

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**BUILDING AND PROPERTY LIST**

VCAT REFERENCE NO. BP775/2014

**CATCHWORDS**

Domestic building – assessment of damages – loss of profit by builder -manner of assessment – evidence

<b>APPLICANT</b>	Peter Kyle
<b>RESPONDENT</b>	Michael Wilson
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member R. Walker
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	25 May 2018 Submissions received by 21 June 2018
<b>DATE OF ORDER</b>	24 September 2018
<b>CITATION</b>	Kyle v Wilson (Building and Property) [2018] VCAT 1446

**ORDER**

- 1 The Applicant's damages are assessed at \$13,346.39.
- 2 The Respondent is ordered to pay to the Applicant \$13,346.39 plus interest pursuant to section 53 of the *Domestic Building Contracts Act 1995* of \$2,193.93, making together the sum of \$15,540.32.
- 3 Costs reserved.

**SENIOR MEMBER R. WALKER**

**APPEARANCES:**

For the Applicant	Mr R. Rozenberg of Counsel
For the Respondent	In person

## REASONS FOR DECISION

### Background

- 1 In this proceeding the Applicant (“the Builder”) claimed damages for breach of contract from the Respondent (“the Owner”) with respect to a major domestic building contract (“the Contract”) for the construction of a house on the Owner’s land in Bena in Gippsland.
- 2 The matter came before me for hearing in February last year and, by agreement of the parties, I directed that I would first determine whether or not the Builder had lawfully terminated the Contract. If I should find that it was lawfully terminated, the proceeding would then be adjourned for further hearing and determination of the Builder’s claim for an assessment of damages.
- 3 After a lengthy hearing and the consideration of written submissions, a decision was handed down on 27 April 2017 that the Contract was lawfully terminated by the Builder on 20 January 2015. Directions were then given for the hearing of the assessment of damages.

### The hearing

- 4 Following a number of adjournments at the request of the Owner the assessment of damages came before me for hearing on 25 May 2018 with one day allocated. Mr Rozenberg of counsel appeared for the Builder and the Owner appeared in person. I heard evidence from the Builder and the Owner and also from the Builder’s expert witness, Mr Jubb.
- 5 The Owner tendered reports from two experts, one from an engineer, Mr Andrew Smith, dated 6 April 2018 and the other from a building expert, Mr Laurie Mitchell, dated 10 May 2018. These two reports were directed to the question of allegedly defective workmanship and the cost of reconstructing the house, issues that I had already determined. Neither of those experts was called by the Owner to verify either of these reports, although Mr Mitchell had given evidence at the earlier hearing and had verified an earlier report.
- 6 After hearing the evidence produced and Mr Rozenberg’s submissions, I gave directions for the Owner to file and serve any written submissions by 10 June 2018.
- 7 On 18 June 2018 I received an affidavit sworn by the Owner and, on 21 June 2018, I received his submissions. Although received late, the degree of non-compliance is slight and has not prejudiced the Builder and so I have had regard to them.

### The claim

- 8 The Contract was terminated by the Builder pursuant to the provisions of Clause 22 of the Contract. Clause 22.4 provides as follows:

“If the Builder terminates this Contract in accordance with this Clause 22, the Builder will be entitled to recover from the Owner all the loss, expense and damages caused to the Builder resulting therefrom as if the Owner had wrongfully repudiated this Contract.”

9 It should be noted that the clause provides for the recovery of damages. There is no provision for the Builder to recover the value of the work that he has done on a quantum meruit basis. The issue therefore is one of assessment of damages as if the Contract had been repudiated by the Owner and the Builder had accepted that repudiation and claimed damages for the breach.

10 Damages for breach of contract are such damages as:

“... may fairly and reasonably be considered either [as] arising naturally, that is, according to the usual course of things, from such breach of contract itself or ... may reasonably be supposed to have been in the contemplation of both parties, at the time they made a contract, as the probable result of the breach of it.”

[*Hadley v. Baxendale* (1854) 156 ER 145 (at p. 151)].

11 As to the quantum of damages to be awarded, in *Tabcorp Holdings v. Bowen* [2009] 253 ALR 1 the High Court said (at p.6):

“The “ruling principle”... confirmed in this Court on numerous occasions..., with respect to damages at common law for breach of contract is that stated by Parke B in *Robinson v Harman* (1848) 154 ER 363 at 365:

“The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.”

12 The Builder claims:

- (a) the profit that he says he would have made if he had been able to complete the Contract, which he says was \$73,545.82 “including GST”;
- (b) interest on late progress payments, of \$585.38; and
- (c) the sum of \$3,109.90, inclusive of GST, for windows that he purchased for the house that he was not able to sell or use in other projects.

13 Of these, the main issue is related to the claim for loss of profits. As to that, the question is, if the Builder had carried out the remaining work to complete the job, would he have made a profit?

### **Damages for loss of profit**

14 The measure of damages for loss of profit by a Builder in a building contract is the difference between the amount payable to the Builder under the terms of the contract and the amount it would have cost the Builder to

carry out the work if the Contract had not come to an end (see *Brooking on Building Contracts* 5th ed. at Para. 12.18).

### **The alleged loss of profits**

- 15 The Contract price, including GST, was \$337,190.00. The Builder received \$104,867.00 from the Owner, which was less than what he said he spent on the project.
- 16 Of the monies the Builder received, \$101,157.00 was the total of three staged payments under the Contract, being the deposit, the base stage and the frame stage. He also received \$2,500.00 for a window variation, which was paid to him on 20 October. The remaining \$1,210.00 comprised \$650.00 for a permit fee for the septic tank and \$560.00 extra for a change in the verandah posts. Since the permit fee has been paid by the Builder and the verandah posts have been supplied, these figures can be ignored for present purposes.
- 17 The amount the Builder spent on the job up until termination included additional work that he agreed to do on the subfloor, which he said cost \$5,599.53, calculated as follows:

Galvanized plates	\$1,127.00
Engineering amendment	\$550.00
Engineer's fees	\$300.00
Purchase of bigger bearers	\$2,822.53
Labour – 1 day for two carpenters	<u>\$800.00</u>
Total	<u>\$5,599.53</u>

Even without this additional expense, which the Builder had not contemplated when he costed the job, he would still appear to have made a small loss up to the date of termination.

- 18 The Builder nonetheless contends that, had he been able to finish the job, he would have made a profit and it is the loss of that profit that he claims. The principal evidence relied upon in support of the claim is that of his expert, Mr Jubb.

### **The Owner's quotation**

- 19 The Owner obtained a quotation dated 21 April 2015 from a local builder to complete the construction of the house from frame stage for a price of \$343,805.44 plus GST. In the text of the quotation, the author advises replacing the water damaged flooring, although that was not included in the price that he quoted. The document does not purport to be a valuation or an assessment of cost. It is a statement of what that particular builder would have charged for the work. However it is some indication of the scale of the work to be done, albeit that it includes the quoting builder's margin on the job.

### **The Builder's own labour**

- 20 The Builder said that, in assessing his profit on a job he does not count his own labour and that of his apprentice as an expense. He gave figures for other jobs he had done showing 'profits' of, he said, between 20% and 29% after deducting what he had spent but without taking into account any labour cost.
- 21 I do not think that is a correct approach. He was paying wages and employee costs with respect to his apprentice. Further, his own labour and that of the apprentice, if used on this job, would not have been available for the other jobs that he said he was carrying out at the time. He acknowledged that his apprentice who assisted him would be working on numerous jobs at the same time.
- 22 He is a 'hands on' builder, that is to say, apart from sub-contractors, he and his apprentice provide all of the labour for the houses they build. If, on any of those houses, the Builder only received a very small sum, say \$100.00, in excess of his out of pocket expenses after he and his apprentice had worked on it for several months, it would be quite artificial to say that he had made a profit on the contract. He would have suffered a substantial loss. The labour of the Builder and his apprentice is an expense of the construction and its value needs to be taken into account in the assessment of any profit or, in this case, loss of profit.

### **The experts' reports**

- 23 There is a report in evidence from the Owner's expert, Mr Mitchell, that contains a costing of the work and materials required to complete the house on the basis that the frame and flooring would be demolished and replaced.
- 24 Otherwise, apart from the Builder, Mr Jubb is the only expert that was called to prove the cost of completion. Since the Owner was unrepresented, this evidence was not subject to the usual cross-examination or expert comment. It is not my function to cross-examine a party or his expert but in assessing evidence that has not been scrutinised either by an opposing expert or opposing counsel I must look at it carefully with the knowledge that it has not been tested.
- 25 Although, in common with other members of this tribunal hearing these sorts of cases, I have acquired over the years some knowledge and understanding of building and construction, as one would expect of members of a building tribunal, I am not an expert. In understanding and assessing the evidence I am assisted by the technical knowledge that I have acquired but I cannot form an expert opinion and rely upon it because I am not an expert. I can rely upon the opinion of an expert provided:
- (a) the expert is appropriately qualified;
  - (b) the facts upon which the expert's opinion is based are proven by the evidence as a whole; and

- (c) the opinion is relevant to something that I have to decide.
- 26 Mr Jubb, who I accept is appropriately qualified, said in his report that he was commissioned to prepare the following cost analyses of the Contract:
- (a) to analyse the cost estimate prepared by the Builder to determine what margin it would give “if the contract was executed and at termination” [sic]; and
  - (b) to separate any task and its labour costs that the Builder would complete himself throughout the construction of the building.
- 27 Mr Jubb said that he did his costing on the basis of Cordell’s “Platinum Estimating Program”. I accept that the Cordell’s cost guide is an appropriate reference for assessing building costs. It is commonly referred to by experts giving evidence before this Tribunal. However I am not familiar with the “Platinum Estimating Program” or how it works.
- 28 Mr Jubb said that Cordell’s has “confirmed” that a 7.67% increase in cost had occurred from 2014 to 2017 and he attached an email to his report saying that there had been an increase of approximately that amount. He said that he had therefore deducted 7.5% from the figures he calculated in order to be in line with the 2014 cost of building a house.
- 29 Mr Jubb did a complete breakdown of the cost of constructing the house from start to finish. That was unnecessary because the Builder had already constructed the house up to the frame stage and had been paid all that he was entitled to receive under the Contract, up to that stage.
- 30 It seems strange that Mr Jubb was apparently not asked to undertake the very exercise that I must undertake namely, to ascertain what it would have cost the Builder to complete the construction in accordance with the Contract documents in order to see whether that was more or less than the unpaid balance of the Contract price that he would have received.
- 31 The invoices for what the Builder has spent, which are attached to Mr Jubb’s report, necessarily relate to work that has already been done. However, regardless of the construction cost the Builder has paid already, until termination, he was bound by the Contract to complete the house and, apart from any variations or prime cost or provisional sum adjustments, all that he was entitled to receive upon doing that was the unpaid balance of the Contract price. Although the expenses already incurred might be some guide as to the sorts of costs the Builder was incurring, what I need to know is the cost that would have been incurred by the Builder to complete the construction in accordance with the Contract documents
- 32 Mr Jubb’s report consisted of a 20 page narrative, entitled “Cost Analysis” and two spreadsheets, called Attachment C Part 1 and Attachment C Part 2. These form the main operative section of his report. There were also a number of attachments.

- 33 In the first spreadsheet he set out the various items of the Builder's original estimate and proceeded to compare each of those figures with what he said the Cordell's platform would have allowed for the same item. In one of the columns he specified the amount by which he considered some of the figures had been underestimated or overestimated by the Builder and stated by how much.
- 34 It is not relevant whether the Builder, in his costing, underestimated or overestimated the cost of carrying out the construction. He was bound to carry out the work for the Contract price, whether he had underestimated the cost of construction or not.
- 35 Mr Jubb added up all of the costs the Builder had already paid, together with the prime cost figures and what he considered should be paid by the Builder in the future and arrived at a figure of \$207,155.16, which he said is what it ought to have cost the Builder to construct the whole house from start to finish. To this figure he added a further \$22,802.03 that he said related to items that the Builder had underestimated or not estimated but would be a cost to the Builder. That addition produced a figure of \$229,957.79, which he then deducted from the Contract price of \$306,536.36 to arrive at a figure of \$76,578.57 which he said was the profit the Builder should have earned on the whole job.
- 36 In his conclusion he stated that, at the time the Contract was terminated, the Builder had \$19,530.32 plus GST 'left over' plus the above payments for the Windows variation, the septic tank permit and the veranda posts, which totalled \$3,710.00.
- 37 I do not understand what he meant by 'left over' or how this figure of \$19,530.32 was arrived at. It does not seem to form the basis of any further calculation.
- 38 He said that the Builder would also have incurred the following costs after termination in order to "quit the site":

Payment for the windows that had already been ordered	\$17,122.00
Clean up the site and return to the yard	\$1,920.00
Administration to finalise invoices & "de-brief" trades	<u>\$720.00</u>
	\$19,762.00
Margin of 15%	<u>\$2,964.30</u>
	\$22,726.30

GST	<u>\$2,272.63</u>
Total out-of-pocket to the Builder after termination	<u>\$24,998.92</u>

This calculation does not appear to relate to the loss of profits claim and I shall return to it later.

39 The supply of the windows was required by the Contract and so cannot be claimed in addition to the Contract price. As to the margin, he said that, if the Contract had been completed the Builder would have made a margin of “around 26 per cent”.

40 His final figures were as follows:

Funds estimated to execute the Contract	<u>\$271,446.20</u>
Cost of the Builder to pay all suppliers if the Contract were completed	\$229,957.79
Margin	<u>\$76,578.57</u>
Contract sum excluding GST	\$306,536.36
GST	<u>\$30,653.54</u>
Contract sum including GST	<u>\$337,190.00</u>

41 He concluded the Builder was entitled to the sum of \$88,370.43, calculated as follows:

Variations	\$ 3,710.00
‘Letting gains’ and margin on Contract	\$80,288.86
Total gain to the Builder on completion of Contract	\$88,317.43

42 During the course of Mr Jubb’s evidence I said to him and to counsel that, although the elaborate exercise that had been undertaken was interesting, it did not answer the question that I needed to answer which was, what would it have cost the Builder to have completed the Contract in accordance with the Contract documents?

43 Because the Contract was terminated, the Builder was relieved of the obligation to complete the work but he was also denied the opportunity of earning the last three payments; that is, the lock up stage, the fixing stage and the completion stage payments. Was he better or worse off as a result? If he was worse off, then he is entitled to an award of damages to compensate him for the loss. If he was no worse off or even better off, he is not entitled to damages for loss of profit because there was no such loss.



44 The matter was stood down for a short while and when the hearing resumed, Mr Jubb said that the cost to complete the work would have been \$144,342.88 plus GST, calculated as follows (the figures are without GST):

The cost to the Builder of carrying out the whole job:	\$229,957.79
Less: What the Builder has paid	\$72,539.00
Over-runs	<u>\$13,075.91</u>
	<u>\$ 85,614.91</u>
Cost to complete the job	<u>\$144,342.88</u>

45 This figure of \$229,957.79 for carrying out the whole job is substantially below the Builder's own estimate of \$271,446.20 and the amounts the Builder had paid included \$5,599.53 which was a 'no cost' variation for which he had agreed to be responsible.

46 Past expenditure and the work that has been completed is not relevant. I must focus on the remaining work still to be done. In that regard, it appears from Mr Jubb's figures that he has not allowed the cost of some of that remaining work. Particulars of those items appear below. I also prefer the assessments of the Builder or Mr Mitchell in regard to many of the figures. The question is not, what is the minimum for which the Builder could have completed the house but rather, how much, on the balance of probabilities, is the Builder, acting reasonably, likely to have spent to complete the house?

47 Although it is an expert opinion, many of the assumptions upon which Mr Jubb's conclusions are based are not supported by the evidence as a whole and, given the methodology used, I am unable to adjust his figures to suit the facts as I have found them to be.

48 The approach taken does not appear to have been directed to assessing what, on the balance of probabilities, the Builder is likely to have spent to complete the work following frame stage. It seems to be more a critique of the Builder's costings. Accordingly, the conclusion reached is not relevant to what I have to decide and I must assess the cost of completion myself, doing the best that I can with the evidence that I have.

49 There are very few details in Mr Jubb's report of how he arrives at his figures. The text of his report suggests that they have been generated automatically by the program that he has used and a blanket reduction of 7.5% has been applied to take account of increases in building costs. The problem with that is that it is very difficult to compare his costings with those of the Builder or Mr Mitchell. In addition to that, the application of an across-the-board percentage reduction to take account of a general increase in building costs may be appropriate in regard to some items of work and materials and inappropriate in regard to others. Not everything will go up in price by the same degree over the same period.

50 The other matter to be borne in mind is that, I am not assessing what it would reasonably have cost to have another builder carry out the work but rather, what the Builder is likely to have spent to complete the job. It is likely that he has his regular suppliers and is generally familiar with building costs in the area where he works. In some cases he has obtained quotations which he has included in his costing, indicating that those are the tradesmen that he intended to engage. What Cordell's might suggest as being reasonable might not represent what the Builder intended to spend.

**What work is still to be done?**

51 In his spreadsheet, Mr Jubb listed the following items of work in blue which had not been done. Next to each of these I have put the amount the Builder allowed in his pricing of the job for that item. Also included are provisional sums and prime cost items, which are marked "(P)". The numbering used is taken from the Builder's costings. In his column headed "Invoices and Workings" Mr Jubb has placed various numbers which do not altogether correspond with the narrative in his report. I do not find that these figures are his assessments.

52 For the purposes of the following comparison I will rely upon the comments in the body of Mr Jubb's report.

<b>Item</b>	<b>Builder's pricing</b>	<b>Mr Jubb</b>	<b>Allowance</b>
26. Front door	\$350.00	\$259.83	\$350.00
27. Electrical (PS)	\$9,000.00	\$9,000.00	\$9,000.00
28. Septic tank	\$8,000.00	\$8,000.00	\$8,000.00
30. Door hardware	\$1,500.00	\$844.93	\$1,500.00
31 Carpentry clad./linings	\$225.00	Nil	Nil
31a. Ditto	\$960.00	Nil	Nil
32. Ditto	\$435.00	Nil	Nil
33. Cavity slider doors	\$465.00	\$326.52	\$465.00
34. Verandah deck soffits	\$4,930.00	\$1,244.70	\$4,933.00
35. Tile underlay	\$252.00	Nil	\$252.00
36. Masonite packers	\$ 95.00	Nil	\$95.00
37. Plinth board	\$540.00	Nil	Not needed

38. & 43. Insulation	\$3,800.00	\$3,017.00	\$3,800.00
39. Merbau decking	\$5,250.00	\$4,990.15	\$5,250.00
41. Ducted heater (PS)	\$6,000.00	\$6,000.00	\$6,000.00
42. Ducted vacuum (PS)	\$2,200.00	\$2,200.00	\$2,200.00
44. Stairs	\$900.00	\$808.00	\$900.00
45. Plastering	\$11,650.00	\$10,590.91	\$11,650.00
46. Waterproofing	\$948.00	\$878.32	\$948.00
47. Tiling (PS)	\$5,360.00	\$5,360.00	\$5,360.00
48. Carpentry archs /skirts	\$2,870.00	\$2,900.60	\$2,870.00
49. Carpentry balustrade	\$1,260.00	\$918.60	\$1,260.00
51. Joinery – linen	\$1,600.00	\$1,600.00	\$1,600.00
52. Caesarstone (PS)	\$5,000.00	\$5,000.00	\$5,000.00
53. Joinery kitchen laundry	\$13,000.00	\$13,000.00	\$13,000.00
55. Painting	\$10,250.00	\$9,318.18	\$10,250.00
56. Floor overings	\$ 4,956.00	\$3,222.70	\$4,956.00
57. Garage door (PS)	\$1,500.00	\$1,500.00	\$1,500.00
58. Mirrors/sh. screen (PS)	\$4,000.00	\$4,000.00	\$4,000.00
59. Internal clean	\$440.00	\$440.00	\$440.00
60. Final clean	\$1,100.00	Nil	\$1,100.00
61. Sanitary ware (PS)	\$5,000.00	\$5,000.00	\$5,000.00
62. Appliances (PS)	\$5,000.00	\$5,000.00	\$5,000.00
62 a. Hot water	\$1,250.00	\$1,286.85	<u>\$1,250.00</u>

service

**Total** \$117,929.00

- 53 I must now address the differences in the figures in regard to each of these items and my reasons for preferring one over the other.

Item 26

- 54 Mr Jubb's front door figure is taken from Cordell's. The specification provided a door by a specific manufacturer for which the Builder has allocated \$350.00. It does not appear from the extract from Cordell's in the spreadsheet that Mr Jubb has costed that particular door. I think the Builder's figure is a better indication of what he would have spent.

Item 28

- 55 This figure of \$8,000.00 is the only figure in the 'Plumber' section of the Builder's costing. The only narrative in that section in the costing is the phrase "PC Allowance" on the line next to the words "Septic tank allowance". There is no such allowance in either the Contract or the Specifications. The Contract states that sewerage, stormwater and water are included (Clause 11.1) which means that it was for the Builder to supply all that that entailed, without any limit of \$8,000.00. That would have included the supply and installation of the septic tank, including excavating for it, installing it, backfilling around it, as well as all the drainage to it and all the stormwater drainage to the lawful point of discharge which appears to have been a soak pit that would need to have been constructed. Mr Jubb stated in his report that he allocated the \$8,000.00 to the septic tank but, correctly, did not suggest that it was a prime cost or provisional sum allowance. Unfortunately, although he suggested a figure of \$3,092.29 at current day's rates for the supply of a septic tank, he did not say what allowance should be made for installing it or providing all the plumbing work for the hot and cold water, drainage and sewerage of the house. I have included the figure above for the septic tank because it was in the Builder's costings but it might be more than the supply and installation of a septic tank on its own would have cost.

Item 30

- 56 The Builder allowed \$1,500.00 for door hardware. Mr Jubb said his figure would be okay for purchase only. It is not clear to me why he inserted the above Cordell's estimate into his spreadsheet if he thought the Builder's figure was reasonable. There was no evidence as to what particular door furniture the Cordell assessment relates to or whether that was the same as the door furniture the Builder intended to supply. I have therefore used the Builder's figure.

Item 31 and 31a

- 57 These items were for, square edged plain, 4.5 mm thick fibre cement sheeting. Mr Jubb has said that it would not have been required as there

were no eaves and soffits other than the verandahs. However the specification provided that the porch and verandah area were to have 4.5 mm cement sheeting lining. I note that Mr Mitchell allowed for it. Again I should accept the Builder's figure.

Item 33

58 The Builder allowed \$155 each for the slider doors. Mr Jubb produced an extract from Cordell's to say that slider doors of different dimensions could be purchased for \$120 each producing, with the 7.5% reduction, a figure of \$326.50. The doors that he has costed have different dimensions and are made of a different material. I think that I should find it likely that the Builder intended to use the doors that he has costed and so I should adopt his figure.

Item 34

59 The Builder allowed \$4,930.00 for the verandah soffits. These were fibre cement pre-primed 9 mm weatherboards with a heritage look. Mr Jubb produced a price of \$1,244.70 based upon an extract from Cordell's for square edged plain fibre cement sheeting 6 mm thick. I should allow the Builder's figure because that is what he was proposing to purchase and install.

Item 35

60 Although Mr Jubb allowed nothing for this in the workings column of his spreadsheet, in his commentary in the spreadsheet he said that he assumed that this was for around the bath. It is clear from the Builder's costings that he intended to box around the bath and that boxing would need to be sheeted and tiled. I will allow this figure.

Item 36

61 Although Mr Jubb allowed nothing for this in his spreadsheet he acknowledged in the body of his report that these packers would be required in order to straighten the studs. The frame had not been straightened with packers when I inspected it and this is work that was still to be done.

Item 39

62 The Builder costed the Merbau decking at \$5.25 per lineal meter. Mr Jubb said that this item was overpriced and produced an extract from Cordell's showing a price of \$5.23 per lineal metre, to which he then applied a 7.5% reduction. Although building costs in general may have increased, there is no evidence that has been any change in the cost of Merbau decking. It seems likely that the Builder would have been aware of the cost of locally sourced decking timber at the time that he priced the job.

Item 44

63 Although he arrived at a slightly lower figure, Mr Jubb said that the timber steps were “OK”.

Item 45

64 This item was a quotation the Builder received from a proposed sub-contractor and there was no evidence that he intended to engage anyone else. The amount of the quotation is likely to be the cost that he would have incurred.

Item 46

65 Although Mr Jubb said that this was overestimated by the Builder there is little difference in the figures. I note that although Mr Jubb’s excerpts from Cordell’s relates to waterproofing, he does not deal with the other work the Builder costed in this item which was caulking. I will therefore take the Builder’s figure.

Item 49

66 In the narrative to his report Mr Jubb said that the external balustrade is “OK”. I am unsure what his figure represents. I will allow the Builder’s figure.

Item 55

67 Mr Jubb said this item was overestimated, but the amount the Builder allowed in his costing is the amount of the quotation that he obtained from the painter that he apparently intended to engage to do the work.

Item 56

68 Floor coverings was a provisional sum allowance. Mr Jubb said that it was under estimated but if the ultimate cost was any more, the excess would have been borne by the Owner. It was not explained how the figure that appears in the spreadsheet of \$3,222.70 was calculated or what it represents.

Item 60

69 The Builder allowed \$1,100.00 for the final clean which included a site clean with a bobcat and bins. At first, Mr Jubb said that this was under estimated but, upon learning that the Builder had his own bobcat and truck he made no assessment of this item. The Builder said that he would have done the job himself at no cost. Even though the Builder has his own bobcat and truck, the work would still have been required and there would have been an expense in the provision of the equipment, the operating cost and the time of the persons involved. In the absence of any other assessment of the final site clean I will accept the amount the Builder allowed for in his costing.

Item 62 a

70 Mr Jubb first produced an assessment for the hot water service of \$4,525.93 but later revised his costing down to \$1,296.95. For consistency I should accept the Builder's figure.

### **Additional work and materials required**

71 The following items are not included in the list above:

(a) The two rain water tanks \_\_\_\_\_ \$7,000.00

These were also to be installed by the Builder. The prime cost for these, with pumps, was \$7,000.00. Mr Jubb said that that item was underestimated because the tanks would require plumbing and would need to be on a compacted contained base or a concrete pad.

(b) Plumbing \_\_\_\_\_ ?

No figures have been provided for the cost of the plumbing. As stated above, the \$8,000.00 that Mr Jubb allocated to the septic tank might be sufficient to pay for further plumbing as well but there is no evidence of that. Although Mr Mitchell's report contains a description of the work that would have been required, it does not cost the plumbing because the Owner was going to contract for that separately. What Mr Mitchell said was required was:

Rough-in and fit off, hot and cold, rough in and fit of gas, prepare base for LPG tanks, connect external sealed stormwater drain to water tanks, install water pump, supply and install cold water line to the house, suspended sub-floor sewer drains, suspended sub-floor stormwater drains, external sewer drain connected to septic tank system, agricultural drains to soakage pit.

I have no evidence of what that would have cost.

(c) The infill slab in the garage. \_\_\_\_\_ \$5,646.00

Mr Jubb said that the costing by the Builder of \$9,240.00 for concrete included the garage slab. There was some discussion about the garage slab during the on-site inspection. It is apparent that substantial preparation will be required, including fill to a height of eight courses of bricks, which will need to be deposited into the garage and compacted in layers. Also, to the extent that that the slab relies upon the integrated piers in the brickwork for support, it is a suspended slab. There was no separate allowance for the cost of constructing this slab. Mr Jubb has calculated an amount of \$2,114.00 for the slab on the basis that it would be 7 m<sup>3</sup> concrete at a rate, according to Cordell's, of \$302.02 per cubic metre. The note from Cordell's relied upon simply refers to a slab on ground. This slab seems to be more complicated than that. I was told on site that those integrated piers would be providing support.

In Mr Mitchell's costing, he allowed first, an amount of \$1,610.00 for excavation and preparation of the base for the slab for the garage and a further \$4,036.00 for the concrete paving, which included a grated drain at the front. At 64 square metres, it is a very large slab. I think that Mr Mitchell's costing is a more reliable guide since it appears to be directed to constructing this particular slab and not just a standard slab on ground.

- (d) The brickwork \$9,861.00

Bricklaying was costed by Mr Jubb that \$1,730.00 per thousand including materials and he said that there were 5,700 bricks still to lay. That amounts to \$9,861.00.

- (e) The roof \$22,000.00

The allowance for the roof in the Builder's costings was \$22,000.00, which was a quote that he had received.

- (f) The windows \$20,850.00

The price of the windows was \$18,350.00 plus the variation that the Owner paid the Builder, which was an additional \$2,500.00. That is what the Builder would have had to spend to provide the windows, taking account of the variation.

- (g) Additional carpentry work \$6,300.00

Mr Jubb said that additional carpentry to complete the house would be 105 hours for which he allowed \$6,300.00. Details of the carpentry work that he said was still to be done appear at the end of section 2 of the spreadsheet. When one examines the items that he has allowed for, there is no mention of the labour required to lay and fix the Merbau decking.

**Extra costs:**

72 There are also the following costs for which no separate assessment has been made by the Builder or Mr Jubb:

- (a) The levelling and construction of a compacted base for the water tanks that Mr Jubb said would be necessary. Mr Mitchell costed that at \$1,610.00;
- (b) The stainless steel cabling for the balcony that is shown in the plans as well as the labour to fix the Merbau decking. Mr Mitchell has included these together with other work in a single item on page 13 of his report for a total cost of \$3,600.00. There is no evidence concerning how the Builder proposed to fix the Merbau, whether screwed or with a nail gun. Having regard to the other items of work that are included, I will allow \$1,800.00, being half of Mr Mitchell's figure; and



(c) Rectification of minor defects. These defects were very minor. I will allow half a day, which is \$200.00, for the work required.

73 Finally, there is a question of contingencies. There were substantial cost overruns with the first part of the construction and it cannot be assumed that the house would have been completed without any further cost overruns. Mr Mitchell allowed a contingency figure of 1% in his costing for the completion of the house and I accept that that is an appropriate allowance.

#### **Conclusion as to the cost of completion**

74 For the foregoing reasons, I assess the cost that is likely to have been incurred by the Builder to complete the construction as follows:

Mr Jubb's report and the Builder's costing	\$117,929.00
Rain water tanks	\$7,000.00
Infill slab in the garage	\$5,646.00
Brickwork	\$9,861.00
Roof	\$22,000.00
Windows	\$20,850.00
Additional carpentry work	\$6,300.00
Base of water tanks	\$1,610.00
Cabling and Merbau	\$1,800.00
Minor defects	<u>\$200.00</u>
<b>Total cost</b>	<b>\$193,196.00</b>
Plus contingency of 1%	<u>\$1,931.96</u>
Likely cost of completion (without plumbing)	<b><u>\$195,127.96</u></b>

75 Consequently, the calculation of the claim for loss of profit, without taking into account the cost of plumbing, would be:

Lock up, fixing and final payments:	\$212,429.70
Cost of completion (without plumbing)	<u>\$195,127.96</u>
Loss of profit (without plumbing)	<u>\$ 17,301.74</u>

76 I do not have the plumbing figure and so I cannot be certain what the outcome would have been in terms of a profit to the Builder. Since the Builder bears the onus of proof I should give the Owner the benefit of any doubt. Even so, having regard to Mr Jubb's figure for the supply of a septic tank and the likelihood that there would have been some of that figure of \$8,000.00 available to pay for plumbing, I think on the balance of

probabilities that there would have been a small profit to the Builder, which I assess at \$10,000.00.

### **Other losses claimed**

77 There are three other losses claimed, as follows:

- (a) The windows \$3,079.90
- (b) Interest on late payments \$266.49
- (c) The 'finishing up' costs \$2,193.93

#### **The windows**

- 78 The Builder claims for the loss that he made on the windows that he purchased the job. According to his witness statement these have been used except for five windows valued at \$4,079.90 which he sold for \$1,000.00.
- 79 Had the Builder been able to complete the contract this loss would not have been sustained because he would have received full payment for the windows from the Owner. I accept his evidence that he mitigated his loss as far as he was able. The amount of \$3,079.90 will be allowed.

#### **Interest on late payments**

- 80 The Builder claims interest of late payment of the base stage and frame stage. By Clause 11 of the Contract and Items 12 and 15 of the Schedule, progress payments were to be made in 14 days of the date of invoice or interest at the rate of 8% per annum compound in weekly would be payable by the Owner.
- 81 As to the base stage, the invoice was issued on 25 September 2014 and paid on 21 November 2014. The Builder claims interest from 9 October 2014 which is calculated \$318.89. That claim is not justified because, following the issue of the invoice, there was a dispute concerning the base stage leading to further work which was not completed until very shortly before the invoice was paid.
- 82 As to the frame stage, the invoice was issued on 21 November and paid on 39 December. Interest is claimed for the 14 days from 5 December. I think that claim is justified and will be allowed in the sum of \$266.49.

#### **The 'finishing up' costs**

- 83 The Builder also claims the sum of \$24,998.92 that Mr Jubb calculated which is referred to earlier in these reasons. If one looks carefully at the figures in that calculation, it is apparent that the Builder is seeking compensation for having to finish up on the job. That is something that he would have had to have done if he had completed the work and it would have counted as an expense against any profit that he would have made. These are not expenses arising from the breach because they would have been incurred even if the breach had not taken place.

- 84 The builder also claims interest on the sum awarded from the commencement of the proceeding, pursuant to section 53(2)(b)(ii) of the *Domestic Building Contracts Act 1995*. That sub-section provides that the tribunal may award damages in the nature of interest. Such damages are awarded to compensate an applicant for loss of the use of the money awarded to him. If the unsuccessful party had paid this sum to the applicant at the commencement of the proceeding then this loss would have been avoided and the successful party could have made use of the amount awarded in the meantime.
- 85 In the present case the only substantial amount awarded is the loss of profit amount which was not claimed until the first day of the hearing. Interest will be awarded on the amount of the award from the first day of the hearing at the rate fixed from time to time under section 2 of the *Penalty Interest Rates Act 1983*, in accordance with section 53(3) of the *Domestic Building Contracts Act 1995*. On that basis, I have calculated the amount to be awarded at \$2,193.93.

### **Conclusion**

- 86 The Builder's damages are assessed at \$13,346.39. There will be an order that the Owner pay to the Builder that sum plus interest as aforesaid of \$2,193.93
- 87 Costs will be reserved for further argument.

**SENIOR MEMBER R. WALKER**