VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D1098/2011

CATCHWORDS

Domestic Building – alleged defects – agreement of Builder to rectify – whether accord and satisfaction – - extent of defects – evidence - assessment of damages – claim for loss of amenity

APPLICANT	Kostadina Kounelis
RESPONDENT	Ross Horton Homes Pty Ltd (ACN: 084 033 232)
JOINED PARTY	Aspect Windows Pty Ltd (ACN: 114 857 591)
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	1-10 July and 18 & 19 September 2013 Submissions 19 March 2014
DATE OF ORDER	25 March 2014
CITATION	Kounelis v Ross Horton Homes Pty Ltd (Domestic Building) [2014] VCAT 319

ORDER

1. Order that the Respondent pay to the Applicant the sum of $66,124.05.
2. The claim against the Joined party is dismissed.
3. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Mr A. Downie of Counsel
For the Respondent	Mr L.E.P Magowan of Counsel
For the Joined Party	Mr B. Reid of Counsel

REASONS

Background

1 The Applicant ("the Owner") is the owner of a dwelling house in Brighton ("the House"). The House was built by the Respondent ("the Builder") which carried on business at all material times as a builder. The joined party ("Aspect Windows") carried on business at all material times as a manufacturer and supplier of windows.

2 The House was constructed pursuant to a building contract entered into on 18 May 2005 ("the Contract"). The Builder was, at the time, called "Masterplan Builders" but after the contract was entered into it sold the building business that it conducted under that name and adopted the name "Ross Horton Homes Pty Ltd" under which it completed a few current jobs, including the construction of the House.

3 The project manager supervising the construction was initially one Joanne van Mourik but the Builder's director, Mr Rossley took over that role in about January 2006.

4 The Owner claims that the House was defectively constructed and that, after allowing the Builder several opportunities to remedy the defects it has failed to do so. She seeks damages for the expense that she claims she will incur in having the defects rectified herself and also for consequential losses she says she will suffer.

The hearing

5 The proceeding came before me for hearing on 1 July 2013 with seven days allocated. Mr A. Downie of counsel appeared for the Owner, Mr L. Magowan of counsel appeared for the Builder and Mr B. Reid of counsel appeared for Aspect Windows.

6 The time allocated was insufficient to dispose of the matter and it was adjourned part heard to 18 September 2013 with two further days allocated. At the request of counsel I then directed that outlines of submissions be filed and served by 18 October 2013 and that submissions be heard on 25 October 2013. Unfortunately, I was in a hearing on that day and the submissions were re-listed on two further occasions and were not finally made until 18 March 2014.

7 Apart from the expert evidence, the witnesses for the Applicant were the Applicant herself and a number of other persons referred to below who were called to prove the various items of loss and damage. They were:

(a) Mr Pietropaolo from Kents removalists as to removal expenses;

(b) Mr Durban as to the curtains;

(c) Mr McKinnon of Johns Lyng Insurance Building Solutions (Victoria) Pty Ltd ("Johns Lyng") as to what that company quoted to rectify the defects;

(d) Mr Lowe as to the cost of removing the carpet;

(e) Mr Anderson as to the cost of removing electrical equipment;

(f) Mr O'Hare, as to the cost of alternate accommodation;

Their evidence in terms of quantum was not in issue.

8 Evidence was given for the Builder by its Director, Mr Rossley, and by its employee Mr Good, a plumber who supervised attempts at rectification. Other witnesses called were Mr Paron, a builder who gave evidence as to the cost of rectification, Mr Piaia, the supplier of the concrete pillars at the rear of the House and Mr Ellis, the supplier of the fireplace.

9 Evidence on behalf of Aspect Windows was given by its Director, Mr Brodie.

The expert evidence

10 Expert evidence was given in regard to all issues by Mr Cheong for the Owners and by Mr Browning for the Builder. In regard to the windows, I also had the expert evidence of Dr Eilenberg and. Mr Mackinnon of the Master Painters' Association, who gave evidence in regard to the painting of the windows.

11 Mr Cheong, Mr Browning and Dr Eilenberg are building consultants with a general expertise. Mr Mackinnon is an expert in painting. The experts gave concurrent evidence and were cross-examined separately.

12 The independence of Mr Cheong was attacked by Mr Magowan on the ground that, towards the end of the construction, he assisted the Owner and her husband in regard to identifying alleged defects, suggesting the scope of rectification works and in discussions with the Builder. Mr Magowan referred to what he said was emotive language in Mr Cheong's reports and said that because of the role Mr Cheong had assumed in preparing lists, arranging meetings, suggesting solutions and attempting to resolve matters with the Builder, he had assumed the role of an advocate which was inconsistent with the role of an expert witness. He pointed out that Mr Cheong also obtained quotations on behalf of the Owner from Johns Lyng.

13 I do not see any reason to discount Mr Cheong's evidence. He was involved from an early time in identifying defects and in dealing with the Builder but that sometimes occurs in these cases. I am mindful of Mr Cheong's long involvement with the dispute and the unsuccessful attempts the parties made to resolve it but despite this involvement I do not believe that his evidence was tainted.

14 Mr Browning's expertise in regard to windows was attacked by Mr Reid but after hearing evidence as to his general building expertise and his more limited experience in manufacturing windows, I ruled that he was qualified to give evidence as to the alleged defects in the manufacture of the windows.

15 I was greatly assisted by a Scott Schedule the experts prepared.

The facts

16 On 16 August 2006 construction was completed and the House was handed over to the Owner.

17 Complaints had been made by the Owner about the construction of the House before the handover and further complaints were made after she took possession. The Owner claims that she was told by Mr Rossley to wait 12 months before submitting a list of defects. Mr Rossley denies having said that. It would be unsurprising if Mr Rossley had said something about waiting before submitting a list of defects but nothing turns on this. It might simply be a difference in recollection. In any case, several lists of alleged defects were prepared during the course of the discussions between the parties and a number of reports were obtained by the Owner from Mr Cheong.

Attempts at rectification

18 A meeting took place at the House on 22 December 2008 between the Owner, her husband Mr Beed, Mr Horton, Mr Rossley and Mr Cheong. Following discussion it was agreed that the Builder would rectify a list of defects within eight weeks from 1 March 2009 ("the December Agreement").

19 A further document was prepared by Mr Cheong and sent as a facsimile on 10 March 2009. This set out some details of work Mr Cheong thought required to be done to fix the windows. When asked why he sent it he said:

> "Just so the parties understand and had the best information possible what the agreement was and conclude the arrangement" (Transcript p. 278).

He added that the Owner was concerned about lack of progress on the part of the Builder.

20 A further email was sent by Mr Cheong to Mr Good on 27 March 2009 saying that it was agreed that he (Mr Cheong) would have some input in the scope of rectification works.

21 On 7 May Mr Cheong sent an email complaining about lack of progress and specifying what would and would not be acceptable. Some work was done under the supervision of Mr Good, but towards the end of May the work had not been completed.

22 A further meeting took place on 28 May 2009. Minutes of that meeting were taken by Mr Cheong and appear in the Tribunal book (pages 446-448) ("the May Meeting").

23 On 13 June 2009 Mr Good sent the Owner and her husband a schedule of works to be completed between 22 June 2009 and 3 July 2009.

24 According to the Owner the Builder's workmen returned on 22 June. Amongst the work done was the replacement of a number of window

sashes. During this work, the windows had to remain open for the paint to dry and the heating system in the House could not be used.

25 In September and October 2009 the Owner and her husband went overseas. When they returned they were dissatisfied with what had been done and they prepared a list of perceived defects which is at pages 452-454 of the Tribunal book. The most significant complaint related to the failure of paint on the windows. Mr Good informed the Owner that the timber in the windows would need to dry out before they could be repainted.

The claim of accord and satisfaction

26 Mr Magowan argued that by entering into the December Agreement the Owner had compromised her claim. On his application made during the hearing I allowed an amendment to the Builder's defence in which it pleaded that the time for carrying out the work which was the subject of the December Agreement was extended by the May Agreement and that the two agreements amounted to an accord and satisfaction, whereby the Builder agreed to carry out the works in consideration of the Owner abandoning her rights under the Contract.

27 That is denied by the Owner.

28 The December Agreement was a partly typed and partly handwritten document signed by the Owner, by her husband and by representatives of the Builder, It was witnessed by Mr Cheong. It appears on pages 401 to 404 of the Tribunal Book. The first three pages set out a list of defects, originally typed, but heavily annotated in handwriting. According to Mr Cheong, these annotations were contemporaneous notes that he made at the meeting. The typed parts of those pages were prepared by Mr Cheong on 20 December for use at the meeting.

29 The discussions that occurred at the meeting were on a without prejudice basis but it was agreed at the hearing that evidence about what took place could be given.

30 According to Mr Cheong, the notes do not contain everything that was discussed. He said that there was a great deal of discussion about the windows and how they should be rectified. He did not remember all that was said on behalf of the Builder but he said:

> "Pretty much they acknowledged that there was a problem and they would do whatever but I kept making the point that you need to be really thorough about it or it will come back again" (sic.)

31 The fourth page of the annotated document is as follows:

> "AGREEMENT
>
> RE: 54 Baird St Brighton east.
>
> The Builder Masterplan Builders and the Owners(s) Dina Kounelis and Dennis Beed have discussed and reviewed the foregoing list of defects on 22.12.08.

Should the Builder fail to fulfil this agreement the Owner)(s) reserve their rights with regard to costs, loss and damages.

The Builder agrees to rectify the following items to the agreed scope and conditional on reasonable access being provided. No instructions direct to contractors by owners and as discussed by (date) 8 weeks duration from 1st March 2009 (If any change to be agreed).

P. Horton…(Signed)……… G. Rossley……(Signed)………

The Owner accepts the Builder's proposed scope and offer to rectify as agreed.

D. Kounelis…(Signed)………. D. Beed……(Signed)………

Witness…(Signed) D. Cheong……Date 22/12/08" (sic.)

32. Mr Magowan submits that I should find that this document constitutes an accord and satisfaction. He said that the words suggested that, if the Builder fulfilled the agreement, the Owner's rights with regard to the "costs, loss and damages" would not be reserved. He said that the Owner was threatening to sue, she had engaged an expert, Mr Cheong, and the parties wished to avoid litigation.

33. The nature of an accord and satisfaction was described by Dixon J (as he then was) in *McDermott v. Black* [1940] HCA 4 in the following terms:

> "The essence of accord and satisfaction is the acceptance by the plaintiff of something in place of his cause of action. What he takes is a matter depending on his own consent or agreement. It may be a promise or contract or it may be the act or thing promised. But, whatever it is, until it is provided and accepted the cause of action remains alive and unimpaired. The accord is the agreement or consent to accept the satisfaction. Until the satisfaction is given the accord remains executory and cannot bar the claim. The distinction between an accord executory and an accord and satisfaction remains as valid and as important as ever. An accord executory neither extinguishes the old cause of action nor affords a new one. ……………………………..An executory promise or series of promises given in consideration of the abandonment of the claim may be accepted in substitution or satisfaction of the existing liability. Or, on the other hand, promises may be given by the party liable that he will satisfy the claim by doing an act, making over a thing or paying an ascertained sum of money and the other party may agree to accept, not the promise, but the act, thing or money in satisfaction of his claim. If the agreement is to accept the promise in satisfaction, the discharge of the liability is immediate; if the performance, then there is no discharge unless and until the promise is performed."

34. In *Osborn & Anor v. McDermott & Anor* [1998] 3 VR 1 Phillips JA said (at p.10) that in a situation such as this there were three possibilities::

> "First, there is the mere accord executory which on the authorities, does not constitute a contract and which is altogether unenforceable, giving rise to no new rights and obligations pending performance and under which, when there

> is performance (but only when there is performance), the Plaintiff's existing cause of action is discharged. Secondly, at the other end of the scale is the accord and satisfaction, under which there is an immediate and enforceable agreement once the compromise is agreed upon, and the parties agreeing that the Plaintiff takes in satisfaction of his existing claim against the Defendant the new promise by the Defendant in substitution for any existing obligation. Somewhere between the two, there is the accord and conditional satisfaction, which exists where the compromise amounts to an existing and enforceable agreement between the parties for performance according to its tenor but which does not operate to discharge any existing cause of action unless and until there has been performance."

35. Mr Downie said there was no consideration for the December agreement because the Builder was already obliged to rectify its defective work. I do not accept that submission. The Builder had handed the House over to the Owner and, apart from maintenance items, had no contractual right to return and rectify its defective workmanship. Conversely, it had no obligation to do so either. Insofar as its work was defective it was exposed to a claim by the Owner for damages for the reasonable cost of bringing the work into conformity with the Contract. Its liability in this regard was not admitted and the scope of works required by the December and May Agreements was arrived at as a result of discussion. It is trite law that an agreement to compromise a disputed claim is good consideration (see *Wigan v. Edwards* (1973) 1 ALR 497 at p. 512).

36. The parties have used the word "agreement" and appear to have understood that an agreement of some kind was entered into.

37. The issue is whether, on its proper construction, the December Agreement was a mere accord executory or an agreement to compromise the Owner's claim. In the former case, it cannot effect the Owner's cause of action. In the latter case there is the further question whether it was an agreement by the Owner that she would accept in satisfaction of her claim the mere promise by the Builder contained in the December Agreement or whether there was to be no satisfaction unless and until the work was actually done. In the latter case, it would be necessary for the Builder to perform the work before the Owner's cause of action was satisfied.

38. In *Hollyburton UK Ltd v Irani* [2006] VSC 403 Whelan J said (at para.24):

> "Where the arrangement amounts to mere accord executory, it does not operate to discharge existing rights and duties unless and until the accord is performed. A compromise arises only if and when something is done. In this situation the claimant in return for abandoning its existing rights accepts an act, or agrees that he will accept an act, and there is no discharge for the other party in relation to those existing rights unless and until the act is performed".

39. In the present case, the document the parties signed provides that, should the Builder fail to fulfil the agreement, the Owner reserves her rights in regard to costs, loss and damages. The word "reserves" suggests that the

rights referred to are existing rights, not rights that will only come into existence at some future time if there should be a default. The express reservation of existing rights is inconsistent with an accord and satisfaction which would have immediately extinguished all existing rights.

40. Further, the scope of work to the windows in the December Agreement is quite vague. Mr Cheong sent further communications seeking to have input in regard to that scope of works.

41. In addition to the rectification of the windows, some of the other things the Builder was to do were referred to in the document in very imprecise terms. It was to:

    (a) contact someone in regard to the staircase handrail and obtain a quotation and there would then be further discussion about who was responsible;

    (b) assess the replacement of some cabinet work;

    (c) contact a supplier in regard to some door and window furniture.

42. When these circumstances are looked at objectively, I do not believe that the parties' intention, was that, in return for the Builder merely agreeing to do these things, the Owner would immediately give up all her claims against it and rely entirely upon such an indefinite arrangement.

43. I think that the most reasonable interpretation of the document is that the Builder was given an opportunity to attempt to fix whatever was wrong. If it should be able to do so then the dispute would be resolved, not simply by the performance of the work listed, because the list is quite vague, but by addressing and satisfying the Owner's concerns.

44. That is not what happened. Even if it was a "mere accord executory" in the sense used by Whelan J in *Hollyburton* as distinct from an informal opportunity to the Builder to fix whatever was wrong, the work was not done by the required date and in some respects it was never done. There is no accord and satisfaction.

45. Mr Magowan submitted that the December Agreement was varied at the May Meeting. The site minutes of that meeting were prepared by Mr Cheong. The opening paragraph states:

    > "Owners disappointed with broken agreement re time frame and work still not complete.
    >
    > Owners advise this is the last chance.
    >
    > Builder admitted fault and again resolved to complete within reasonable time frame to be advised depending on availability of painter.
    >
    > David Good will co-ordinate and advise (by 5th June?). Painter available 22.06.09 T.B.C."

    The work was to be completed within a reasonable time.

46. It does not seem to me that this was a variation of the December agreement. The work to be done is expressed in quite different terms. Rather, I think that it was a new agreement in similar vague terms. In any case, despite a promising start by Mr Good, the work was still not done. There is no accord and satisfaction. The Owner has given the Builder ample opportunity to address the faults in the House and it has not done so.

Rectification

47. A quotation was given by Johns Lyng to carry out a scope of rectification works for a total of $128,395.08. The quotation incorporates quotations from other witnesses of $8,800 for removal and storage of the carpet and $3,113 for removal and storage of the window furnishings. Other than that, the price is not broken down into individual aspects of the work although there is a break up of trades and such things as preliminaries, supervision, insurance and rubbish removal.

48. The quotation was verified as being fair and reasonable by the witness from Johns Lyng who gave evidence, Mr McKinnon (a different McKinnnon from the painting expert).

49. Mr Paron, a builder, gave evidence of a similar nature on behalf of the Builder, assessing the work at a much lower figure.

50. I do not derive any assistance from either of these assessments. The difficulty with each quotation is that, unless the scope of works that has been priced coincides with what I find to be required I do not know how to adjust the pricing to match a different scope of work.

51. Mr Magowan submitted that I should find that the overall quality of the construction was very good, particularly the painting. He pointed out that the contract price was $684,081.69 and said that it was modest. He said there was a "disconnect" between the amount of damages claimed of $186,988.86, the contract price and the real extent of the problems complained of.

52. I have to assess the quantum of the claim as proven and although I must be careful to award no more than is appropriate I am not assisted in that task by looking at the contract price.

53. The extent of the defects and the cost of rectification of each were dealt with by the principal experts on an item by item basis. I will deal with that evidence together with the evidence as to liability for the item in question.

Windows

54. The main item in dispute was the windows. They are mainly double sash windows made from kiln dried hardwood. The opening sashes are fixed at the side to the stile of the frame. There are also fixed sashes which do not open.

55. The windows were manufactured and delivered to site by Aspect Windows and installed in the House without them first having been primed or

otherwise painted. The window sashes and frames suffered water penetration. The cause and extent of that and who is to blame occupied a large proportion of the hearing time.

56. The windows were delivered to site, unprimed and unpainted, on or shortly before 7 September 2005. The first invoice for painting the window frames is dated 16 November 2005. That appears to relate to painting of the upstairs windows that was commenced a few days earlier.

57. According to the rainfall records taken at the Brighton Bowls Club, by the time painting commenced, there had been 14 days over the intervening two months following delivery upon which it had rained. In addition, a further 32 mm of rain fell on 15 November 2005, three days after painting commenced and the day before the Invoice for painting the upstairs windows was dated. Painting of the downstairs windows does not appear to have been undertaken until May the following year with some work extending even beyond that.

58. I asked Mr Rossley why he left the unprimed windows unprotected for such long periods and he explained that the method of construction that he used was to paint the downstairs windows after the scaffolding for the brickwork had been removed.

59. There was an issue raised as to whether the windows were painted with a brush or spray painted. As to that, the preponderance of expert evidence is that they were painted with a brush and so I find that they were.

60. The specifications in the Contract required the windows to be primed and undercoated. What occurred was that they were painted instead with Dulux Weathershield which the Builder claimed was a self-priming paint that did not require a primer.

61. The problem with the windows that manifested itself was a breakdown of the paint at the surface of some of the joins of the various parts of the windows; in particular, between the stiles and the top and bottom rails of the sashes which had been doweled and glued together. The manifestation of the problem was cracking of the paint and some blistering

62. The Owner claimed that when she expressed concern during construction as to how the windows were painted the Builder gave a specific verbal warranty of the windows. That was denied by the Builder but I need not resolve this dispute. There is a statutory warranty anyway and so a further verbal warranty would have been unnecessary.

63. This was put largely on credit but I cannot find that either the Owner or Mr Rossley is discredited because they each claim to have different recollections of what was said about this. One would expect that some words of reassurance would have been given and the Owner may well have interpreted those, rightly or wrongly as being a specific warranty.

64. Inspection has revealed that the bottom surface of the bottom rails of some sashes were not painted at all and that paint coverage in the parts of the windows that were difficult to access was very poor.

65. When the first attempt at rectification was made, moisture readings taken showed excessive levels of moisture in the timber. Mr Cheong said that the timber had to be fully dried, an anti-fungal preparation applied and the windows were then to be repainted correctly.

66. The paint failed again following attempts at rectification. The Builder’s employee, Mr Good, said that he observed that there was too much moisture in the timber, that the moisture was trapped inside and the windows had to be given time to thoroughly dry out.

67. According to Mr Cheong, parts of the windows are now affected by rot, some have already been replaced and others have to be replaced. It was agreed between Mr Cheong and Mr Browning that 18 sashes require replacement and I accept this to be the case.

68. There was some complaint by the Builder and Aspect Windows of a lack of maintenance by the Owner, in that the windows have not been repainted since their installation. Mr Browning said that windows in an exposed location should be re-painted every four years.

69. However since construction the windows have been re-painted by the Builder and a number of the sashes have been replaced. There is no evidence that the present problem is related to any lack of maintenance by the Owner. The real issue with the windows is whether the fault lies with the Builder, with Aspect Windows or with both of them.

70. In its Points of Claim against Aspect Windows, the Builder pleads that the windows it supplied were not of merchantable quality and were not fit for the purpose for which they were supplied. It is also pleaded that Aspect Windows was negligent in the manufacture of the windows.

Were the windows defective?

71. It is clear from the expert evidence that the defect on the windows is water in the joints of the components and high water content in those components. I agree with Mr Magowan that not all windows are affected but a large proportion of them are.

72. In addition, the windows were painted a considerable time after they were delivered to the site and even then, the weight of expert evidence is that they were inadequately painted.

73. Dr Eilenberg said that there was no fault in the manufacture of the windows, that the appropriate adhesive had been used and that the problem of water penetration into the joints was likely to be the result of the windows being exposed to the weather after they left the factory. He also said that the windows had not been maintained since their installation as, at

the time of his inspection, there was evidence of external paint deterioration but no signs of recent repainting.

74. One of the sashes was removed by the Builder and cut into two with one part being retained by the Builder and the other by Aspect Windows. The glue was tested and found to be of an appropriate type for the purpose but the glue coverage was insufficient to fill the joint between the stiles and rails of the windows.

75. According to Mr Browning, part of the function of the glue is to prevent the ingress of water into the joint and if there is insufficient glue coverage, water can enter and affect the timber, causing it to swell and for the joint to open up more. He believed that this was the mechanism or one of the mechanisms responsible for the problem.

76. In response to a question from Mr Magowan, Dr Eilenberg acknowledged that, if the joints had been fully wetted with glue it would have prevented the intrusion of water into the joints that were so wetted and I find that to be the case.

77. The first question is, whether that is the cause of the problem complained of and the second question is, does the fact that the joints were not fully wetted with glue mean that the windows were not of merchantable quality or fit for the purpose?

78. As to the cause, both the Applicant and Aspect Windows blame the problem of water penetration into the joints upon the absence of prompt or adequate painting.

79. Mr McKinnon said that the specification for the Dulux Weathershield paint used on the windows called for priming on new timber surfaces. He pointed to Australian Standard AS2311 which he said calls for a primer coat to be applied on all new timber work. The windows were delivered to the site in an unprimed state and were not thereafter primed by the Builder but instead, were painted directly with Dulux Weathershield.

80. That criticism was answered when evidence was produced that established that the Dulux Weathershield paint used was self priming. The instructions on the side of the paint tin that was tendered require three coats to be applied to previously unpainted timber surfaces.

81. Mr Mackinnon said that the causes of the premature breakdown or delamination of the paint were:

    (a) coating applied over substrate with high moisture content;

    (b) windows exposed on site before any painting was carried out;

    (c) the moisture content of the sills due to prolonged exposure before being coated.

82. He added that there was poor paint coverage which was not providing complete sealing of the timber substrate, therefore allowing water penetration to continue.

83. Mr Browning agreed that there was a lack of paint or inadequate paint application to the windows but he said that the driver of the deterioration was the glue and a combination of the other factors. Dr Eilenberg disagreed saying that if the windows had been properly primed and painted they would not have deteriorated and Mr Mackinnon appeared to agree with Dr Eilenberg. By "primed" I take him to mean the third coat of paint that the instructions required.

84. Mr Magowan pointed to the randomness of the failure and said that was more consistent with glue failure than a failure to paint promptly. He also said that some windows were painted promptly whereas others were not painted for several months, yet failures were found in both groups. He said that the windows remained unpainted during a period of drought and were unlikely to have become wet. The rainfall records do not support that submission, nor were the upstairs windows painted promptly.

85. Finally, Mr Magowan said that it was the obligation of the manufacturer to prime and seal the sashes. In that regard there is a dispute as to whether Aspect Windows offered to prime the windows at an additional cost which the Builder refused to pay. Although it appears to have been acknowledged that it is "best practice" for the manufacturer to prime windows, the cost will necessarily be reflected in the price that the Builder would have paid. It was not unlawful for Aspect Windows to supply unprimed windows and it was not unlawful for the Builder to order them. The Builder knew they were unprimed and unpainted and should have painted or at least primed them before they were effected by moisture.

86. Mr Magowan said that the manner in which the fixed sashes had been made prevented them from being properly painted. Once the sash is fixed it cannot be removed to allow painting between the sash and the frame so that if any water were able to penetrate between the two components it could effect the unprotected timber of both the frame and the sash. A sample window was tendered which shows the fixed sash with a small gap left around the perimeter which has been caulked. It does not appear that this would allow the entry of water and the caulked area could certainly be painted on the outside.

87. Mr Magowan pointed out that, for the purpose of the rectification works, replacement windows were supplied by Aspect Windows free of charge. Although he did not say that that constituted an admission, he said it was consistent with the glue being at fault. The rectification works were carried out in the hope of resolving the complaint. I cannot infer any fault on the part of Aspect Windows from the mere fact that they supplied the replacement windows free of charge.

88. Mr Reid submitted that the relevant Australian Standard (AS 2047) was the appropriate benchmark that the windows were to meet. Certainly they must meet that standard in terms of performance but the mere fact that they comply with the standard does not mean that they are necessarily free of all defects.

89. Mr Reid pointed out that the AS 2047does not required the joints of a window to be fully wetted with glue. It appeared from the expert evidence that the windows met the Standard. I am not attracted by Mr Browning's suggestion that the word "sealant" in the Standard refers to the glue that holds the structure of the window together.

90. As to whether the windows were of merchantable quality, Mr Reid referred me to the classic statement of Dixon J (as he then was) in *Australian Knitting Mills v. Grant* 919330 50 CLR 387:

> "The condition that goods are of merchantable quality requires that they should be in such an actual state that a buyer fully acquainted with the facts and, therefore, knowing what hidden defects exist and not being limited to their apparent condition would buy them without abatement of the price obtainable for such goods if in reasonably sound order and condition and without special terms."

91. Mr Reid also argued that in considering whether the windows were merchantable I should have regard to the normal use to which such windows would be put that is, that they would be properly painted (see *Hardchrome Engineering Pty Ltd Kambrook Distributing Pty Ltd* [2000] VSC 359 at para.409).

92. The preponderance of evidence is that, had the windows been promptly painted in the normal way, there would not have been any difficulty. If the Builder had been aware that the joints in the subject windows had not been fully wetted with glue so as to exclude water but that there was sufficient glue to ensure that the windows were structurally sound, I think it likely that it would still have bought them without any abatement in the price. There is certainly no evidence to the contrary. The Builder's employee who ordered the windows was not called.

93. There was general agreement as to the scope of works although Mr Cheong priced it at $20,744 for the base cost excluding margin and GST. Mr Browning's estimate for the base cost was $11,650. Mr Downie said that I should discount Mr Browning's assessment because, he said, he had based it upon the Paron quotation. Mr Cheong has also relied upon quotations for the window frames. Mr Browning allowed $625 for each of the 18 sashes that require replacement whereas Mr Cheong has allowed $6,000 for materials which seems less per sash. The big item in Mr Cheong's costing is $11,000 for sealing and re-painting of the windows whereas Mr Browning's cost is $3,326.25. Both assessments are estimates. Mr Cheong believed, incorrectly, that the windows had been spray painted which might

have effected his assessment of the painting cost. I will allow $15,000.00 for the replacement of the sashes.

94. As to the claim for window frames, Mr Cheong believed that three frames have to be replaced whereas Mr Browning believed that only the sashes need to be replaced and the frames only need to be repainted. The elevated moisture content appears to be acknowledged and the difference in opinion relates to whether or not there is a flexible sealant which would protect the frames. On this issue I prefer the opinion of Mr Cheong and shall allow his figure of $6,830.00 for the window frames.

Conclusion as to the windows

95. Although I accept that if the joints between the rails and the stiles of the windows had been fully wetted with glue it would have prevented the intrusion of water into joints that were filled with glue I do not find that the windows were not of merchantable quality or unfit for the purpose on that account. In the first place, the function of the glue was to hold the windows together. The exclusion of water from joints filled with glue may have been a consequence of them being glued in that way but that is an incidental benefit.

96. I accept the evidence of Mr McKinnon, Dr Eilenberg and Mr Cheong that the windows, which were unprimed, should have been promptly painted so as to protect them from the weather within a reasonable time after their arrival on site. They were not painted for some months and even then, the paint coverage was poor. I find that to be the cause of the failure of the windows.

97. Since I do not find the windows to have been defective the claim against the Joined Party will be dismissed.

The handrail on the stairs

98. The handrail on the stairs was supplied by the Builder and, following its installation, it was attached to a metal balustrade that was supplied and fitted by a contractor engaged directly by the Owner. The balustrade was in several pieces and the two pieces in question were joined by a dowel or a fillet of timber. It is the joint between these two pieces that has failed.

99. Mr Cheong said that this ought not to have occurred and that it was a defect. Mr Browning pointed to the presence of a screw adjacent to the failed joint which connects the handrail to the metal balustrade on one side of the joint. He pointed out that this screw had been inserted by the Owner's contractor and its effect was to pull the handrail down onto the metal balustrade on one side of the joint only. He attributed the failure of the joint to the force exerted in this way some months earlier.

100. Having examined the photographs I can see that there is a gap on one side of the joint between the top of the balustrade and the handrail and that the screw appears to have pulled the handrail down onto the balustrade. I am not satisfied that it has been proven that the failure of the joint was due to

defective workmanship or materials of the Builder. It seems more probable that it was due to the Owner's own contractor. I note that a report from Slattery & Acquroff, stair builders, at Tribunal Book page 203A reached the same conclusion. The author of that document was not called but I have formed my own opinion based upon Mr Browning's evidence.

Refinish the treads on the stairs

101. The allegation is that there is grit impregnated in the finish on the stairs. The Builder claims that the complaint was about scratch marks and that the Owner's contractors who installed the carpets would not take off their shoes. The Owner's list of defects dated 30 July 2007 contains the description: "Staircase treads badly scratched and lacquer chipped".

102. Both Mr Cheong and Mr Browning agreed on the method of repair. The only issue is liability.

103. If it were simply scratches it would not be possible to make a finding that they were caused by the Builder because there is no evidence as to how they were caused and there were tradesmen on site engaged directly by the Owner.

104. However both Mr Cheong and Mr Browning said that the grit was embedded in the finish of the stairs. There is no expert evidence to support Mr Magowan's suggestion that this was imbedded by workmen's boots.

105. The base cost $2,000 for re-finishing the stairs was agreed.

Timber strip between wall and stringer to support new filler

106. The gap between the wall and the stringer contained filler which has shrunk and sagged. The experts agreed on the method of rectification and the cost forms part of the previous item.

Supply and fit matching flyscreens

107. This was agreed at $1,800. The contract provided for them to be supplied and they were not there at handover. The Owner said that she could not remember what was discussed about that. Mr Magowan said this is simply a credit and that no margin should be added. Mr Downie said that the failure to provide the flyscreens was a breach of the Contract and should be treated as damages rather than a credit. That seems right. Both Mr Paron and Mr Mackinnon allowed $1,700 in their costings for supplying the flyscreens but the two experts costed it at $1800 and that will be allowed for the flyscreens.

Pillars leaching

108. There is a concrete pillar in the alfresco area outside the back door which has cracked and requires repair. Mr Cheong quoted on the replacement of the pillar on the basis that it had been repaired previously.

109. The manufacturer of the pillar, Mr Piaia, gave evidence that he would be willing to come to the House, grind out the affected area and fill it with

epoxy and sand it back at no charge. Mr Magowan said that nothing should be allowed because Mr Piaia has agreed to fix it for nothing. I cannot approach it on that basis. It is a defect and I must allow the reasonable cost of repair. Mr Piaia might change his mind. If the Builder had wanted Mr Piaia to do it for nothing, that should have been arranged before the hearing and it was not. Mr Browning assessed the cost of repairing the pillar at $656.42. I accept Mr Browning's costing of $656.42 for repair of the pillar.

Garage door bottom edge

110. The garage door requires repainting. The moulds on the door will need to be removed and refixed. There is agreement between the experts on the scope of works but the difference is in the hours allowed for labour. Mr Cheong has assessed this item at $1,826.00 whereas Mr Browning has assessed it at $1,156.25. It seems to me unlikely that it would take as long as 16 hours to paint the door but the removal and replacement of the bolection moulding might, as Mr Cheong asserts, take more time than Mr Browning has allowed. I will allow $1,400 for repainting the garage door.

Rear double door lock

111. The cut out for the lock on this door appears to have been excessive and the timber has broken away between the two cut outs. Mr Cheong allowed to replace the door whereas Mr Browning costed to repair it. On site the suggestion was made that the area between the two cut outs be covered with an escutcheon plate at a cost of $320 and I will allow that sum for the rear door lock.

Sealing excessive gaps around the skylight frame

112. This was work done during the attempt at rectification. The Owner claims that some of the plaster ceiling material has since fallen out. Mr Cheong says it has to be redone. Mr Browning said that what has been done is satisfactory but agrees that if further work is required then Mr Cheong's assessment of $1,346 is reasonable.

113. Mr Magowan said that it lasted for four years without issue but I would have thought that such a repair should last longer than that. I will allow Mr Cheong's figure of $1,346 for sealing around the skylight frame. I note that the evidence was that the scaffolding in the hall required to carry out the work will be in place for two days.

Rectify garage leak

114. Water has been penetrating into the garage and it took some considerable investigation to ascertain where it was coming from. It appears that the flashing over the garage roof is inadequate and needs to be reworked. Mr Cheong costed the work at $3,658 and Mr Browning at $1,965.30, although there was some element of uncertainty and Mr Browning has re-costed his figure. Mr Magowan said that there is no evidence of what Mr Cheong allowed for in his figure but the extent of the work required was gone into

during evidence. I will allow Mr Cheong's figure of $3,658 for rectifying the leak in the garage.

Fireplace surround

115. There is a polished stone fireplace in the main living room which is an architectural feature. It has a metal fireplace insert in it. The Owner complains that there is a blemish in the stone and that although the supplier of the fireplace has attempted to remove it he has been unsuccessful. She says that the fireplace will therefore have to be replaced.

116. I asked to have the blemish shown to me at the on-site inspection and an attempt was made to point it out but I could see nothing. I examined the fireplace very carefully and even took some photographs which I subsequently enlarged but could still see nothing. Mr Browning acknowledged that on his first inspection he did see something with the aid of a torch held by the Owner.

117. Building work is to be done in compliance with the statutory warranties which require a reasonable standard of workmanship. Although absolute perfection may be an ideal an Owner cannot complain if it is not achieved. An alleged cosmetic defect that cannot be seen, even by someone looking for it, is not a defect. I am not satisfied that the fireplace is defective.

Additional items

118. There was complaint about a loose towel rail, a leak in the ensuite and a mismatched air conditioner register that were not identified by Mr Cheong in his report. These were not referred to me at the on site inspection and I ruled that they were not part of the claim.

Preliminaries

119. Apart from the base costings Mr Cheong assessed preliminaries at $10,252 and Mr Browning assessed it at $8,278.10. There is no reason that I can see to prefer one over the other and so I shall allow $9,250.00.

Margin and Contingency

120. Mr Cheong included his contingency in his margin which he assessed at 35%. Mr Browning allowed a 20% contingency which is included in his preliminaries figure plus a 40% margin based upon the job value. He acknowledged that if the cost was higher the contingency would be the same but the margin would be lower. Since the total is closer to Mr Browning's figure than Mr Cheong's I will allow a margin of 40%.

121. The cost to remedy the defects is assessed at $33,010.42, calculated as follows:

Replacement of window sashes	$15,000.00
Replacement and repair of window frames	$ 6,830.00
Re-finishing the stairs	$ 2,000.00

Supply of flyscreens	$ 1,800.00
Repair of the pillar	$ 656.42
Repainting of garage door	$ 1,400.00
Repair of rear door lock	$ 320.00
Sealing around the skylight frame	$ 1,346.00
Rectifying the leak in garage	$ 3,658.00
Total	$33,010.42

Window furnishings

122. The Owner contends that for the works to be done it will be necessary to remove and reinstall the window furnishings, which are Roman blinds, and pelmet boxes.

123. A quotation was provided by a contractor, Active Track Installations, to carry out this work at a total cost of $3,113 and a Mr Durban of that company gave evidence that that was a fair and reasonable price for doing so.

124. In cross-examination Mr Durban acknowledged that the window furnishings could be put in bags without having to remove them, but he said that would not be easy to do so. He agreed that they could be covered in plastic but said that if the remedial work involved working under the architraves they would have to come off. According to Mr Good's evidence, during the rectification works the window furnishings were rolled and wrapped and stored on site. He said that that work was done by "…the people that installed them originally."

125. Mr Browning conceded that if the architraves were to be repainted then the window furnishings and pelmets would have to be removed. I will allow the amount of $3,113 for their removal and reinstatement.

Removal of electrical equipment

126. The Owner contends that the rectification work required to be done will necessitate the removal of the electronic equipment throughout the House. This includes such things as a DVD, audio and SACD player, in-wall speakers, in-ceiling speakers and other speakers, electronic controllers and receivers, intercom equipment and computers. Much of this material is to be wrapped or otherwise covered but much is to be removed from the House.

127. The Owner has obtained a quote from a contractor to carry out this work, store the components for six weeks and then reinstall them at a price of $7,433.

128. Evidence was given by a Mr Anderson of the contractor to the effect that that was a fair and reasonable price for what would be involved. He said that he was asked to quote on the cost of removing and storing all of the items but was not asked to advise whether or not they ought to be removed.

He said that would depend on the type of work. If there were to be lots of dust, debris and plaster dust, he would want to remove the equipment due to the damage that might be caused. It would not need to be removed if it was just painting.

129. He acknowledged that the protection of the system might be more suitably handled but said that its replacement cost would be approximately $50,000. He was unable to say where the storage time of six weeks came from.

130. Since it does not appear that the scope of works will involve the creation of significant plaster or other dust in the areas in question I am not satisfied that the removal of this equipment is necessary.

The removal and storage of carpet

131. The Applicant has obtained a quotation of $8,775 including GST to take up the existing carpet, remove it from the House and store it for 12 weeks and then re-lay it. Evidence was given by Mr Lowe of the carpet contractor who said that it was a thick plush style carpet that would have been very expensive. He said that its removal would entail removal and replacement of the doors.

132. The preponderance of expert evidence was that it would be unnecessary to remove the carpet. I am not satisfied that the scope of work to be done warrants the removal of the carpet.

The time the works will take

133. Mr Cheong estimated twelve weeks for all of the work. Other experts considered it would take considerably less time. Certainly the new sashes will need to be manufactured but that will be done off site and before the work commences. According to Mr Good's evidence, as part of the rectification works, five or six sashes were replaced in a day. The scaffolding in the stairwell will be up for two days.

Removal of furniture

134. The Owner has obtained a quotation for $13,852.10 for moving out her personal belongings and furniture and storing it for six weeks while the wok is carried out and then moving it back in again. I am not satisfied that is necessary or reasonable to move out the furniture in order for this work to be done.

Alternate accommodation

135. The Owner claims that she and her husband and daughter will need to move out of the House for the period during which the work will be carried out.

136. Mr Browning, Mr McKinnon and Dr Eilenberg agreed that there would be no need for her to move out. I have found that the carpet need not be taken up and that the electrical equipment need not be removed if the Owner remains there.

137. The Owner and her family were in occupation when the last rectification work was carried out and although she and her family will undoubtedly suffer inconvenience and discomfort that can be compensated. Moreover, the disruption of relocating themselves for such a short period should also be considered. I am not satisfied that it is appropriate to order the cost of alternate accommodation.

138. Compensation for inconvenience and loss of amenity is always very difficult to assess. In the case of *Anderson v. Wilkie* [2012] VCAT 432 I said as to this sort of claim (at paras 26-30):

> "26. The Owners also claim loss of use and enjoyment and amenity and inconvenience.
>
> 27. Where there is a breach of contract, the party in breach is only responsible for resultant damage which he ought to have foreseen or contemplated when the contract was made as being not unlikely or liable to result in his breach, or of which there was a serious possibility or a real danger (see *Halsbury Laws of England*, 4th edition, Vol 9, para 1174).
>
> 28. It has been held that substantial physical inconvenience and discomfort caused by a breach of contract will entitle the party to damages (see *Burke v Lunn* [1976] VR 276 at 285-286; *Clarke v Housing Guarantee Fund Limited* (1998) 13 VAR 19 at p. 21-22.) Loss of amenity generally is also recognised as a head of damages (see for example *Ruxley Electronics and Construction Limited v Forsyth* [1995] 3 All ER 268. I was also referred to *Wilshee v Westcourt Limited* [2009] WASCA 87 to a similar effect.
>
> 29. However, damages for personal injury are not recoverable (*Domestic Building Contracts Act* 1995 s. 54(2)) nor are damages for disappointment, hurt feelings or damage of any other kind that was not reasonably foreseeable at the time the contract was made.
>
> 30. In the present case, the Owners claim damages for having lived in a wet house for 2 ½ years. That is a loss of amenity which is compensable. They will also face the inconvenience of having to move out while repairs are effected. However, Ms Doughty's claims for headaches said to have been caused by having to work long hours to pay for the House and lack of sleep and stress resulting from both the defects themselves and this dispute are not compensable. Insofar as any such claim amounts to damages for personal injury, it is barred by s 54(2). Otherwise, I do not believe that it is reasonably foreseeable."

139. I allowed $5,000 for loss of amenity in that case to compensate an applicant for living in a wet house for two and a half years. In the present case the Owner claims $5,000. I think that if the remedial work required is carried out sensibly there should not ne any excessive disruption although there will be a loss of amenity suffered. I will allow $2,000.00.

Conclusion

140. There will be an order that the Builder pay to the Applicant the sum of $66,124.05, calculated as follows:

Cost of rectification as above	$33,010.42
Add margin (40%)	$13,204.17
Preliminaries	$ 9,250.00
plus GST	$ 5,546.46
Removal of window furnishings	$ 3,113.00
Loss of amenity	$ 2,000.00
Total	$66,124.05

141. The claim against the Joined party will be dismissed.

142. Costs will be reserved for further argument.

SENIOR MEMBER R. WALKER