VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D359/2011

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic building – claims by owner for credits and damages – amount paid to Builder to obtain access to completed works – whether accord and satisfaction – requirements to establish – onus of proof – breach of contract in using different material – no loss demonstrated – nominal damages awarded – claim for refund of amount paid to Builder – payment voluntary with knowledge of facts - not recoverable

APPLICANT	Kelco Asset Management Pty Ltd
RESPONDENT	Skabaw Pty Ltd (ACN 006 056 524) t/as Detailed Homes
WHERE HELD	Melbourne
BEFORE	Senior Member Walker
HEARING TYPE	Hearing
DATE OF HEARING	13 – 16 February 2012
DATE OF ORDER	12 April 2012
CITATION	Kelco Asset Management Pty Ltd v Skabaw Pty Ltd trading as Detailed Homes (Domestic Building) [2012] VCAT 433

ORDER

1. Order the Respondent to pay to the Applicant the sum of $51,976.89.

2. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicants	Mr K. Naish of Counsel
For the First Respondent	Mr Barbagello, Director

REASONS

Background

1 The applicant ("the Owner") is the owner of land in Tuerong ("the Land"). It is a company controlled by a Mr and Mrs Kelly ("the Kellys").

2 The respondent ("the Builder") formally carried on business as a domestic building contractor. Its principal, Mr Barbagello, is a registered domestic builder.

3 By a contract in writing dated 19 June 2009 ("the Contract") the Builder agreed to construct a house on the Land ("the House") in accordance with plans prepared by a designer, Mr Thomas, and engineering drawings and specifications that were incorporated into the Contract by its terms. The Contract price was $893,650 and the construction period was a little over a year.

4 In Schedule 2 of the Contract the Builder's quotation dated 16 January 2009 was incorporated into the Contract in regard to prime cost items and provisional sum allowances. Due performance by the Owner of its obligations under the Contract was guaranteed by one of the Kellys, Cheryl Kelly ("Mrs Kelly").

Construction

5 During the course of construction there were a number of variations to the work. Some of these were documented and some were not.

6 Disagreements arose between the parties which are referred to below. As a result, their relationship deteriorated and, at the time of handover, there were a number of serious disputes between them.

7 On 17 August 2010 the Builder notified the Owner that work was complete and requested that arrangements be made for a final inspection. An amount of $73,563.54 was sought by the Builder.

8 The Kellys did not agree that the House was finished or that the amount claimed was due. After discussion, they agreed to pay the Builder $65,000 in order to obtain possession of the House. The Builder received this sum on 27 August 2010 and the Kellys entered into possession.

These proceedings

9 On 16 May 2011 this proceeding was issued by the Owner seeking various orders, including a claim for damages with respect to allegedly incomplete and defective work. Points of Defence were filed on behalf of the Builder denying the existence of any incomplete or defective work and alleging that a final settlement had been reached by the parties by the payment and acceptance of the $65,000 and the Kellys entering into possession of the House.

10 The Builder also filed a counterclaim but no fee was paid, despite several requests by the registry, and so the registrar refused to accept it. It is accordingly not before me.

The hearing

11 The matter came before me for hearing on 13 February 2012 with four days allocated. Mr K. Naish of Counsel appeared on behalf of the Owner and Mr Barbagello represented the Builder.

12 Lay evidence was given on behalf of the Owner by Mrs Kelly and expert evidence was given by a building expert, Mr Zoanetti, and by a stonemason, Mr Freeden.

13 Evidence was given on behalf of the Builder by Mr Barbagello but no expert evidence was called on its behalf. Mr Barbagello had informed the tribunal at a directions hearing shortly before the hearing date that no expert evidence would be called.

14 Evidence concluded at the end of the fourth day and I informed the parties that I would provide a written decision.

15 I see no reason to disbelieve the evidence of any of the witnesses although I thought that some of Mr Barbagello's evidence was somewhat vague.

16 It is apparent that there were a number of witnesses who might have been able to assist the Builder's case, such as the bricklayer and the plumber, but they were not called. Mr Barbagello indicated early in the hearing that he would seek to have the designer Mr Thomas and the plumber appear by telephone link. Mr Naish opposed this course. When I invited Mr Barbagello to make his application for an order that they be permitted to give evidence in this way he decided not to make it and so it was unnecessary to deal with it.

17 Mr Barbagello also indicated during the hearing that he thought that a view of the House would be useful. Again, this course was opposed by Mr Naish, apparently on the ground of the delay that it might cause. When I asked Mr Barbagello to make the application and I would deal with it he then decided that he would not make it.

18 In view of the extent of the evidence and the numerous photographs I do not believe that a view was necessary in this case. The various points were very well articulated and supported by the documents and photographs on both sides.

19 The case turns on the determination of a number of discrete issues raised by the parties and I will deal with each of these in turn.

The Builder's claim that the Owner's claim has been settled

20 As will appear below there were a number of claims agitated by the Kellys at the time the Builder served its notice of completion.

21 The claim for the final payment was contained in a letter dated 17 August 2010 addressed to the Owner by the Builder. It was hand delivered to Mrs Kelly on 23 August 2010 by Mr Barbagello and attached to it were some invoices, a credit note and some other documents relating to variations. The letter concludes with the following paragraph:

> "In order to finalise this Contract for the benefit of both parties, I am willing to accept the discounted final payment of $70,000 (reducing payment by $3,563.54) due on handover of certificate of occupancy".

22 This letter as well as communications that followed it appear to contain without prejudice offers but both sides waived privilege. In any case, I have to determine whether these communications resulted in a settlement.

23 The Kellys responded to the letter by email, disputing the variations and offering $34,670.10. The Builder rejected this and made a counter offer of $65,000. Mrs Kelly said that she informed Mr Barbagello that the Kellys would agree to pay the Builder $65,000 but that they did not agree that the House was finished and that they would be pursuing the matter further and exercising their rights.

24 In a letter dated 27 August 2010 to the Builder Mrs Kelly recited various matters in dispute including an allegation that Mr Barbagello had said that in order to achieve the hand over of the keys and end the Contract the full amount of $65,000 was to be paid to the Builder. The letter then continues:

> "Therefore it was agreed verbally on the telephone yesterday 26 August 2010, we will without prejudice pay your $65,000 claim not as acceptance of settlement in completion but simply to obtain your permission for us to take possession occupancy of our new house this Friday morning 27 August 2010.
>
> Please be advised that our payment is not an admission or liability, nor is it an acceptance of any of the building works, and we do not release you as the individual who carried out the building works Skabaw Pty Ltd t/as Detailed Homes and all obligations under the Contract whether in writing or implied, until such time as our dispute has been settled, and even then your personal release is limited to that which is permitted for Skabaw Pty Ltd t/as Detailed Homes under the Contract".

25 The letter goes on to suggest further meetings and discussions. At the foot of the letter there is an acknowledgement by Mr Barbagello in the following terms:

> "I, Tony Barbagello of Skabaw Pty Ltd t/as Detailed Homes have received a copy of this letter … and although this acknowledgement is not acceptance of the letter's content, I hereby hand over possession of the land and building works … on this day in exchange for payment of $65,000".

26 Mr Barbagello did not dispute Mrs Kelly's evidence in regard to the discussions in this correspondence but asserted that, on its proper interpretation it amounted to a settlement of the Owner's claims.

27 An accord and satisfaction is the purchase of a release from an obligation by means of valuable consideration. The accord is the agreement by which the obligation is discharged and the satisfaction is the consideration which makes the agreement operative (see *Halsbury Laws of England*, 4th edition, vol. 9, paragraph 585; *British Russian Gazette v Associated Newspapers Limited* (1933) 2KB616 at 643 per Scrutton LJ).

28 Before there can be an accord and satisfaction it is necessary to establish that the parties agreed on a sum in satisfaction of the claims (see *Mitcham Road Pty Ltd v Carlovers Carwash Limited* [2001] VSC 225 at paragraph 35 per Whelan J).

29 It is clear from the correspondence that, at the time of this exchange of correspondence and the payment of the money, there was no agreement that the claims being agitated by the Owner were to be released or discharged upon payment of the money and the handing over of possession of the House. Indeed it was specifically stated that the Owner would continue to press its claims. What was handed over in exchange for the money was possession of the House. The claim for an accord and satisfaction therefore fails.

The stonework

30 There was to be feature stonework in the House, to the fireplace and to external columns. The stone selected was a slate inspected by the Kellys and Mr Barbagallo at the supplier's premises. During this inspection photographs were taken of a sample wall.

31 In an email dated 18 March 2009 to the Kellys the Builder stated that 80 square metres of stonework had been allowed for in the Contract price for which the charge, for labour and materials, was $48,500. However the stonework is not a prime cost item apart from the supply of the stone itself, which was allowed at $200 per square metre. That figure was not exceeded by the Builder for the stone purchased.

32 The stone does not appear to have been laid by a stonemason but rather, by a bricklayer and the Kellys expressed dissatisfaction with the work shortly after its commencement. Many discussions followed, in which Mr Barbagello suggested that the Kellys should allow work to continue and that the appearance of the stonework would improve. At one stage the hearth was dismantled and rebuilt.

33 Finally, when the stonework around the chimney had reached about two thirds of the way up the wall the Kellys called a halt and insisted that no further work be done. There were similar complaints about the stonework done around the garage pillars.

34 On 15 July 2010, following a complaint in writing by the Kellys, Mr Barbagello wrote back denying that the work was unsatisfactory and continuing:

> "… We can either give you a credit for the stonework yet to be completed, or it can be rebuilt to your cost in accordance with the new photos recently provided".

35 A lengthy letter from the Kellys followed, reaffirming their complaints and suggesting that they would accept "your offer" to remove the stonework from the Contract. However the offer by the Builder was not to remove it from the Contract but to give a credit for the stonework that had not been completed. The balance of the Kellys' letter makes it clear that they propose that the stonework already done be demolished. I cannot spell out from this correspondence any

agreement for a variation, nor do the parties appear to have reached any oral agreement about the matter.

36 On 19 July there was a further detailed email from the Kellys to the Builder setting out their version of the history of the matter and demanding that Mr Barbagello contact them urgently and confirm the booking of a stonemason for no later than the close of business the following day, 20 July. The last paragraph of the letter stated that in the absence of any contact they risked losing their window of opportunity to have the stonework pulled down and completed by a reputable stonemason. There was no resolution and the stonework remains unrectified.

37 In his expert's report, Mr Freeden concludes:

> "The stonework that has been completed is nothing like the sample work provided. It is uniformly unacceptable, naively executed, unstable of poor workmanship and very unslightly, even to an untrained eye.
>
> All of the stonework I examined was of such a low standard, unacceptable aesthetically and technically in that it requires dismantling. It is structurally unsound in places, unfinished in others and poorly executed everywhere else".

38 In his expert's report Mr Zoanetti concluded as to the stonework that the standard of workmanship was unsatisfactory and it should be removed and re-laid.

39 The further point was made that the incorrect lintel has been installed over the fireplace insert, resulting in a sag, preventing the free opening of the door of the fireplace insert. There is a dispute between the parties as to whether the brickwork above the fireplace has obstructed the venting.

40 Mr Barbagello denied that the work was of a poor standard and suggested that it had a rustic look which he thought the Kellys wanted. In regard to one stone in particular that was projecting into a vent space Mr Freeden acknowledged that it had the appearance of having been placed in that position deliberately in order to create a particular affect.

41 I do not accept that the Kellys wanted an appearance of the nature that has been supplied. The photographs of the sample wall show a vastly superior result and appearance and in any event, regardless of appearance the work has been done in such an unsatisfactory way that, according to the experts, it has to be demolished.

42 Mr Zoanetti has costed the rectification at $42,424.07. The details of the calculation of this sum appear on page 8 of his report. The basis of this calculation is the initial allowance by the Builder of $48,500 for the stonework. That figure appears in the email sent by Mr Barbagello.

43 Mr Barbagello suggested that that figure should not be used. He said that it includes supporting brickwork and other materials but that does not appear from the email that he sent and there is no other figure suggested upon which the calculation can be based. If one were to accept Mr Freeden's figures which are based on a higher rate per square metre, the result would be an even higher figure.

44 I think I should prefer Mr Zoanetti's calculations because Mr Freeden said on several occasions that he is very busy and is able to command higher prices. He acknowledged that there might be other tradesmen who would do the job for less than he would charge.

45 What should be allowed as damages to the Owner is the amount that it would reasonably have to spend in order to bring the work into compliance with the Contract. If the Kellys choose Mr Freeden to do the work that is a matter for them but I cannot be satisfied on the state of the evidence that the cost of having the work rectified will be necessarily as much as Mr Freeden would charge.

46 From the total cost of $42,424.07 there must be deducted the credit already allowed by the Builder of $13,705, resulting in a final figure of $28,719.07.

Incorrect stumps to verandahs and decks

47 The Contract required the Builder to install concrete stumps to support the external verandah and deck. Instead, the Builder has used cypress. In his report Mr Zoanetti mistakenly identified the material as being treated pine. He said that treated pine could be used for that application but the stumps would have a lesser life expectancy. Mr Barbagello disputed that. He said that he chose cypress because the stumps were for external use and the metal pin in concrete stumps would rust and cause concrete cancer in the stumps. He said the cypress was the better option.

48 Although I am satisfied that there has been a breach of the Contract in that a different material has been used from that specified I am not satisfied that any loss has resulted. Mr Zoanetti acknowledged that the verandahs were very well constructed and all he was concerned about was an amount to compensate the Owner for a lesser life span for the stumps. According to Mr Barbagello's evidence, the cypress pine stumps are more expensive and will last longer. I am not satisfied that there should be anything other than nominal damages awarded which I will fix at $5. Proof of actual damage is not an ingredient of a cause of action in contract and upon proof of breach an entitlement to damages arises even though no actual loss has been suffered (*Halsbury* 4th Ed. Vol 12 para 1114).

Ceiling height

49 The Contract documents in several places require a ceiling height to be achieved of 2,750mm. It has not been. It is 70mm less and specified.

50 Mr Barbagello offered two different explanations. He said first that the dimensions shown on the drawings referred to the dimensions between the structural members that is, the top surface of the slab and the underside of the bottom corner of the trusses. That might be correct if one is referring to simple dimensions on drawings. However the dimensions concerned here are stated on the plans to be "finished floor level" and "finished ceiling level". I accept Mr Zoanetti's evidence that this means that the measurement is taken from the top of the finished flooring material to the underside of the plaster ceiling. Indeed, a note on the plans makes it quite clear that the Builder is to ensure that the

structural dimensions include allowances for floor coverings, ceiling linings and battens.

51 Mr Barbagello also said that a particular beam (RB 4) was so positioned as to intrude into the ceiling space and that in order to avoid this occurring, the steel had to be repositioned and further engineering drawings were provided. The amended engineering drawings were tendered but I do not understand them to support what Mr Barbagello was saying.

52 It seems to me that the substantial reason for the diminished ceiling height is Mr Barbagello's misreading of the plans and his failure to take into account, in setting the height of the stud walls, the fact that there would be 24mm of flooring material laid on the slab and battens and plaster laid on the underside of the trusses. It seems to me that it is the thickness of these elements that has caused the diminished ceiling height and not any re-engineering of any of the supporting beams.

53 Mr Zoanetti says that an allowance should be made for the savings to the Builder of the materials that would have been necessary to extend the walls the extra 70mm. I am not satisfied that that is appropriate. The evidence is clear that the studs purchased by the Builder would have been sufficiently long to build the walls as designed and there was no saving in providing a slightly lower wall as far as the frame was concerned. It is also not clear that there would have been any saving in plaster since, whatever the standard size of the plaster sheets may be, there was scope to cover any shortfall of the minor nature involved by cornice at the ceiling level and skirting at the ground level. I am not satisfied that any saving to the Builder has been demonstrated.

54 Mr Zoanetti also said that the effect of the lower walls was a substantial diminution in amenity. These sorts of questions are very subjective. It is a difference between 2.68 metres and 2.75 metres.

55 Although I am satisfied that there has been a breach of Contract by the Builder I cannot see that any loss has resulted from that. The ceilings were already high and they are still high, only slightly less so. The difference of 70mm is not such as, in my opinion, sufficient to cause any significant loss of amenity. I will therefore only award damages of $500. I will add that it is remarkable that a Builder of Mr Barbagello's apparent experience should have made such a mistake.

Expansion joints in the floor tiling

56 Contrary to the Australian Standard no expansion joint was put in the floor tiling in the bathroom. This was not disputed by Mr Barbagello and I accept Mr Zoanetti's rectification cost of $500.

External taps

57 The Builder was to provide four external taps and there is only one. Mr Barbagello accepts that this is the case but says that the plumber did other work instead. He suggests that the plumber had a conversation with Mr Kelly that Mr

Kelly did not want the other three external taps and that instead the plumber put a tap point in the space for the refrigerator and did some other work. There is no documentation of any variation of this nature and the alleged conversation was not one which Mr Barbagello himself witnessed. The Builder has not done what was required by the Contract and the amount said by Mr Zoanetti for the cost of installing three extra taps should be allowed, which is $350.00.

Bathroom sliding doors

58 The plans required "full height" glass sliding doors to be installed in the bathroom to allow it to be divided into two sections. Mr Barbagello argued that "full height" meant 2340 mm. Mr Zoanetti said that it meant floor to ceiling and I accept his evidence. The Builder allowed a credit of $1,045. The Kellys purchased doors of $2,348 and have still got less than what the Contract required. Although the doors look satisfactory they do not have the same dramatic appearance or affect as those required by the Contract drawings would have had and I accept Mr Zoanetti's evidence in that regard. I think an allowance should be made for loss of amenity and I accept an amount of $1,000 as appropriate. There will therefore be an award of damages to the Owner of $2,303.

Items withdrawn from the Contract

59 The Contract plans provided for a bench and a broom cupboard in the laundry. The cabinetwork was removed from the Contract following the Kelly's dissatisfaction with work carried out by the Builder's own cabinetmaker. The cabinet work was then provided by the Owner. Mr Barbagello considered it unfair for further allowances to be made for work that he did not have to do.

60 I think that it is appropriate to make an allowance to the Owner for the cost that the Builder has saved in not building a standard bench top in the laundry. Mr Zoanetti has costed the bench top using Rawlinson's Guide at $609. That is on the basis of incomplete work but what I need assessed is a credit. I am not satisfied that it would necessarily have cost the Builder as much as that to have his tradesmen on site construct a bench of the required dimensions. A credit has already been given of $301. Mr Zoanetti regards that as insufficient. I will allow a further $100 because the cabinetwork was removed by consent and what I am assessing is the saving to the Builder, not damages payable by the Builder for defective or incomplete work.

External limestone wall

61 The wall was replaced with a double glazed window for which the Kellys paid. There was no credit raised for the supplying and laying of the limestone wall. Mr Barbagello said that, in exchange, he put a timber floor in the study which he had not quoted for. The Kellys responded by referring to the plan of floor surfaces that they had sent to the Builder on 17 June showing the study to have a timber floor.

62 However I think Mr Barbagello is right concerning the Contract. The Contract documents are quite clear that the study wall was to have carpet, not a timber

floor, and the coloured floor plan sent to Mr Barbagello was not taken up in the actual Contract documents which clearly specify that the room is to be carpeted. This was an agreed change and I think I should not allow a credit for the limestone wall without looking at all of the costs on both sides.

63 Mr Barbagello says that he provided termite treated studs but that was a requirement of the Contract. In the absence of evidence as to the cost of supplying the timber floor to the study I will deduct $1,500 for that and so the credit to the Owner for the limestone wall will be $1,096.86 in accordance with Mr Zoanetti's calculations.

Others walls replaced with plaster

64 Other limestone walls that were replaced with plaster were the feature wall into the TV room, the master bedroom feature walls, the end hallway feature wall, the two entry door feature walls, a double skinned feature wall and the wall to the left of the fireplace. For all of these limestone was replaced with plasterboard and in each case the amount calculated by Mr Zoanetti will be allowed, which totals $7,854.21.

Gable end over the rumpus room

65 This was changed from cedar lining boards to louvres and the Builder gave a credit of only $112.00. Mr Zoanetti has calculated that the saving to the Builder was $4,321.15, based upon the Builder's own figures as to the extra that it charged in Invoice 1265 to substitute cedar lining boards for louvres elsewhere in the House. The difference between this figure and the $112.00 credit already given by the Builder, $4,209.15, should be allowed to the Owner.

Hydronic heating

66. The Contract allowed a prime cost figure of $8,000.00 for a ducted heating system through the ceiling. The Kellys decided to have hydronic heating instead and they organized and paid for a hydronic heating system at a cost of $17,820. The Builder has credited the Owner with the prime costs figure and charged a margin on it of $1,473.04.

67. Under the form of contract used, which is the HIA Victorian New Homes Contract October 2004, a prime cost or provisional sum figure does not include the cost of fitting the item or the Builder's margin or overheads. Those are already included in the Contract price (Clause 33). Schedule 2 of the Contract provides that if the figure is exceeded, the Builder is entitled to charge a margin of 20% on the excess. The margin chargeable on excess work was to be 15% (Item 10, Schedule 1). In this case, the Builder has charged $1,473.04, which is 15%. The Owner denies that the Builder is entitled to a margin. It says that the heating was removed from the scope of works and that the Builder did not do it.

68. In order to be able to claim a margin on the excess of a particular provisional sum or prime cost item, a Builder, whether directly or by its suppliers or sub-contractors, must carry out the work or supply the item and it must be the Builder that incurs the consequent expense. If he allows the Owner to assume

responsibility for the item and engage other tradesmen to do it directly, he is not entitled to the margin because the prime cost or provisional sum has not been exceeded. In fact, he has not incurred the cost at all. To be entitled to a margin, the item in question must remain within the scope of works.

69. As with the proof of any other fact, the onus of establishing that the scope of works has been reduced lies on the person who asserts it. The mere fact that a builder allows a client to go to a supplier and choose tiles, appliances or any other article or find a sub-contractor will not, on its own, establish that the article or work in question was removed from the scope of works, particularly where it is the Builder that fits or installs the article concerned or supervises and pays the sub-contractor. Even where an owner pays for something and receives repayment or a credit from the builder, that might have been done for convenience. No single fact is likely to be conclusive. In the end, a finding must be made as to whether parties have agreed to vary the scope of works.

70. In the case of the heating I am satisfied from Mrs Kelly's evidence that it was removed from the Contract. The Owner's own contractor supplied and installed the heating system and the whole cost was paid to it by the Owner without any involvement of the Builder. The Owner is therefore entitled to a refund of the margin charged of $1,473.04.

The white goods

71. Mrs Kelly went out and selected the white goods, as seems to be a common practice. She said that Mr Barbagallo told her: "If you want to pay for them we'll sort it out later." The white goods were then delivered to the site and installed by the Builder's workmen. I am not satisfied that the white goods were removed from the scope of works.

72. The prime cost figure for white goods was $7,100.00. Those selected cost $18,082.00. The Builder has charged a margin of $2,712.30 (incl. GST). What should have been charged was $1,812.03 (incl GST), being $15% of the difference. The excess of $900.27 must be credited back to the Owner.

Tiling

73. There was a prime cost allowance of $13,500.00 for the supply of tiles. The tiles cost $20,500 of which the Builder paid $7,609.93 and Owner paid the balance. The Owner was therefore entitled to a credit for the balance of the prime cost allowance, which was $5,890.07. By a credit note attached to Invoice 1275, the Builder has credited that amount but then charged a margin of 15% on the excess of the total spent on tiles over the prime cost allowance. The Owner disputes this but the tiles were not removed from the scope of works and so I think that the Builder is entitled to the margin.

The hot water services

74. There were to be two hot water services with a prime cost of $3,500.00 for both . Two hot water services were delivered to the site by the Builder's suppliers but one was unsatisfactory because it required natural gas, not bottled gas, which the House was to have. It was returned by the Builder and replaced with a correct

unit which was cheaper. The Kellys were not credited with the difference between the cost of the original incorrect unit and the replacement unit. The difference was $$605.18 which, with the Builder's margin, became $648.83 and this needs to be credited to the Owner.

The limestone sealant

75. The Builder did not seal the limestone walls. The Kellys purchased sealant and the Builder's workmen applied it. The expert evidence of Mr Zoanetti is that the limestone should have been sealed and that was supported by a note on the invoice for the limestone. Although Mr Barbagello said that it is not his practice to seal Western Australian limestone I prefer the evidence of Mr Zoanetti. The amount of $600.00, being the cost of the sealant will be allowed to the Owner.

The painting of the doors

76. The Contract required the internal doors to be painted with "two pack/emporite or similar". That is a high cost painting method and, in the quotation process, the parties had allowed an amount of $11,286.00 in the Contract price to have it done. That is established by Exhibit "DDD", which was a communication from the Builder to the Owner explaining the increase in price that was set out in the quotation dated the same day. That quotation (Exhibit "G") was incorporated into the Contract.

77. Mr Zoanetti said that the doors were not painted in either of the specified ways. A door was brought to the hearing and tendered into evidence. Upon inspection it appeared to be a chalky finish, quite rough in spots, with the wood grain visible on the sides. It looked like a very ordinary and poorly executed paint job. I therefore accept the evidence of Mr Zoanetti that they have not been painted in the special way required and will allow a credit back to the Owner for the amount it paid to have it done.

The claim for extra concrete for the deepened edge beams

78. The Builder obtained its quotation from the concreter before the plans were finalized. Mr Barbagallo then did not notice that the roofing material had changed from Colorbond to tiles, imposing an additional load on the slab and a change to the engineering design, deepening the edge beams. The Kellys were not advised but were presented with a bill by the Builder for an additional $7,753.18 for the deepened edge beams, which the Owner paid in order to maintain good will with Mr Barbagallo. I agree with Mr Zoanetti that the Builder was bound by the Contract price and that this was probably not a variation claimable by the Builder. However the Owner has paid it and that payment having been made voluntary and not under any compulsion and with full knowledge of the facts, I do not believe that it is now recoverable from the Builder.

Conclusion

79. As a result if the forgoing I find that the Owner is entitled by way of damages or credits to the sum of $60,540.43, calculated as follows:

• Stonework	$28,719.07
• Incorrect stumps	$ 5.00
• Reduced ceiling height	$ 500.00
• Expansion joints in the floor tiling	$ 500.00
• External taps	$ 350.00
• Bathroom sliding doors	$ 2,303.00
• Items withdrawn from the Contract	$ 100.00
• External limestone wall	$ 1,096.86
• Others walls replaced with plaster	$ 7,854.21.
• Gable end over the rumpus room	$ 4,209.15
• Hydronic heating	$ 1,473.04
• White goods	$ 900.27
• Hot water services	$ 648.83
• Limestone sealant	$ 600.00
• Painting of the doors	$11,286.00
Total	$60,540.43

Payments due and payments made

80. The Owner has paid a total of $907,307.03 to the Builder. The final Contract price claimed by the Builder, with adjustments for variations and without taking into account the matters dealt with above, was $915,870.57. The Owner has therefore paid $8,563.54 less than the Builder has claimed. When the Builder's claims are adjusted by deducting the amount of $60,540.43 it appears that the Owner has overpaid the Builder by $51,976.89.

Order to be made

81. There will be an order that the Respondent pay to the Applicant the sum of $51,976.89. Costs will be reserved.

SENIOR MEMBER R. WALKER