

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D503/2011

CATCHWORDS

Electricity power line relocation, sections 8 and 24 Domestic Building Contracts Act 1995, breach of contract, damages

APPLICANTS	Andrew Jansen, Bridget Jansen
RESPONDENT	Hometech Industries Pty Ltd (ACN: 006 489 425)
WHERE HELD	Melbourne
BEFORE	Member M. Farrelly
HEARING TYPE	Hearing
DATE OF HEARING	27-28 February 2012
DATE OF ORDER	22 March 2012
CITATION	Jansen v Hometech Industries Pty Ltd (Domestic Building) [2012] VCAT 319

ORDERS

1. The application is dismissed.
2. Costs reserved. Any application for costs to be listed before Member Farrelly.

MEMBER M. FARRELLY

APPEARANCES:

For the Applicants	Mr S. Krischock of Counsel
For the Respondent	Mr C. Gilligan of Counsel

REASONS

BACKGROUND

- 1 In early 2006 the Applicants (“the owners”) lived in Narre Warren and began planning for the construction of their new home at their property in Neerim South (“the property”). The owners discussed the matter with their neighbour in Narre Warren, Mr Orsini, a director of the Respondent (“the builder”). Mr Orsini told the owners that he could prepare plans for the new home but the owners should first obtain a soil test for the property.
- 2 The owners obtained and provided to the builder the report dated 14 February 2006 from Chadwick Geotechnical Investigations Pty Ltd outlining, amongst other things, the site classification and foundation recommendations for the new home (“the soil report”).
- 3 The builder produced plans for the owners’ consideration which were revised and finalised following further discussions which took place over several months (“the plans”). On 25 June 2007 the owners and the builder entered into a domestic building contract (“the contract”) by which the builder agreed to construct the new home at the property for a price of \$272,860. The contract provided that the owners were responsible for excavation and site preparation works.
- 4 On the recommendation of Mr Orsini, the owners engaged Tromp Excavations Pty Ltd to carry out excavation works to prepare the site for construction of the home. The excavation works, which included a “cut and fill” of the site, were carried out in the period 27 September 2007 to 10 October 2007. The builder commenced construction of the home on about 5 October 2007.
- 5 Prior to the commencement of works, the builder made application to the electricity supplier, SP Ausnet (“SPA”), for the supply of electricity to the property.
- 6 On 14 November 2007, at which time underground plumbing had been laid but the slab had not been poured, the builder received two letters, each dated 13 November 2007, from Mr Ron Tucker of SPA. One of the letters confirmed the supply of electricity to the property. The other advised that
“All works near existing electricity distribution assets must be carried out in accordance with Electrical Safety (Network Assets) Regulations 1999 Statutory Rule No 141 and Worksafe’s No Go Zone Guidelines”
and that
“The ground level has been altered significantly and the clearance to our overhead line now breaches the statutory requirements. This must be corrected by either a power line relocation or ground clearance being returned to the statutory requirements as a minimum”
 (“the SPA 13 November 2007 letter”)

- 7 Mr Orsini claims that in November 2007 he had a number of discussions with the owners in relation to the SPA 13 November 2007 letter and suggested two options to address the SPA concerns :
- (a) relocation of the overhead power line at an estimated cost to the owners of \$10-15,000, or
 - (b) move the building envelope southward on the site cut (away from the “no go zone”) at an estimated cost to the owners of about \$1,500.
- 8 The builder says the owners chose the power line relocation option because they did not wish to alter the home site location or disrupt their plan to construct a carport in the future on the southern section of the site cut. The builder says that on 27 November 2007 it lodged an application with SPA for relocation of the power line.
- 9 The owners say no such options were discussed and that they were not informed or aware of the SPA concerns in relation to the power line until mid February 2008. At that time the relocation of the power line was the only commercial option available to resolve the SPA concerns.
- 10 The owners say they had no choice but to pay the cost of the power line relocation, \$12,736.90, as Mr Orsini told them that works would not continue until they made the payment. In this proceeding the owners seek payment from the builder of \$12,736.90 plus damages for loss of opportunity to invest that sum.

THE HEARING

- 11 The hearing was conducted on 27 and 28 February 2012. Each of the applicants gave evidence. Mr Ron Tucker of SPA also attended to give evidence in answer to a witness summons issued by the owners. For the respondent, Mr Orsini gave evidence and Mr Brendan Tromp of Tromp Excavations Pty Ltd gave evidence from Hobart via video link hook-up.

WHO DETERMINED THE LOCATION OF THE BUILDING SITE AT THE PROPERTY?

- 12 The project specifications, incorporated in the contract, confirmed the owners’ responsibility for excavation and site preparation works. The specifications provided, amongst other things:
- Site preparation – Site must comply with approved finished levels the owner must remove all rubbish, trees, cut grass or any other obstructions which prevent builder from commencing work ...*
- Excavation by owner – The owner will provide own contractor to excavate the area occupied by the building to a finished level stated on plan.*
- 13 Mr Orsini says that neither he nor any other representative of the builder attended the property prior to the signing of the contract. He says in preparing the plans he relied only on the information provided in the soil report and his discussions with the owners. The soil report includes a

diagram identifying site levels and the area of the property selected for the building site.

- 14 The owners say the builder had significant input into selecting the location of the building site on the property. They say that in around late February 2006, shortly after they had provided the soil report to Mr Orsini, he attended the property with them to discuss the location of the building site and to measure the fall of the land. They say that Mr Orsini's wife attended with him and assisted in the use of Mr Orsini's theodolite.
- 15 Mr Orsini denies any such visit. He says his first site visit was on 15 September 2007 when he attended the property to introduce the owners to Mr Tromp (the excavator). Mr Orsini says it was on this occasion, and no other, that his wife attended the property with him as they were on their way to Mt Baw Baw on a weekend excursion to celebrate their wedding anniversary. He says he did little more than introduce Mr Tromp to the owners and that the owners and Mr Tromp proceeded to measure and identify the building site location and area for excavation.
- 16 The owners agree that Mr Orsini attended the property with Mr Tromp on 15 September 2007. They say that Mr Orsini stepped out the slab measurements for Mr Tromp. Mr Orsini denies this.
- 17 The Owners also say that Mrs Orsini did not attend the site meeting on 15 September 2007. At the Hearing Mrs Jansen was unwavering in her evidence in this regard.
- 18 Mr Tromp gave evidence as to who attended and what took place at the property on 15 September 2007. I found Mr Tromp to be an honest witness who gave straightforward answers to questions asked of him. He says that on 15 September 2007, a Saturday morning, he took a measuring tape with him to the property. He confirmed that Mrs Orsini was at the property with Mr Orsini. He says that the owners had written notes as to where they wanted the building site located and that they assisted him in measuring and marking with white paint their chosen location for the building site. I accept Mr Tromp's evidence.
- 19 Consequently, whilst acknowledging the difficulty in remembering events which occurred 4 to 5 years ago, I find that Mrs Jansen is mistaken in her recollection that Mrs Orsini was not at the property on 15 September 2007. This being the case I find also that I cannot be satisfied as to the reliability of Mrs Jansen's recollection that Mrs Orsini attended the property with Mr Orsini in February 2007. I accept Mr Orsini's evidence that his wife attended the property with him on one occasion only. Having accepted Mr Tromp's evidence, I find that the one occasion was 15 September 2007.
- 20 I find, on the balance of probabilities, that Mr Orsini did not attend the property in February 2007 or on any other occasion prior to 15 September 2007, at which time the contract had been signed by the parties. I accept Mr

Orsini's evidence that he drew the plans in reliance on the information contained in the soil report and his discussions with the owners

- 21 I also accept Mr Tromp's evidence that in around early October 2007 the owners requested that he extend the cut area at its southern boundary as they wished to have a greater area of level ground surrounding the home. As requested Mr Tromp extended the southern boundary of the cut and used the "fill" from the extra cut to extend the north western area of fill.
- 22 I find that the owners, and not the builder, determined the location of the building site at the property. Their determination was initially confirmed by the site location as set out in the soil report. It was subsequently confirmed by their directions provided on site to Mr Tromp.

CONSIDERATION GIVEN TO THE OVERHEAD POWER LINE

- 23 There is no dispute that prior to commencement of the construction works at the property there was no communication of any nature between the owners and the builder in relation to the overhead power line.
- 24 Mr Orsini says that on the first occasion he attended the property on 15 September 2007 he did not notice the overhead power line and he had no reason to be looking for it. While the owners say that the power line has always been visible they do not dispute that there was no mention of it at this site visit.
- 25 At the Hearing Mr Orsini provided photographs which he says support his contention that the power line was not readily noticeable. Having viewed the photographs, I do not accept his evidence. The power line is noticeable in the photos.
- 26 Mr Orsini says further that, prior to preparation and signing of the contract, the builder was not provided with any information or documentation raising the existence of, or concerns in relation to, an overhead power line. He says he first became aware of the power line when he received the SPA 13 November 2007 letter. I accept his uncontested evidence in this regard.
- 27 The owners say that the power line has always been readily visible and that, had they been aware of the problem it would ultimately create, they would have moved the location of the building site to avoid the problem.
- 28 I find that the owners gave no consideration to the overhead power line in determining the location of the building site, probably because they were not aware of the implications.

COMMUNICATIONS BETWEEN THE OWNERS AND THE BUILDER IN RELATION TO THE POWER LINE

The builder's evidence

- 29 Mr Orsini says he received the SPA 13 November 2007 letter on 14 November 2007 and that this was the first time he or any other representative of the builder became aware of the power line.

- 30 He says he then immediately rang Mr Tromp to briefly discuss the matter. He then rang Mr Tucker of SPA who confirmed the two options available to remedy the breach of the *Electrical Safety (Network Assets) Regulations 1999* (“the safety regulations”), namely relocate the overhead power line or return the ground clearance to the required statutory minimum. He says Mr Tucker also confirmed that the builder could proceed to lay the slab.
- 31 Mr Orsini says that later that day (14 November 2007) he visited the property to assess the situation. It was at this site visit that he says he first noticed the power line.
- 32 Mr Orsini says that later that same day he attended the owners’ home in Narre Warren and showed them the SPA 13 November 2007 letter. He asked the owners to consider the rectification options.
- 33 He says that during the following 10-12 days he had “numerous” discussions with the owners, one of which was conducted on site at the property, in relation to the options available to remedy the breach of the safety regulations. At the request of the owners, he had contacted Mr Tucker and obtained a ball park estimate of \$10-15,000 as the cost of relocating the power line. He says he also told the owners of a further option, namely to relocate the site of the home further south on the existing site cut so that the works would be clear of the “no go zone”. He says he told the owners that as only internal plumbing piping had been laid, the home site relocation could be carried out at a cost to them (the owners) of approximately \$1,500. He says he requested that the owners confirm to him their choice of either the power line relocation or the home site relocation.
- 34 Mr Orsini says that on around 25 or 26 November 2007 the owners told him that they had chosen the power line relocation option and that they did not wish to relocate the home site because it would interfere with their plan to construct a carport at the southern section of the cut and it would result in the overhead power line intruding into the view from the north western aspect of the home.
- 35 Mr Orsini says that on 27 November 2011 he, on behalf of the builder, completed and signed a SPA “supply request form” and arranged for the form together with supporting documentation and an application fee of \$550 to be forwarded to SPA. The supply request form was the first step in the process of seeking the relocation of the power line. The form provides the option of requesting that SPA provide either a “firm offer” or a “preliminary estimate” as to the cost of the requested works. Mr Orsini says he selected the “firm offer” option. (Mr Orsini produced in evidence a copy of the supply request form signed by him and dated 27 November 2011).
- 36 Construction of the home continued with the slab poured in December 2007 and the framing, including the roof, constructed in January 2008. Mr Orsini says he was of the belief (mistaken as it turned out) that the framing works could be carried out provided the use of any machinery did not breach the

“no go zone” in respect of the power line and construction workers were made aware of the power line.

- 37 Mr Orsini says that on 13 February 2008 he received a telephone call from Mr Tucker who advised that the construction of the framing was in breach of the safety regulations and that construction works on the home must immediately cease. Later that day the builder received a facsimile letter from Mr Tucker confirming the matters discussed. The facsimile letter states, amongst other things :

“As stated in the letter to your company dated 13/11/07, prior to any additional work occurring on the property adjacent to the power line, the no go zone guidelines must be adhered to as this has not occurred work must cease immediately ... to date SP Ausnet has not received the completed “supply request form” and associated project fee of \$550 including house plans showing the design and elevation computations”.

- 38 Mr Orsini says that, following the telephone conversation with Mr Tucker he telephoned the project manager at the property to advise that works should cease.
- 39 Mr Orsini says that on the evening of 13 February 2008 he visited the owners at Narre Warren and advised them of Mr Tucker’s direction that construction works must cease. He says the owners were very concerned with the delay and asked why SPA were taking so long to respond to the power line relocation application.
- 40 On 14 February 2008 a young carpenter was electrocuted and seriously injured whilst working on the roof of the home. Works were suspended while WorkSafe carried out an investigation.
- 41 Some of the construction works, including brickwork, recommenced at around the end of February 2008.
- 42 Mr Orsini says that it took until May 2008 for SPA to approve, by way of a “firm offer”, the relocation of the power line at a cost of \$12,736.90. He says that agreement for the relocation of the power line was confirmed by a memorandum of agreement between SPA and the owners dated 19 May 2009.

The Owners’ evidence

- 43 The owners say that the discussions Mr Orsini alleges took place in mid to late November 2007 (paragraphs 32, 33 and 34 above) never happened. They say that the first time they became aware of any issue in relation to the power line was in January 2008 (at which time the frame had been constructed) when Mr Orsini visited them at Narre Warren and advised them that the power line appeared to be close to the roof frame. They say they were unaware of the SPA 13 November 2007 letter and Mr Orsini made no mention of it. They say that within a day or two they visited the

property to inspect the power line and that Mr Orsini assured them that it did not pose a problem.

- 44 They say that they first became aware of SPA's concern and directions in relation to the power line on the evening of 13 February 2008 when Mr Orsini visited them at Narre Warren and:
- (a) advised them that SPA had issued a stop work notice;
 - (b) handed to them the builder's claim for an extension of time which he said was being claimed by reason of the stop work notice; and
 - (c) told them that the power line would have to be relocated and that they (the owners) would have to bear the cost; and
 - (d) told them that an application for relocation of the power line would need to be submitted to SPA and that he would find out for them the cost involved.
- 45 They say that Mr Orsini visited them again on the evening of 14 February 2008 and informed them of the unfortunate accident involving the young carpenter.
- 46 They say that some days later Mr Orsini informed them that they were required to attend a site meeting with Mr Tucker from SPA. They say the site meeting occurred in March 2008 when Mr Tucker showed them the plan for the proposed power line relocation and informed them that the cost would be approximately \$12,000 to \$13,000 and that there would be an additional \$550 fee for SPA to issue a 'firm offer' for the proposed works. They say that, believing they had no choice, they gave their approval.
- 47 They say that the builder subsequently submitted the power line relocation application together with the initial application fee of \$550.
- 48 By letter addressed to the builder dated 5 May 2008, SPA provided its "firm offer" to relocate the power line at a cost of \$12,736.90.
- 49 The owners say that on 26 or 27 May 2008, Mr Orsini visited them at Narre Warren and showed them an invoice addressed to the builder from SPA seeking payment of \$12,736.90 for the proposed relocation of the power line. They say Mr Orsini told them that they must pay the invoice and, until it was paid, no further construction works would proceed. They say that, believing they had no choice, they gave Mr Orsini their cheque for payment of the invoice.

Mr Tucker's evidence

- 50 Mr Tucker gave evidence that SPA received from the builder the completed "supply request form" (the first step in the power line relocation application process) together with the initial application fee of \$550 on 19 February 2008. Mr Tucker produced at the Hearing the supply request form received from the builder. It appeared to be a photocopy of a document signed and dated by the builder on 27 November 2007, however it was date stamped by

SPA as having been received on 19 February 2008. I accept Mr Tucker's evidence that it was received by SPA on 19 February 2008.

51 Mr Tucker also produced an internal office memorandum prepared by him and dated 27 August 2008. The memorandum set out a chronology of events which included the following:

- 22/11/07 Rino from Hometec rang and requested that the power line be relocated. Sent out a supply request form and also requested property plans including proposed building elevations.
- 12/02/08 While working in the Neerim South area ... I observed that the house frame including the roof frame had been erected on the property.
- 13/02/08 I rang Rino at Hometec Industries and advised that work must cease immediately on the property. I sent a fax to their office also reiterating the above. As of this date no correspondence or project fee had been received for Hometec Industries as was requested in November 07.
- 19/02/08 Received house plans and project fee from Hometec Industries.

I accept Mr Tucker's evidence that the memorandum provides an accurate record of events.

Discussion

- 52 Although Mr Orsini maintained in cross-examination that the supply request form was forwarded to SPA on 27 November 2007, he had no explanation as to why it took until 19 February 2008 for SPA to receive it. The builder could have, but did not, produce any documentation (such as a covering letter, cheque butt, expense account, receipt) to verify the date of the builder's payment of the fee accompanying the supply request form.
- 53 SPA's receipt of the supply request form on 19 February 2008 is consistent with the evidence of the owners that Mr Orsini first told them on 13 February 2008 that an application would need to be submitted to SPA for the relocation of the power line.
- 54 The builder produced no evidence, other than Mr Orsini's oral evidence, to support the proposition that the option of moving the home site relocation (in lieu of relocation of the power line) was acceptable to, or even considered by, SPA as a solution to the breach of the safety regulations. No drawings or diagrams were produced detailing the home site relocation option. There is no evidence of any discussion or communication between Mr Orsini and Mr Tucker in relation to the home site relocation option. Save for Mr Orsini's estimate of \$1,500, there is no evidence detailing the cost of carrying out the home site relocation option. The lack of evidence in relation to the alleged home site relocation option as a viable remedy to remedy the safety regulations breach is striking in light of Mr Orsini's evidence that, for a period of about 10 to 12 days from 14 November 2007,

he had numerous discussions, including a site visit, with the owners to discuss the options.

55 For the above reasons, I am not satisfied that Mr Orsini's recollection of events and communications occurring after 13 November 2007 is reliable and I prefer the owners' evidence. As a consequence I find that:

- (a) the owners first became aware of a breach of the safety regulations on 13 February 2008. By that time the option as contained in the SPA 13 November 2007 letter (to return the ground clearance to the statutory required minimum) was not commercially viable as the frame had been constructed;
- b) the option of relocating the home site was never put to the owners by Mr Orsini or any other representative of the builder;
- c) the owners paid the cost of the power line relocation believing they had no choice as Mr Orsini had advised them that the construction works would not continue until they made the payment.

ARE THE OWNERS ENTITLED TO DAMAGES?

SECTION 24 DOMESTIC BUILDING CONTRACTS ACT 1995

56 Mr Krischock, counsel for the owners, submits that the builder failed to comply with section 24(2) of the *Domestic Building Contracts Act (1995)* ("the Act") and that failure, on its own, is sufficient to find an entitlement to damages in favour of the owners.

57 Section 24 of the Act provides:

- (1) This section applies if a builder wishes to exclude from the contract price the amount any third person is to receive in relation to the work to be carried out under a domestic building contract—
 - (a) for the conveying, connection or installation of services such as gas, electricity, telephone, water and sewerage; or
 - (b) for the issue of planning or building permits.
- (2) The builder may exclude any such amount by stating in the contract immediately after the contract price first appears in the contract—
 - (a) that the cost of the work or thing to which the amount relates is not included in the contract price; and
 - (b) a reasonable estimate of how much the amount is likely to be.

58 In Schedule 1 in the contract the builder nominated an estimated amount of \$150 payable to a third party in respect of "*conveying, connection or installation of electricity*" as an amount to be excluded from the contract price.

- 59 Mr Krischock says that the relocation of the power line should be considered as part of the cost of the “*conveying, connection or installation of electricity*”. He says further that, in view of the actual cost of relocating the power line (\$12736.90), the builder’s estimate of \$150 could not be considered “*a reasonable estimate of how much the amount is likely to be*” as required by section 24(2)(b) of the Act. He says that the inadequate estimate constitutes a failure by the builder to comply with section 24 (2)(b) of the Act with the consequence that the owners are entitled to damages.
- 60 I do not accept the submission.
- 61 I accept Mr Orsini’s evidence that the \$150 estimate provided in the contract schedule was the builder’s reasonable estimate, based on prior experience, of the cost of reconnecting the electricity supply to the property in the owners’ name after the builder had finished construction of the home
- 62 In my view section 24 of the Act does not extend to amounts for works not contemplated by the builder at the time of entering the contract. Sub section (1) provides that section 24 applies “*if a builder wishes to exclude*” from the contract price amounts payable to third parties. It is only in respect of the amounts the builder *wishes to exclude* that the builder is obliged to provide a reasonable estimate of the likely cost. The builder’s intention is fundamental to the operation of section 24 of the Act. I do not see how a builder can *wish to exclude* an amount for works which the builder has not foreseen or given any consideration to. It is no answer to say that the builder *should* have contemplated the works. The operation of section 24 depends on the builder’s actual intention at the time of entering the contract, not what it might or should have been.
- 63 I find that at the time of entering the contract the builder had not foreseen or given any consideration to the possibility of the need to relocate the power line at the property and, as such, the builder could not have *wished to exclude* the amount of such work from the contract price. I find that the amount the builder wished to exclude was the sum payable in respect of the cost of reconnecting the electricity supply to the property in the owners’ name after the builder had finished construction of the home and that the estimate of \$150 was a reasonable estimate of the likely amount.
- 64 Accordingly I find that the builder has not failed to comply with section 24 of the Act.

BREACH OF CONTRACT

- 65 Section 8 of the Act sets out a number of mandatory warranties which apply to work carried out under a domestic building contract. The warranties include:
- (a) the builder warrants that the work will be carried out in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract;

- (b) the builder warrants that all materials to be supplied by the builder for use in the work will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new;
- (c) the builder warrants that the work will be carried out in accordance with, and will comply with, all laws and legal requirements including, without limiting the generality of this warranty, the **Building Act 1993** and the regulations made under that Act;
- (d) the builder warrants that the work will be carried out with reasonable care and skill and will be completed by the date (or within the period) specified by the contract;

The above warranties also appear in the contract at clause 11.

- 66 Mr Krischock's submits that the builder breached the warranty in section 8(c) of the Act by failing to carry out the works in accordance with all laws and legal requirements (namely the safety regulations) and that, as a result, the owners are entitled to damages being the cost of relocating the power line.
- 67 I accept that in carrying out the works, in particular the construction of the frame, the builder failed to comply with the safety regulations and that this constituted a breach of the warranty in section 8(c) of the Act. It also constituted a breach of the contract by the builder.
- 68 Where a party sustains a loss by reason of a breach of contract, that party is, as far as money can do it, to be placed in the same situation as if the breach had not occurred.
- 69 Mr Krischock raised what he perceived to be a difficulty in reconciling the builder's obligation pursuant to the section 8(c) warranty with the obligation pursuant to the section 8(a) warranty which requires the builder to carry out the works *in accordance with the plans and specifications set out in the contract*. In this case, says Mr Krischock, the builder has constructed the home in accordance with the plans but in so doing has breached the section 8(c) warranty.
- 70 Mr Krischock referred to the text *Hudson's Building and Engineering Contracts*¹ where the learned authors suggest that where (under a commercial building contract) a contractor has expressly undertaken to carry out work which will perform a certain duty or function and, in carrying out the work in accordance with the plans and specifications, it turns out that the works will not perform the duty or function, the express undertaking to perform the duty or function overrides the obligation to comply with the plans and specifications. Mr Krischock submits that, by analogy, in this case the section 8(c) warranty should override the section 8(a) warranty.

¹ 12th edition, p493

- 71 I do not find it necessary to reconcile the statutory warranties. In my view what matters in this case is that the owners have been unable to establish any quantifiable loss arising from the builder's breach of the contract.
- 72 As noted above I find that the owners, and not the builder, determined the level and location of the building site at the property. The builder commenced works on the site as presented by the owners. A breach of the safety regulations (alteration of the ground level with resulting breach of the minimum required clearance to the over head power line) existed before the builder commenced any construction works, that is, before the builder's breach of the contract.
- 73 The options to remedy the initial breach of the safety regulations (the alteration of the ground level)) were, according to SPA, to relocate the power line or return the ground level to the statutory minimum clearance. In my view the builder ought to have raised the matter with the owners immediately it became aware of the breach in mid November 2007 in order to discuss the remedy options. Whichever option the owners may have chosen, some further works (over and above removal of the plumbing pipes already laid) would have been necessary. In my view, the builder would have been entitled to claim a variation to the contract price to include the extra expense of such further works. However, because the builder delayed advising the owners of the breach of the safety regulations until February 2008 and in the interim proceeded with the construction works (resulting in the builder's breach of the contract), the owners were deprived of the opportunity to consider options to remedy the initial breach of the safety regulations. They had no practical choice other than to relocate the power line.
- 74 In assessing damages, the primary issue is whether the owners can established a loss ,arising from the breach of contract, which can be met by a sum of damages to put them, so far as money can do it, in the position they would have been had they not been deprived of options to remedy the safety regulations breach.
- 75 There is no evidence that the owners would have, if given the option in November 2007 (prior to the slab pour), elected to lower the site level at the property in lieu of relocating the power line. Further, there is no evidence as to how much such work would have cost. There is no evidence as to whether it would have been a cheaper or more expensive option.
- 76 As noted above I find that the builder never put to the owners the alleged option of moving the home site location southward on the cut. I am not satisfied that it would have been a viable option, acceptable to SPA, to remedy the initial breach of the safety regulations. Even if it was a viable option, I am not satisfied with the builder's evidence as to the approximate cost involved and I am not satisfied that it would have been the owners' preferred option.

- 77 Accordingly, I find that the owners have been unable to substantiate any quantifiable loss or damage incurred by them as a result of being deprived of options to remedy the initial breach of the safety regulations.
- 78 Further, the owners have produced no evidence to substantiate any other loss or damage arising as a result of the builder's breach of the contract. It may be that the completion of the home was delayed, however the owners have not claimed, or produced evidence to substantiate any quantifiable loss attributable to any such delay.
- 79 I find that the owners have failed to establish any quantifiable loss or damage arising as a result of the builder's breach of the contract.
- 80 For the reasons given above, the application is dismissed.
- 81 The parties are at liberty to make application in respect of costs. I draw the parties' attention to section 109 of the *Victorian Civil and Administrative Tribunal Act* (1998).

MEMBER M. FARRELLY