the window sill flashings and sarking to the laundry windows require additional work. Mr Lorich has allowed 16 hours at $60 an hour plus $150 for materials, amounting to $1,110 and that amount will be allowed. I accept that this is a defect

Roof flashings

185. Mr Lorich criticised the roof flashings and says that they need to be repaired and altered at a cost of $840, which includes $200 for materials. Mr Mitchell said that the flashing has been done correctly. I prefer the opinion of Mr Mitchell. I am not satisfied as this item

Cavity flashings to perimeter brickwork

186. Mr Lorich criticised the cavity flashing for not extending to the external face of the brickwork. He said that it would have to be replaced and assessed the base cost of rectification at $2,620, being 32 hours at $60 per hour plus $500 for flashing and $200 sand and cement.

187. I accept that the flashing ought to have extended to the external face of the brickwork and that this is a defect. The amount that Mr Lorich has assessed will be allowed.

Out-of-level blockwork

188. The brick work around the lower story is not level. It is not suggested that this has any structural or practical significance and the walls in question are to be rendered.

189. In his costing Mr Lorich has allowed 40 hours for a tradesman at $60 per hour to demolish and relay the block work so that it is level. He also allowed $1,250 for materials.

190. Mr Mitchell agreed that the brickwork is not level but said that, since it is to be rendered, it is not required to be face brickwork. He concluded that the brickwork is suitable for the purpose, that is, to be a substrate for a rendered wall and that demolition and rebuilding is not necessary.

191. On this item I prefer the opinion of Mr Mitchell. Although the brickwork is out of level it is not credible that the Owners would demolish and reconstruct it when they are proposing to render it. It was always intended that this wall would be rendered and the brickwork is not and was never intended to be face brickwork. I therefore think that it would be unreasonable to allow the cost of demolition and reconstruction when it is clear that that cost will never be incurred. No other loss is shown.

The party wall

192. The party wall between the two units was to be constructed as a stud wall on each side of a central firewall. The firewall supplied was a proprietary product designed by Boral, which supplied the components. According to the evidence the main purpose of the firewall was to provide a sufficient fire rating between the two units so that if a fire occurred in one of the units the occupants of the other unit would have time to escape.

193. The firewall was not constructed in accordance with the Boral system and complaints were made to Mr Schachter by Mr Paritsi and Miss Kuna in December 2013. Following these complaints Mr Schachter spoke to the building surveyor but does not appear to have undertaken any rectification work.

194. On 2 March 2013 Mr Paritsi asked Mr Schachter whether the supplier of the system had inspected it and he replied that he was "okay with the fire rating" and if the building surveyor had passed the installation that should be sufficient. In fact, the building surveyor had not passed the installation.

195. Mr Brown from Boral inspected the installation and provided a report dated 20 March 2014 in which he said that the firewall had "multiple non-compliant issues" and that it "would not be guaranteed to perform to its expected standards in a fire situation". He identified (amongst others) the following defects:

(a) the panels at the rear of the wall were not appropriately sealed;

(b) the aluminium clips were in the wrong places;

(c) one of the shaft liner panels was fractured;

(d) the screws were incorrectly spaced;

(e) butt joins were not neatly butted together;

(f) the horizontal join between the shaft liner panels was connected incorrectly and using the wrong materials;

(g) the shaft liner panels in the front upstairs bedroom roof space were installed horizontally.

196. Mr Lorich also listed similar defects in his report and said that major structural alterations were required to rectify the problems that he detected. These defects do not appear to be disputed but there is considerable dispute as to the appropriate method of rectification.

197. By a revised Direction as to Work dated 18 June 2014, the building surveyor directed the Owners to rectify the defect items listed on Mr Brown's report.

198. In his report Mr Lorich said that the stud wall on one side will have to be removed and the building temporarily propped, that the firewall will need to be demolished and removed from the site and a new wall constructed, followed by a new stud wall. For this he assessed a base cost of $38,980 on to which is added the margin of 35% plus GST to arrive at a final figure of $59,370.00.

199. Mr Lorich's figure is calculated on the basis of the wall being 200 m². He assessed the cost of constructing the new wall at $110 per square metre and the cost of constructing a new stud wall at $45 a square metre. The main factor in this calculation is his assumption that the wall is 200 m².

200. Mr Schachter calculated that the area of the party wall was 110 m². Having checked the dimensions on the plans I find that Mr Schachter is correct about the area. He said that the hourly rate for a plasterer or carpenter is $40 per hour. He said that shaft liner panels cost $30 a square metre and that the installation of the shaft liner does not take as long as a standard plaster wall. He attached an invoice from the supplier of the shaft liner panels which would suggest that the cost of the panels is $22.50 per square metre plus GST. According to the invoice three meter lengths of "H stud" are $16.81 each and three meter lengths of wall track are $4.43 each. There is GST to be added in each case.

201. Mr Mitchell agreed that the firewall requires demolition, removal and reconstruction. He did not cost that work in his report but referred to a quotation produced by Mr Schachter from a company called Val Interior Proprietor Limited that Mr Schachter had said was reasonable. That quotation is for a base amount of only $6,080.00. It assumes that some of the materials will be reused including the existing liner boards. The author of this quotation was not called to give evidence.

202. By the time of the hearing Mr Mitchell had costed the work. He said that the firewall replacement should be costed on the basis of $57 per square metre which he said was at the high-end and allowed for a materials cost of $25 per square metre, which seems consistent with the figures on the invoice produced by Mr Schachter. He said that 10 panels would need to be replaced and the total cost would be $7,712.00.

203. During the hearing Mr Lorich agreed that it would only be necessary to pull down one stud wall and not two but he said that it would not be possible to salvage the existing wall or the existing liner boards and the rectifying builder would quote on the basis that they would be discarded.

204. Mr Schachter said that the quote from Val Interior Proprietor Limited represented the actual cost. Although his primary contention was that the wall could be rectified, he said that to replace the entire firewall would require popping up the posi-struts and beams on one side only, removing the temporary staircase, removing the stud walls and reusing undamaged studs, removing the bottom track, the "H" studs and the shaft liner panels, reinstalling new track, "H" studs and reusing existing boards to manufacturer's specifications, reinstalling Rockwool and Firestop plaster where required and reinstating the stud walls. He said that he believed that represented one week's worth of work.

205. Mr Lorich said that it would not be cost-effective to re-use existing material and I accept that evidence.

206. Doing the best I can with this evidence I think I have to reduce Mr Lorich's assessment to take account of the fact that the wall is only 110 m² and his rate

per square metre for the wall itself seems rather high. I prefer Mr Mitchell's evidence about the rate and will allow $57 per square metre for 110 m² for the replacement of the party wall itself, excluding the replacement stud wall. Re-working Mr Lorich's figures in this way I arrive at a base cost of $19,200 before GST.

The basement

207. The two units are constructed over a basement accessed by a common driveway in the middle. According to drawing A2.01 the basement towards the front of each house is shown as a carpeted storeroom with "joinery to later detail". The storeroom is separated from the basement as a whole by a smaller store room and the lift well. Most of the external walls of the carpeted storeroom are below ground level. They are shown as cavity walls with a 190 mm block wall to engineer's detail as the outer leaf and a 90 mm timber stud wall as the inner leaf. At ground level between these two leaves there is a spoon drain cavity in the slab which is to be connected to the drainage system.

208. An engineering drawing (09-01-S.2 G) provides the following note in regard to the taking of the external block wall:

> "Fortecon waterproof membrane on bitumen painted external face all protected with cement sheet".

209. The relevant section shows an agricultural drain below the level of the footing of the wall some distance away. The distance is not dimensioned.

210. Mr Lorich said that the waterproofing of this external wall does not comply with these details.

211. He said that there has been water penetration into the front storerooms and attributes this to improper waterproofing. He has assessed a base cost of $13,030.00 to excavate and remove all the backfill to the external walls, clean off the existing wall structure, ensure that the agricultural drain is a correctly located, properly tank the walls in the manner required by the engineer's details and backfill, with an allowance to rectify the spoon drain.

212. Mr Mitchell said in his report that he was instructed by Mr Schachter that the basement area had been constructed in accordance with the engineer's details except for a product substitution that is, "…a paint applied Ormanoid…" instead of a Fortecon waterproof membrane. He said that he was instructed by Mr Schachter that the Owners had agreed to the substitution.

213. Mr Schachter said that the basement was designed as a "wet basement". As I understand his use of the term, it is intended to describe a basement that allows the entry of water and then directs it away by means of a perimeter drain. That may be the case in regard to the car parking area but in regard to the store room under the front of each unit it could not be sensibly suggested that a wet basement would be carpeted or contain cabinetry that might be affected by moisture. Moreover, the perimeter drain that he has installed in the storeroom is not graded and the internal wall that was designed to be constructed adjacent to

it is an ordinary pine and plaster stud wall. When one takes into account the fact that this part of the basement is to be tanked the design intention apparent from the drawings is that the tanking will prevent the ingress of water in the first instance but any that passes through will be collected in the perimeter drain and directed to the drainage system. I do not believe the drawings show a wet basement in regard to these rooms.

214. Mr Forrest submitted that the specification permitted the Builder a broad discretion in the use of materials and that those used were in accordance with the design. He pointed out that Clause 16 of the Contract provides that the specifications have priority over plans.

215. On page 46 of the specification the Builder is given a choice of four methods for tanking, as follows:

(a) a tanking membrane, which was to be a material called Xypex concentrate;

(b) three coats of natural asphalt;

(c) two coats of Aqueous bitumen;

(d) a torch-on bitumen sheet.

216. All products were to be applied strictly in accordance with the manufacturer's recommendations. If a membrane were to be used there were detailed instructions as to the preparation of the surface. For the first two methods the Builder was to provide a protective board over the tanking material. For the second two methods the tanking material was to be protected with a scratch coat and a finishing coat of cement render. Whichever method was used the owners were to be provided with a warranty covering satisfactory performance of the complete installation for a period of 15 years.

217. The other materials to be used were "Tremproof 3000", a torch-on single-layer bitumen sheet made by a company called Tremco and a product called "Superstop 215500" also made by Tremco.

218. It is apparent that none of the methods and none of the materials specified in the specifications was used. Instead the Builder has painted the walls with a paint called Ormanoid and then protected it with corflute sheets which butt together but do not form a waterproof barrier. The contractor used by the Builder gave a warranty of 10 years. Mr Stuckey submitted that this did not satisfy the Builder's contractual obligations but I think the obligation is upon the Builder to provide the warranty and it is not necessary to have it provided by the sub-contractor.

219. I do not accept that the Builder had a general discretion as to which product to use. The specification was quite specific. The onus is on the B will uilder to show that the substituted material is sufficient and that it would be unreasonable to order rectification.

220. Mr Mitchell said that he considered that Ormanoid perform the same function as a waterproof membrane on the basis of what he was told by Mr Schachter. I was told that Fortecon membrane is a heavy grade of builder's plastic whereas

Ormanoid is paint-on product with waterproofing qualities manufactured by a company called Davco.

221. Although he acknowledged that the design in the Contract documents was not a good one, Mr Lorich said that the materials specified were better than what was supplied. He said that his own preference would be for a torch-on membrane but that was only one of the alternatives available to the Builder.

222. Mr Lorich said that he believed that the walls were leaking at the corners where the control joints were. Mr Mitchell said that he tested the room with a moisture meter and obtained no reading above 5% which is described as being very dry. However it was apparent to me at the inspection that there had been water penetration into these rooms and at the corner of each room adjacent to the driveway the floor was damp. Mr Forrest submitted that there was no evidence as to where the water came from and suggested that it might have come from above. Mr Lorich said that he thought that this was unlikely.

223. The key to this part of the claim lies in whether or not the Owners agreed to the substitution as the Builder claims. Mr Schachter said that Mr Paritsi visited the site and saw the materials there. He said that he had a number of discussions on the telephone about the matter with Mr Paritsi who told him that he wanted him to look at the tanking and make sure that it was done correctly. Mr Schachter said that he had the water proofing contractor go out there again and he verified that it was. He then said that Mr Paritsi wanted to have a bit of extra material in the joints. He does not say specifically that he asked Mr Paritsi whether the Owners would consent to the material substitution and it does not appear on the evidence that they did.

224. The breach of contract in failing to follow the specifications having been established, the onus of proving that rectification is unreasonable is on the Builder (see *Clarendon Homes v. Zalega* [2010 VCAT 1202 and the cases there cited).

225. I am satisfied on the balance of probabilities that water has penetrated the room on each side and that had the tanking been effective that would not have occurred. I therefore find that the burden of proof has not been discharged and this part the claim is therefore proven and the amount assessed by Mr Lorich will be allowed.

Total defects

226. The claim for defects is allowed to the extent stated. Allowing for the builder's margin specified by Ms Lorich of 35% and GST, the total cost is assessed at $56,467.13, calculated as follows:

Floor fixing	$	220.00
Poor truss support	$	630.00
Missing screws in floor	$	220.00
Ply bracing	$	265.00

Shower base recesses	$ 730.00
Window flashings and sarking	$ 1,110.00
Cavity flashings	$ 2,620.00
Party wall	$19,200.00
Basement	$13,030.00
Total	$38,025.00
Plus Margin 35%	$13,308.75
	$51,333.75
Plus GST	$ 5,133.38
Total	$56,467.13

Frame stage

227. Mr Forrest submitted that the construction of the units had reached frame stage. By s. 40 (1), "frame stage", within the meaning of that section, means the stage when the frame is completed and approved by the building surveyor. The building surveyor had not approved the frame before termination.

228. A "progress report" dated 31 March 2014 describes the completion of framework on both units as "Not Approved, although it would seem that the Building Surveyor's reason for not approving the frame was that he was "awaiting further engineering amendments". Whatever the reason was, the frame was not approved.

229. By a revised inspection report dated 10 April 2014 the building surveyor's inspector said that the frame was "Approved subject to above items". The items listed above required revised architectural drawings to show certain matters, balconies to be constructed, revised engineer certified plans and revised architectural drawings to town planning for approval.

230. Provision of plans would have been the responsibility of the Owners. What the inspector meant by the word "balconies" is unclear because although there are pergolas at the rear of the units and a terrace at first floor level across the front in each case incorporating a portico over the front door, none of these is described as a balcony.

231. Whatever the inspector meant, it is clear that the frame could not be said to be completed or approved until these matters had been attended to and so although the Builder might have felt encouraged by the wording of this report to proceed to the next stage, it is not an approval within the meaning of the Act. More significantly, it is also quite clear from the expert evidence that the frame was not completed.

232. Accordingly, for the purpose of s.40 the frame stage was not reached and, under that section, the Builder was not entitled to submit a claim for the frame stage payment.

Notice of dispute

233. Special Condition 3 of the Contract made provision for the parties to resolve disputes. It stated:

> "The Owner will not delay any payment to the Builder under the Contract, unless it intends to dispute the work or money is claimed in progress or final claim. In this circumstance, the parties will be regarded as being in dispute under the Contract. The parties will use their best efforts to resolve any dispute quickly and amicably."

234. On 11 April 2014 the Owners served upon the Builder a notice of dispute pursuant to that Special Condition, seeking to resolve the dispute "quickly and amicably". Why this process was not undertaken in any formal way is not clear, although the Builder had served a Notice to Remedy Breach on the Owners on that same day. Possibly the notice under Special Condition 13 was intended to forestall that.

235. Thereafter the Contract was determined by the Owners. Mr Forrest submitted that the service of a Notice to Remedy Breach by the Owners was in breach of this Special Condition and a substantial breach of the Contract. Mr Stuckey objected that this was not pleaded and that no opportunity was given to lead evidence on the question. I think that objection is well-founded. This allegation should have been made earlier.

236. In any case, I do not accept Mr Forrest's submission. The parties had been in dispute for some time before that notice was served and some efforts were made on both sides to resolve the issues in contention. In particular, there was a very lengthy letter from Mr Paritsi to the Builder's solicitors on 16 November discussing the matters in dispute in great detail and although Easter thereafter intervened there was no immediate response and it was not for another eight days that the Contract was determined.

237. Although it takes priority over Clauses 42 and 43 of the Contract, Special Condition 8 is not inconsistent with them and does not purport to read them down. The three provisions can work together.

Termination

238. Termination under the Contract is dealt with by Clauses 42 and 43. The first deals with termination by the Builder and the second, termination by the Owners. In each instance, the party giving the notice can only do so if the other party is in substantial breach.

239. The notice in each case is required to specify the substantial breach, require it to be remedied within 10 days after the notice is received and say that if it is not remedied as required the innocent party intends to end the Contract. In each case, if the party receiving the notice does not remedy the substantial breach stated in the notice within 10 days of receiving the notice then the party giving the notice may end the Contract by giving a further written notice to that effect. There is a qualification in each case that a party is not entitled to end the Contract under the

relevant clause when that party is in substantial breach of the Contract. Termination must also not be unreasonable in the circumstances.

240. The Builder served upon the Owners a Notice to Remedy Breach on 11 April 2014. The breaches alleged were the failure by the Owners to pay the 3 progress payments 8, 9 and 10.

241. By email dated 7 April 2014 from their daughter, Ms Kuna, the Owners served upon the Builder a Notice to Remedy Breach signed by them, purportedly given pursuant to Clause 43.2 of the Contract. The notice annexed the report by Mr Brown and also the report by Mr Lorich dated 3 April 2014.

242. As to the nature of a substantial breach, I was referred by counsel to a number of authorities, including *Shevill v. Builders Licensing Board* (1982) 149 CLR 620; *Cardona & anor v. Brown and anor* (2012) 35 VR 538 and *Ilija Stojanovski v. Australian dream homes Pty Ltd* [2015] VSC 404.

243. In the last of these cases, Dixon J considered the application of a similar provision to a termination on the ground of a substantial breach and provided some guidance as to the proper approach to be taken, which may be summarised as follows:

(a) Whether the Builder was in substantial breach of the Contract is to be evaluated at the time the notice was sent (para 42);

(b) The term 'substantial' may have various shades of meaning. Having regard to the context, it may mean 'large or weighty' or 'real or of substance as distinct from ephemeral or nominal' (para 47);

(c) Although a substantial breach is one that is more than ephemeral or de minimis in its character, the concept and purpose of evaluating, and limiting, the kind of breach that enlivens an owner's right to serve a default notice is given context by reference to the terms of the contract as a whole. It is unhelpful to paraphrase the qualifying condition introduced by the word 'substantial' by using the phrase 'only really important breaches' because that is not the language (para 52);

(d) Whether a breach is a substantial breach is a question of fact and the answer to the legal question: "What was intended by 'substantial '?" is that the nature and the consequences of the breach must satisfy that description and, in the present context, be ample or considerable or important (para 53);

(e) The proper approach is to first identify the term or terms breached, and then evaluate the breach by considering its nature and consequences (para 56);

(f) The time specified in the notice to remedy the breach is that set out in the Contract, even though rectification might take longer, although the time allowed might be relevant to the question whether termination was reasonable in the circumstances.

244. The breaches alleged in the notice served by the Owners were expressed as follows:

(a) You have failed to carry out the building works in a proper and workmanlike manner and in accordance with the plans and specifications set out in the Contract.

(b) You have failed to carry out the building works in accordance with and in compliance with all laws and legal requirements including, and without limiting, the generality of this warranty, the *Building Act* 1993 and the regulations made under that act.

(c) You failed to ensure that the building works are carried out with reasonable care and skill.

The particulars of each breach are said to be the two reports referred to. The notice stated that if the Builder did not remedy the substantial breaches set out in the notice within 10 days of receiving it then the Owners may end the Contract by giving a further written notice to that affect.

245. On 8 April 2014 Mr Schachter contacted Mr Brown and asked about alternatives to rectify the perceived defects in the firewall. He then sent an email asking him to contact Boral's fire engineer to see if there was some other solution to the problem. On 14 April, Mr Brown replied to say that he had taken the matter to Boral's engineer for evaluation but that they could not provide him with a suitable solution to rectify the concerns by means of remedial works.

246. In the meantime, Mr Schachter took the Notice to Remedy Breach to his solicitors who wrote to the Owners on 10 April 2014. In this letter they disputed a number of the alleged defects and said that others would be attended to. Importantly, they suggested remedies to the firewall other than what Mr Brown had said had to be done.

247. They then demanded payment of the following progress payments which they said were due to the Builder:

No.	Stage	Date	Due	Amount
8.	First floor framing Stage II	11/03/14	25/03/14	$138,812
9	Ground floor brickwork	27/03/14	10/04/14	$99,151
10	Windows installed	27/03/14	10/04/14	$118,181

248. Mr Schachter said that he could not comply with the notice served by the Owners because of the Passover holiday, which was between the evening of 14 and 22 April 2014. It was apparent during the hearing that Mr Schachter was very observant of his religious obligations and would not work or conduct any business on the Sabbath. The Passover was therefore a significant obstacle for him in complying with the notice. However this difficulty was not mentioned in his solicitors' letter, nor was there any request made to the Owners for more time to comply with the notice.

249. It is also quite clear from Mr Schachter's final witness statement and his evidence in the witness box that it was not his intention to reconstruct the party wall in the manner suggested by Mr Brown and that he considered the

deficiencies in the wall to be, if not minor then at least insubstantial. It is therefore doubtful whether, even if Passover had not intervened, he would have attended to the defects identified in Mr Brown's report.

250. I find that, at the time of the Owners' notice was served, the work carried out by the Builder was seriously defective in the manner described earlier in these reasons, particularly in regard to the party wall. I find that the Builder did not express to the Owners any willingness to rectify the defect in the manner recommended by the experts, whether during the period allowed in the notice or at all. In the context of the Contract the defective construction of the party wall was a serious matter. There were significant safety implications if the wall should fail in the event of a later fire. On that ground alone I find that the breach is not minor or ephemeral but one of substance. There are also the other defects referred to. I therefore find that the Owners were entitled to serve their notice.

251. The Owners served a notice of termination by email on 24 April 2014. They then changed the locks and excluded the Builder from the site. Mr Forrest submitted that the Owners acted unreasonably in serving their notice of termination and said that their conduct in doing so was repudiatory.

252. It would seem from the evidence that, notwithstanding the serving of the notice of breach the Owners were anxious for the Builder to complete the work. On the same day the notice of breach was served Mr Paritsi sent an email to Mr Schachter setting out a number of matters in the course of which he said:

> "We will need to have a meeting to discuss the process moving forward."

253. The third extension of time claim was then served by email which was immediately responded to by Mr Paritsi, alleging that Mr Schachter was the cause of any delay. There were further emails between the two on 9 April in which no mention is made of the notice that had been served. The Builder's solicitors then sent a letter to the Owners enclosing the Builder's notice to remedy breach, claiming payment of the three progress claims that had been made.

254. Mr Schachter received his a reply from Mr Brown 3:49 pm on 14 April to say that the party wall could not be rectified via remedial works. That was the start of Passover and Mr Schachter was unable to attend to any business matters himself but the notice of termination was not served until three days later. In those three days someone on the Builder's behalf could have informed the Owners that the party wall would be rectified but that did not occur.

255. Mr Forrest submitted that the Builder by its solicitor's letter of 10 April 2014 had clearly indicated that it was willing to rectify the party wall defects and other defective works referred to in the reports. Certainly some indication of an intention to carry out remedial work is given but there is not an unqualified acceptance of the presence of the defects and the need to rectify.

256. At the time Mr Schachter regarded the deficiencies in the party wall as being minor. In paragraph 3 of his expert report he says:

> "The errors and omissions in the installation of the Boral Parti Wall installed at dwellings A and B are minor and rectification only is required. Complete demolition and reconstruction is unnecessary and unreasonable."

I have not found that to be the case.

257. In paragraph 41 of his witness statement he set out what he considered or to be done about the party wall which seems to be well short of addressing Mr Brown's concerns.

258. It therefore seems likely that, whatever the remedial work to the party wall foreshadowed in the Builder's solicitor's letter was, it was intended to be directed to rectification of minor matters which, according to the evidence of Mr Brown, would have been insufficient.

259. Mr Paritsi responded to the solicitor's letter of 10 April, advising that he was willing to meet with Mr Schachter at any mutually convenient time to discuss the matters referred to in the notice of dispute and asked the Builder's solicitors to suggest alternative dates and times for such a meeting. Attached to his email is a schedule setting out his response to various requests for information the Builder had made. There does not appear to have been any response to this email.

260. I find that it was not unreasonable in these circumstances for the Owners to terminate the Contract. Accordingly, their notice of termination served by email on 24 April 2014 brought the Contract to an end.

261. As to the notice of termination served by the Builder on 29 April 2014, I find that, since the Builder was at that time in substantial breach it was not entitled to serve such a notice by reason of Clause 42.4 of the Contract. It is unnecessary to consider the grounds of that notice although the progress payments were not in any case due by reason of s.40 of the Act and the fact that frame stage was not reached.

The Contract price

262. In the meantime, by an email dated 1 April 2014, the Owners sought to remove the prime cost items from the Contract so as to reduce it to $1,540,349.00 plus GST. Mr Schachter referred to this email in his second witness statement but did not say whether or not he agreed with it. I cannot find that this was an agreed variation but in any case, since the Contract was brought to an end shortly afterwards it does not appear that this would have had any consequence in terms of the building or of the calculations which follow.

Consequences of termination

263. Clause 44 of the Contract provides as follows:

> "44.0 if the owner brings this Contract to an end under Clause 43, then the owner's obligation to make further payments to the builder is suspended for a reasonable time to enable the owner to find out the reasonable cost of completing the building works and fixing any defects.

44.1 the owner is entitled to deduct that reasonable cost calculated under clause 44.0 from the total of the unpaid balance of the contract price and other amounts payable by the owner under this contract if this contract had not been terminated and if the deduction produces:

- a negative balance-the builder must pay the difference within seven days of demand; and
- a positive balance-the owner must immediately pay the difference to the builder."

264. According to the evidence of Mr Rosier the reasonable cost to complete the work is $1,103,476.00. As set out above, the reasonable cost to fix any defects is $56,467.13.

265. By reason of S.40(2) of the Act, the Owners are entitled to recover back the amount of $634,568 from the payments that they have made. The effect of that will be a corresponding increase in the unpaid balance of the Contract price to $1,807,000.40, calculated as follows:

Contract price	$1,983,024.00	
Add admitted variations	$ 17,571.84	
Variations allowed	$ 44,367.56	$2,044,963.40
Total paid to the Builder	$ 872,531.00	
less refund to be paid	$ 634,568.00	$ 237,963.00
Balance of Contract price unpaid		$1,807,000.40

266. The Owners are also entitled to the cost they will incur in having the works completed by another Builder, less the amount remaining unpaid under the Contract. The Owners' claim therefore becomes $97,858.33, calculated as follows:

Cost of completion	$1,103,476.00	
plus GST	$ 110,347.60	$1,213,823.60
Defects		$ 56,467.13
Overpayment of instalments		$ 634,568.00
Total		$1,904,858.73
Less: balance of Contract price unpaid		$1,807,000.40
Balance		$ 97,858.33

Orders to be made

267. Since the Builder's claim, insofar as it has been successful, is taken up in the calculation of the amount to be paid to the Owners, the claim will be struck out.

268. There will be an order on the counterclaim that the Builder pay to the Owners $97,858.33.

269. Costs will be reserved for further argument.

SENIOR MEMBER R. WALKER