

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. D198/2013

CATCHWORDS

Domestic Building contract, failure to adequately identify the contract set of plans and specifications, variations, owner's budget, alleged deviations from the contract, failure by builder to comply with the *Domestic Building Contracts Act 1995* ss 37 and 38 regarding variations, for non-compliant work, money to be paid or work to be done by the Builder? *Bellgrove v Eldridge*, set off, defects, time spent on items claimed disproportionate to value, standard of work – perfection or that of a reasonably competent builder, builder must usually identify aspects of design that cannot be built before entering the contract.

APPLICANT	Ms Fay Maree Lee
RESPONDENT	Creative Lifestyles Homes Pty Ltd (ACN 132 709 105)
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Hearing
DATES OF HEARING	10 to 18 and 24 to 26 June; 29 and 30 September; 1, 2 and 4 October and 24 November 2014
DATE OF ORDER	23 April 2015
CITATION	Lee v Creative Lifestyles Homes Pty Ltd (Building and Property) [2015] VCAT 511

ORDERS

- 1 The Respondent must pay the Applicant \$71,688.87 forthwith.
- 2 Interest and costs are reserved with liberty to apply. Any party claiming interest and/or costs must provide a brief outline of their claim with the application. It will be heard by Senior Member Lothian on a date to be fixed with an estimated duration of two hours.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicant

Ms Lee, in person

For Respondent

Mr S Ryan of Counsel

REASONS

- 1 The difference between a good tradesperson and a good builder is that both are good "on the tools", but the builder is also good at the business of building. The business of building includes all the documentation necessary for a successful building contract. There have been occasions when the Builder, which is the respondent to this proceeding, has been let down by its documentation.
- 2 Ms Lee is the applicant-Owner. Her home is in Offshore Drive, Torquay and was built by the Builder in 2011. The building permit was issued on 7 April 2011 and the occupancy permit was issued on 8 December 2011.
- 3 The Owner's¹ claim against the Builder is to recover damages for works she alleges are defective, incomplete or deviating from the agreed design.
- 4 The sole director of the Builder is Mr David Farrelly. If the Owner and Mr Farrelly were not friends when the contract was entered into, they were acquaintances. The parties agree that the Owner met the lady who is now Mr Farrelly's wife approximately 10 years ago, and there was a time when they worked together. The pre-existing relationship between the parties might explain the Builder's repeated failures to properly document alleged variations to the contract works, but it does not excuse them.
- 5 The biggest issue between the parties is what they agreed. What did the contract provide? Had the parties varied the contract, or did the Builder deviate from the contract without permission? As discussed under "Specifications" below, the Owner co-operated in the Builder's practice of issuing fresh iterations of the specifications, rather than documenting variations in the manner called for by the contract.
- 6 Mr Farrelly stated²:

... the changes were so many that eventually I created a spreadsheet so we could both keep track. The spreadsheet would list each and every change requested then advise whether there was a credit to her or an addition to the contract price. I would change this list when she changed something then I would e-mail it to her regularly.
- 7 Nevertheless, the Builder was the professional in this relationship, and should have documented any variations³ properly so that there could be no doubt as to the nature of changes made and their price. At paragraph 92 of her witness statement, the Owner identified 17 such variations.
- 8 In contrast, Mr Farrelly characterised the Owner as:

¹ I refer to Ms Lee as "the Owner" to avoid confusion with the Builder's expert, Mr Lees.

² Mr Farrelly's witness statement, paragraph 31

³ At paragraph 10 of his witness statement in reply, Mr Farrelly accused the Owner of confusing variations and deviations. He said "Any variation or deviation was always discussed with Ms Lee." The contract does not refer to deviations in this sense.

... of a personality that if a single thing (however small) was not done as she wanted she would let me know immediately. Any tiny blemish, imperfection or defect was brought to my attention immediately.⁴

- 9 It is the Builder's assertion that any change not promptly objected to by the Owner has been made with her consent.
- 10 The parties agree that the contract price was \$433,000 but the scope of works is less clear. There have been a number of iterations of the designs, and it is not immediately obvious which one is the contract set. The Owner's claim in her Further Amended Points of Claim ("FAPoC") is for \$184,971.40, being \$12,499.03 for variations and \$172,522.37 for alleged defects and deviations. She revised this down in her final submissions to \$178,061 to take into account a few items that she acknowledges were claimed twice. The Owner also claims interest and costs.
- 11 There is no counterclaim by the Builder, but Mr Ryan of Counsel, who appeared for the Builder, said there was approximately \$1,900 owing by the Owner that should be set off against the amount owing to her.
- 12 The Owner had, on occasions, been legally represented, but appeared in person at the hearing. The Owner's building expert was Mr John McKee. He identified alleged defects and deviations from the contract. He prepared reports and gave oral evidence for a number of days. Her expert for the appropriate scope of works and costing was Mr Wilkinson, builder, who prepared a report and gave evidence on 12 June 2014 only.
- 13 On 13 June 2014 Mr McKee advised the Tribunal that Mr Wilkinson would not be appearing that day. The Owner said that Mr Wilkinson was unwell and visiting his doctor, but that she did not know any more. He did not return on any other day and no medical certificate was provided. Mr Wilkinson was not present for evidence regarding any item of allegedly defective work after item 9u in the Scott Schedule⁵, and was not available for cross-examination.
- 14 Mr Robert Lees, building expert, prepared a report for the Builder on defects and costing and gave oral evidence on a number of days.

INITIAL IMPRESSION OF THE HOME

- 15 The hearing was held on site on the second day, 11 June 2014. The home is two storey, substantial in size with four bedrooms (one is used as a treatment room) and two bathrooms. It is weather-tight and, without considering in detail the individual matters complained of, gives the impression of being competently built. Only one small bathroom leak is complained of. The finish and workmanship support the view that the contract sum was fair to both parties.

⁴ Mr Farrelly's witness statement, paragraph 25

⁵ The Scott Schedule was finalised in expert conclave by Mr McKee, Mr Wilkinson and Mr Lees on 11 February 2014. It was used in the hearing as the basis of the Owner's claim for alleged defects, incomplete works and deviations.

ACCURACY OF EVIDENCE

- 16 I do not have confidence in the strict accuracy of evidence of either the Owner or Mr Farrelly. The Owner has demonstrated repeatedly in the conduct of the hearing that she has a very good memory and she is also very well organised. However, there have been a few instances where she has failed to report accurately. An example concerns a mark on the driveway, near the entrance alcove.
- 17 This item is part of item 30e in the Scott Schedule which concerns the finish to the driveway. The Owner made an audio recording of a substantial portion of an hour and a half long inspection and conversation with Mr Farrelly on 3 October 2012. She did not tell him about the recording until the inspection was completed. She raised the driveway finish issue in the course of the inspection. The recording reveals that Mr Farrelly reminded her that she had dropped a bag of cement in that area after the driveway was completed.
- 18 The issue was raised again at the site inspection of 11 June 2014 and again Mr Farrelly reminded the Owner that she had dropped a bag of cement. She did not alter her claim. During cross-examination she was reminded for the third time that she had dropped a bag of cement and her response was “But it was your bag of cement”.
- 19 In contrast, at the commencement of day 6 of the hearing on 17 June 2014 the Owner volunteered information against her interest regarding floorboards under the dishwasher, and lack of damage to the skirting boards in the hallway adjacent to the bathroom where water had leaked.
- 20 I do not conclude that the Owner has been deliberately untruthful, but if such matters can slip from her memory, I cannot be confident that her evidence is entirely reliable.
- 21 Mr Farrelly also volunteered some matters that are against his interests. At the commencement of day 13 of the hearing on 1 October 2014, Mr Farrelly said that in the course of looking for other items, he had discovered that he had allowed for keyed child-proof locks to the back yard (item 33a of the Scott Schedule). Liability for these locks had previously been denied by the Builder.
- 22 Nevertheless, Mr Farrelly failed to admit the vitally important point that he did not document variations in accordance with the contract and sections 37 and 38 of the *Domestic Building Contracts Act 1995* (“DBC Act”) until his obligations were pointed out to him during the hearing. It would be surprising if he were unaware of this issue, given that experienced building lawyers have represented him for a substantial period. Mr Farrelly’s attention to detail is not of the same order as the Owner’s and there are some matters in respect of which I have serious reservations about Mr Farrelly’s accuracy.

23 In addition, there are occasions when Mr Farrelly's evidence deprecates the Owner's character and not is necessarily accurate. At paragraph 12 of his witness statement Mr Farrelly stated that the Owner had said:

Make sure you do a good job because I took my last builder to VCAT.

I accept the Owner's evidence⁶ that she has never contracted a builder to build a home and taken them to VCAT before, although under cross-examination, Mr Farrelly stated: "That is what you told me."

24 In contrast, Mr Farrelly has stated on a number of occasions that he wanted to do a good job for the Owner, and to keep down the cost to her. I have no reason to believe that he has inaccurately represented these motivations.

25 The result is that I approach the evidence of both parties with care, and determine each matter taking into account these reservations.

26 For reasons given under item 22t, "Island bench location", I also treat with caution the evidence of Mr Connors of Lancefield Classic Kitchens. Mr Connors gave evidence for the Builder.

HISTORY

27 The contract allowed for a building period of 418 days from the date for commencement of the building contract. The contract schedule included as the anticipated commencement date "March 2011". If 1 March 2011 was adopted as the start date (the least favourable for the Builder), completion should have been achieved by 22 April 2012.

28 The Owner and her sons moved in to the home, with the Builder's consent, on 9 December 2011, much earlier than the date for completion.

29 By an email dated 7 December 2011 at 8:22PM, Mr Farrelly wrote to the Owner. It commenced:

Hi Fay

Minutes from the final inspection.

Can you please arrange the final payment for handover to be completed tomorrow night a cheque or eft receipt is fine. I'll get Kim to contact you tomorrow to discuss.

30 There followed a list of items headed "Offshore defects list" and an updated defects list was sent by the Builder to the Owner, dated 8 December 2011.

31 Final payment was made on 23 December 2011.

THE CONTRACT

32 The Owner contends that the contract documents included:

- a. The building contract
- b. Specifications dated 18 January (2nd copy)

⁶ The Owner's witness statement in reply, paragraph 6.

- c. Building plans dated 24/2/2011 – drawn by draftsman⁷ with energy rating stamp. Stamped on 1 page by RBS on 7/4/2011
 - d. Quay Committee approval – stamped plans⁸
 - e. Engineers plans by Andrew Cherubin and his Certificate 1507
 - f. Building permit dated 7/4/2011 [sic]
- 33 It is not entirely clear what the Builder claims were the contract documents.

Specifications

- 34 In her witness statement the Owner states that the Builder provided two sets of specifications, both dated 18 January 2011 and that the contract set is the second set she received, a copy of which is at Tribunal Book (“TB”) page 494 (“2nd Specs”). She states at paragraph 12 of her witness statement, at TB510, that she received the second set on 29 January 2011.
- 35 Another set of specifications dated 18 January 2011, identified by the Owner as the first set, starts at TB438 (“1st Specs”) The Owner was asked in cross-examination whether the hand writing on the 1st Specs was done on about 29 January 2011. She replied that she could not say that. She said she had a number of meetings with Mr Farrelly and continued to write on her copy of the specifications, and that Mr Farrelly noted the changes as well.
- 36 The Owner stated⁹ that she hand-wrote changes to the 2nd Specs at a meeting with Mr Farrelly on 19 July 2011, and added:

There were no further copies of updates of specifications provided to myself apart from the initial two.

- 37 She referred to a text message of 26 August 2011, reproduced at TB527 where Mr Farrelly referred to a particular item raised by the Owner and added: “We still need another hour to go over the specs as well”
- 38 Mr Farrelly stated that the relevant set of specifications is the set tendered by him as R2 (“3rd Specs”). Again, the printed date is 18 January 2011, but there are a number of handwritten notes on it, in one hand:

Created 17/3/2011

Modified 26/5/2011

3rd Set of Specs.

In another hand:

Sent to printer 26/6

And in a third hand:

2nd set of specifications

⁷ The architectural drawings are by Techno Draw (Vic) Pty Ltd.

⁸ The Quay Committee is the governing body for the development in which the home was built.

⁹ Owner’s witness statement, paragraph 13

- 39 I conclude that the third notations were after the Tribunal Book was prepared because TB938 is an email from Mr Farrelly to admin.network@geelongce.net.au, the subject is “offshore specs”, the attachment is CLH-Specs-Offshore.doc and the message is:

2 copies please. Just normal printing ok.

Thanks and regards

Dave

- 40 Mr Ryan asked the Owner in cross-examination whether changes to the 1st Specs were made on 27, 28 and 29 January 2011 in accordance with the chain of emails between her and Mr Farrelly at TB509, and if that was so, whether it followed that the second version of the specifications was in existence then. She agreed, but said she seems to have continued to make notes on the first set. She said all the notes on the 1st Specs were written on 27 January 2011 with the exception of the amendments to clause 6.1.5 of the specifications, at TB497.
- 41 Clause 6.1.5 of each of the specifications is “Concrete Paths and Driveway Included Exposed Aggregate”. The note is “Patio driveway step pad for bluestone pavers”. The Owner cross-examined Mr Farrelly about this note and referred to exhibit A26, third page, and said that it is not included in the 3rd Specs. A26 appears to be an extended bill of quantities for costing purposes. The relevant item is a table:

deleted	Exposed aggregate to driveway and pads from driveway to front door for bluestone stepping pavers supply and installed by others	Sqm	50	\$100	\$5,000
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- 42 The Owner asked if this item was discussed. Mr Farrelly said it was, and the issue was whether the pads and pavers could be done within the budget.
- 43 Mr Ryan asked the Owner whether she also made changes to the 2nd Specs. She said she did. She said she wrote on it for her lawyers and added “I now know I shouldn’t have done that.”

Conclusion regarding specifications

- 44 There are some, but not many, differences between the specifications, which are discussed under the headings to which they relate. The hand-written changes are treated with caution.

¹⁰ Lawyers before the Tribunal sometimes refer to Tribunal Books as Court Books, and CB is consistent with that page in the Tribunal Book.

Plans

- 45 The Owner tendered two sets of plans¹¹ each consisting of the architectural drawings by Techno Draw (Vic) Pty Ltd (“Techno Draw”), and drawings and calculations by Andrew Cherubin & Associates (“Engineering Design”).

The Owner’s budget

- 46 The contract is a fixed price contract, subject to adjustments for items such as variations, prime cost items and extensions of time or delays. There are occasions where the Owner claims for items she says the Builder was obliged to provide but has not, such as waterfall ends on the island bench in the kitchen.
- 47 The Builder claims that some items mentioned in the plans and specifications have not been provided because they are not within the Owner’s budget. I do not accept that the Owner’s budget is relevant, except if a prime cost item has been allowed. Under cross-examination, the Owner agreed that the last quotation before the contract was signed included a \$12,000 budget for the kitchen, but the Builder did not make submissions about how this could be relevant to the contract.
- 48 Further, proper application of prime cost item is to allow for a particular item, such as the cost of taps yet to be chosen by an owner. They do not allow unilateral changes by the Builder such as leaving out certain items that are included in the contract documents.
- 49 Under item 21 of the appendix to the contract at “Prime cost allowances for Prime Cost items” the notation “See Specifications” has been written.
- 50 The 1st, 2nd and 3rd Specs are all consistent in that the items with the notation “PC Sum”¹² beside them are:
- | | | |
|------|-----------------------------|---------------|
| 16.2 | Laundry | PC Sum \$1500 |
| 16.3 | Bathroom Vanity | PC Sum \$1000 |
| 16.4 | Ensuite Vanity | PC Sum \$1000 |
| 16.5 | Powder Room Vanity | PC Sum \$500 |
| 16.6 | Upstairs Powder Room Vanity | PC Sum \$500 |
- 51 I note that the kitchen joinery did not have a PC sum allocated to it. I am not satisfied that there was a limit of the value of the kitchen joinery in the contract.
- 52 The parties’ practice of negotiating what was in and what was out of the contract is demonstrated by text messages of 28 August 2011¹³:
- Mr Farrelly to the Owner at 13.03:

¹¹ Exhibits A2 and A9

¹² Although not identified as a PC sum, an allowance of that type was made under item 22.1 for bathroom floor tiles.

¹³ TB527

Hey mate. Something to think about between now and tomorrow's meeting is dropping the solar power off for now. It \$3 grand we could do with for some of these upgrades.

Owner to Mr Farrelly at 13:16:

Hmm, will assess the price of the upgrades tomorrow when we meet. Cheers.

Owner to Mr Farrelly as 20:08:

Hi Dave, can u pls email thru the tapware, bath, etc quotes so i can compare b4 tomorrow's meeting. Thanks.

- 53 Apart from prime cost items, I am not satisfied that the Owner's budget is relevant.

ALLEGED VARIATIONS

- 54 A variation to a domestic building contract is a change to the plans and specifications which might or might not result in an adjustment of the contract price – an increase or decrease – and which might or might not result in a claim by the builder for an extension of time. All variations must be undertaken in accordance with clause 12 or 13 of the building contract and in accordance with sections 37 or 38 of the DBC Act.

- 55 The sections provide:

37 Variation of plans or specifications—by builder

- (1) A builder who wishes to vary the plans or specifications set out in a major domestic building contract must give the building owner a notice that—
 - (a) describes the variation the builder wishes to make; and
 - (b) states why the builder wishes to make the variation; and
 - (c) states what effect the variation will have on the work as a whole being carried out under the contract and whether a variation to any permit will be required; and
 - (d) if the variation will result in any delays, states the builder's reasonable estimate as to how long those delays will be; and
 - (e) states the cost of the variation and the effect it will have on the contract price.
- (2) A builder must not give effect to any variation unless—
 - (a) the building owner gives the builder a signed consent to the variation attached to a copy of the notice required by subsection (1); or
 - (b) the following circumstances apply—
 - (i) a building surveyor or other authorised person under the **Building Act 1993** requires in a building notice or building order under that Act that the variation be made; and

- (ii) the requirement arose as a result of circumstances beyond the builder's control; and
 - (iii) the builder included a copy of the building notice or building order in the notice required by subsection (1); and
 - (iv) the building owner does not advise the builder in writing within 5 business days of receiving the notice required by subsection (1) that the building owner wishes to dispute the building notice or building order.
- (3) A builder is not entitled to recover any money in respect of a variation unless—
- (a) the builder—
 - (i) has complied with this section; and
 - (ii) can establish that the variation is made necessary by circumstances that could not have been reasonably foreseen by the builder at the time the contract was entered into; or
 - (b) the Tribunal is satisfied—
 - (i) that there are exceptional circumstances or that the builder would suffer a significant or exceptional hardship by the operation of paragraph (a); and
 - (ii) that it would not be unfair to the building owner for the builder to recover the money.
- (4) If subsection (3) applies, the builder is entitled to recover the cost of carrying out the variation plus a reasonable profit.
- (5) This section does not apply to contractual terms dealing with prime cost items or provisional sums.

38 Variation of plans or specifications—by building owner

- (1) A building owner who wishes to vary the plans or specifications set out in a major domestic building contract must give the builder a notice outlining the variation the building owner wishes to make.
- (2) If the builder reasonably believes the variation will not require a variation to any permit and will not cause any delay and will not add more than 2% to the original contract price stated in the contract, the builder may carry out the variation.
- (3) In any other case, the builder must give the building owner either—
 - (a) a notice that—
 - (i) states what effect the variation will have on the work as a whole being carried out under the contract and whether a variation to any permit will be required; and
 - (ii) if the variation will result in any delays, states the builder's reasonable estimate as to how long those delays will be; and

- (iii) states the cost of the variation and the effect it will have on the contract price; or
 - (b) a notice that states that the builder refuses, or is unable, to carry out the variation and that states the reason for the refusal or inability.
 - (4) The builder must comply with subsection (3) within a reasonable time of receiving a notice under subsection (1).
- (5) A builder must not give effect to any variation asked for by a building owner unless—
 - (a) the building owner gives the builder a signed request for the variation attached to a copy of the notice required by subsection (3)(a); or
 - (b) subsection (2) applies.
- (6) A builder is not entitled to recover any money in respect of a variation asked for by a building owner unless—
 - (a) the builder has complied with this section; or
 - (b) the Tribunal is satisfied—
 - (i) that there are exceptional circumstances or that the builder would suffer a significant or exceptional hardship by the operation of paragraph (a); and
 - (ii) that it would not be unfair to the building owner for the builder to recover the money.
- (7) If subsection (6) applies, the builder is entitled to recover the cost of carrying out the variation plus a reasonable profit.
- (8) This section does not apply to contractual terms dealing with prime cost items or provisional sums.

56 One of the most important reasons to have variations in writing is that a change to the building might be characterised by a builder as an undocumented variation, but by an owner as a breach of contract. The Builder's obligation is to build in accordance with the contract. As described on page 5 of her written submissions, the Owner claims there are 19 items where the Builder has failed to build in accordance with the plans. She claims \$82,155.85 for those items. At page 6 of her written submissions the Owner said of these items:

Mr Farrelly states I agreed to these variations however variations weren't identified in the majority of cases until after occupancy took place. There [are] copies of e-mails, text messages and "contract changes" of the items I did agree to, yet no documentation of the variations undertaken above.

57 The Owner said at paragraph 16 of her witness statement:

Anything I requested or agreed upon, I verified in writing in an email to Mr Farrelly. If I hadn't put it in writing, then I hadn't given my approval or consent.

She emphasised this in her witness statement in reply where she said¹⁴:

If there is no evidence of my consent in print than I didn't authorise the work to be done.

58 Mr Farrelly admitted under cross-examination that he had not fulfilled the requirements of the contract and DBC Act. He said that he documented variations when they would result in a change in contract price, but not otherwise. He said he discussed changes with the Owner. The impression he gave was that the Owner sought changes. However, he also said there have been instances where he identified the need for a variation.

59 Further, the Builder did not document variations as required by ss37 or 38 of the DBC Act. Instead of providing a document relating to each variation giving a description of the work, its impact on the contract price and time, and space for signature by both the builder and owner, he “attempted to note all [the Owner’s] changes by revising the specification list”¹⁵. He continued, at paragraphs 30 and 31 of his witness statement:

Where there are changes in the specifications these are simply variations to the works.

31. Regardless, the changes were so many that eventually I created a spreadsheet so we could both keep track. The spreadsheet would list each and every change requested then advise whether there was a credit to her or an addition to the contract price. I would change this list when she changed something then I would email it to her regularly. I refer to the attach[ed] **DF19** which is the final spreadsheet which listed all the changes over the building works. I would estimate this spreadsheet was updated and sent to her approximately 10 times during the works. [Underlining added]

60 During her cross-examination of Mr Farrelly, the Owner asked him to confirm that the substantial changes to the balcony structure were not in the spreadsheet.¹⁶ His response was: “No, because it is not a change to the contract price.” The words underlined from paragraph 31 of Mr Farrelly’s witness statement give a misleading impression, that “each and every change requested” would be documented rather than only changes that resulted in a change to the contract price.

61 Both parties agree that the Builder sent the Owner a spreadsheet on 21 December 2011, but they disagree about its contents. The Owner refers to a single page document at “Exhibit 10.5”¹⁷, which bears little resemblance to the Builder’s DF19, at TB434 and TB435. Further, given that the occupancy permit was issued approximately two weeks earlier, most if not all of these items must have been carried out before the spread sheet was sent to the Owner – it does not prove the vitally important element of permission from the Owner before the variation is carried out.

¹⁴ Owner’s witness statement paragraph 10

¹⁵ Mr Farrelly’s witness statement Paragraph 30.

¹⁶ Discussed in detail under item 27 of “Alleged defects and deviations”.

¹⁷ Marked 10.50, TB835

62 At page 7 of her final submissions, the Owner said:

The agreed variations (referred to by Mr Farrelly as contract changes) were tabled by Mr Farrelly in an Excel spreadsheet as is seen on page 835 of Tribunal Book 3. There are a number of discrepancies in this table that have been discussed including the exposed bottle traps, laundry chute, pantry bin, garage sliding door deletion and charging to lift the fridge upstairs.

63 Mr Farrelly stated¹⁸ that on 16 November 2011 the Owner expressed concerns about her money problems and raised the possibility of deleting the pantry bin, but he did not go on to say that the parties agreed to do this.

64 The Owner pleaded that there were variations agreed between the parties, but that there were a number that were not compliant with the DBC Act, entitling the Owner to recover \$12,449.03. On the 12th day of hearing, following my request to the Owner to eliminate repetition between the variations and the Scott Schedule, she deducted 14 items from Schedule A to the FAPoC, totalling approximately \$8,500.

65 I have had to consider whether changes to the design are variations or breaches of contract based on the evidence of the parties, including sometimes extensive chains of messages and emails. It has greatly added to the length of the hearing and to the time necessary to write these reasons. I attribute responsibility for this to the Builder, whose obligation it was to ensure compliance with ss37 and 38 of the DBC Act.

DEFECTIVE WORK - MONEY TO BE PAID OR WORK TO BE DONE?

66 The parties agree that there are at least some items that must be rectified. The Builder submits that, for any items proven to be defective, it should have the chance to rectify these items, on the basis that it has always been willing, ready and able to do the work but that the lists of defects kept changing and there was no certainty about what should be done. Further, Mr Farrelly stated¹⁹:

I request this Tribunal finalise what are defects in the eye of the Tribunal and once this has been done I can arrange for these to be completed immediately. Ms Lee has not expressed any reason why this could not be done and I've always expressed my desire to do this.

67 Under ss 53(g) and (h) of the DBC Act the Tribunal has the power to order that a builder rectify and/or complete work. There are competing considerations regarding whether to order work or ordered that a builder pay money to an owner

68 The Owner submits that the Builder repeatedly failed to do all in its power to rectify all defects and that it is now unreasonable for the Tribunal to allow the Builder to return to complete and rectify works.

¹⁸ Mr Farrelly's witness statement, paragraph 32

¹⁹ Mr Farrelly's witness statement paragraph 70

- 69 Having regard to the “Offshore defects list” dated 16 January 2012²⁰ there were 79 items of which some items appear²¹ to be the same as those in the Scott Schedule. The Scott Schedule list approximately 190 items, although some are multiple alleged defects concerning one item of work.
- 70 I accept Mr Farrelly's evidence²² that the Owner replied to the defects list by e-mail on 19 January 2012 with some comments. He added:
- It can be seen from the document that by this date approximately 90% of the defects listed had been completed.
- 71 I do not accept Mr Farrelly’s evidence that the defects listed on the initial list have all been completed. As described above, there are approximately 8 defects that appear on the initial defects list and in the Scott Schedule.
- 72 The Owner stated²³ that up to 25 January 2012 there were seven defects list revisions. She said that she emailed Mr Farrelly additional defects as she became aware of them, and he replied with updated defects lists, although some items were omitted from revised lists without having been repaired. The Owner stated²⁴ that the Builder sought payment of the “contract changes” invoice of \$2,900, and also said that she would suspend all defect works until the invoice was paid. She said that little repair work had been done and that she was concerned that if she made the final payment “it would be difficult to get the defects attended to”.
- 73 The Owner also stated that she allowed Mr Farrelly to retain keys to her home after she had moved in. She said there were a number of occasions when he allowed other trades, sometimes people she did not know, to access the home in her absence, and sometimes when her sons were at home.
- 74 The Owner gave five examples of times, between 18 June and 15 October 2012, when Mr Farrelly would text her in the evening to say that a tradesperson would be arriving and 7:30 or 8:00am the next morning.
- 75 Mr Farrelly acknowledged that he would sometimes send a message to the Owner late, once he was aware that a tradesman could attend the next day. He said²⁵:
- Although I had a key to enter I wanted always to ensure that she knew we were attending and to ask whether this was ok.
- 76 The Owner said that from February 2012 there were excuses why work had not been done. She gave an example that on a number of occasions she asked for completion dates for the defects list and received a reply by text on 24 April 2014 stating:

²⁰ TB905 to 909

²¹ By description. There was no evidence about this.

²² Witness statement in reply, paragraph 41

²³ Owner’s witness statement, paragraph 40

²⁴ Owner’s witness statement, paragraph 41

²⁵ Mr Farrelly’s witness statement in reply, paragraph 65

I'll have defects listed by end of week and hope to start on some of them next week if that suits.

She said she replied "That'd be great", but she didn't receive an updated defects list.

- 77 Mr Farrelly attributed some of the difficulties with rectification to allowing the Owner to move into the home early. He stated²⁶:

With experience I now know I would have been far better off not allowing Ms Lee to move in and using all the time available under the contract to attend to these matters.

- 78 In the context of the job that was not required to be complete until, at earliest 22 April 2012, some of the Owner's concerns regarding delay by the Builder in completing defects are unreasonable. Nevertheless, the Builder's suggestion that defects could wait until the "three months walk-through" was inaccurate as no provision was made in the schedule for a defects liability period.

- 79 The Owner said that there were a number of items where Mr Farrelly said that the item she complained of was "within standards and tolerances" – it is possible that for some of the items sought by the Owner, Mr Farrelly was correct.

- 80 The Owner stated²⁷ that she obtained advice about what to do, and acting on the advice received, wrote to Mr Farrelly on 1 July 2012 requesting that he give completion dates in writing. The Owner's email of 15 July 2012 to the Builder indicated that she had still not received a response to her request of 1 July. She expressed frustration in the first paragraph of her email where she said:

I've paid in excess of \$440,000 for a house that still has over 2 pages of original defects not fixed 7 months after moving in.

- 81 The same email contains a complaint about poor repairs to the plaster ceiling in the treatment room. Under cross-examination Mr Farrelly admitted that he had attempted to do the plaster repairs himself because he was trying to get it done quickly, and he admitted that he had not told the Owner that the work would be done before it was undertaken.

- 82 The Builder's position seems to be that the Owner has produced an unreasonable number of lists of defects, possibly including defects that should have been listed earlier. An example Mr Farrelly gave was of a defects list produced by the Builder dated July 2012²⁸. His evidence was that the Owner sent a list in response the next day. The e-mail, dated 4 July 2012²⁹ commences:

I've only just now had a chance to thoroughly go through the defects list. I'm not sure why the list of defects below have been left off. I

²⁶ Mr Farrelly's witness statement, paragraph 34

²⁷ Owner's witness statement, paragraph 46

²⁸ TB397

²⁹ TB401

know a couple of things aren't defects that have to be done however the majority are defects and were on the last list dated 16th January. There are also new defects that have been noted since 16 January list.

- 83 Concerning painting specifically, Mr Farrelly stated³⁰ that the painter engaged by the Builder, Mr Issell is a "high quality painter. He is what is referred to as a "Dulux quality painter." Mr Farrelly said that Mr Issell's work comes with a five-year workmanship warranty and that therefore any defect relating to painting identified by the Tribunal will be fixed at no cost to the Builder. He also said that the Owner and the painter are friends, therefore rectification of any painting work should not cause problems.
- 84 The Owner stated³¹ that she met Mr Issell when he was sent to the home to undertake rectification work by the Builder but that she does not know him other than by this connection. She denied that he is her friend.
- 85 Mr Issell provided a short statement³² but did not attend the hearing for cross-examination. Further, as referred to on the audio recording, Mr Farrelly was not particularly complementary about "the painter's" work. I am not satisfied that sending tradespeople back will be a satisfactory solution for these parties.

Conclusion regarding money or work

- 86 Factors in favour of payment of money are that these parties have been in a long and complex dispute and are unlikely to cooperate as well as parties to a normal building project. Payment of money does not call for any further cooperation between them and does not condemn them to possible further litigation arising out of the works ordered to be done.
- 87 Assuming that a builder is reasonably competent and honest and there have been no threats between the parties, factors in favour of ordering a builder to complete or rectify works include:
- the hypothetical owner does not run the risk that the amounts ordered will be insufficient to rectify each item found to be defective;
 - it is possible that an owner will choose not to rectify a serious defect and leave a subsequent purchaser with a defect of which they are unaware but for which they might not receive compensation under section 9 of the DBC Act.
 - Only the original builder is responsible for any further building defects; and
 - the cost to the builder is usually substantially less than the amount that will be paid to a third party builder.
- 88 I am satisfied that there are a number of occasions when the Builder made unilateral decisions about changes to the work to be done. Further, I am

³⁰ Mr Farrelly's witness statement paragraph 144

³¹ Owner's witness statement in reply paragraph 75

³² TB926

not satisfied that it is reasonable to order that the Builder do work instead of paying money where there has been a significant delay by the Builder in disposing of outstanding issues by either fixing them or explaining precisely why each alleged defect is not defective.

Bellgrove v Eldridge damages

89 In final submissions Mr Ryan said that if damages are to be ordered, in some instances they should be in accordance with the rule in *Bellgrove v Eldridge*³³ rather than being the full cost of rectification for the particular item. Senior Member Walker analysed *Bellgrove* and the subsequent decision of the High Court, *Tabcorp Holdings v Bowen*³⁴ in *Clarendon Homes Vic Pty Ltd v Zalegna*.³⁵ He said at paragraph 165:

165. I think the following principles concerning the assessment of damages for the breach by a builder of a domestic building contract can be spelled out from the cases referred to:

- (a) Where the work and materials are not in conformity with the contract, the prima facie measure of damages is the amount required to rectify the defects complained of and so give to the owner the equivalent of a building which is substantially in accordance with the contract (*Bellgrove*);
- (b) The qualification, however, to which this rule is subject is that, not only must the work undertaken be necessary to produce conformity, but that also, it must be a reasonable course to adopt (*Bellgrove*);
- (c) Reasonableness is a question of fact (*Bellgrove*) and the onus of proving unreasonableness so as to displace the prima facie measure is upon the builder. It is the builder who is seeking to displace the prima facie position (*Tabcorp per Rares J.*);

90 The Builder made a general submission regarding *Bellgrove* compensation, but did not seek to challenge the reasonableness of the full cost of replacement or rectification for any particular item.

PURPORTED VARIATIONS TO THE BUILDING CONTRACT

91 Schedule A to the FAPoC is a table of the agreed or disputed variations identified by the Owner. In the Builder's Points of Defence to Further Amended Points of Claim ("PoD") there is no item by item response to Schedule A, but it pleads in general terms at paragraph 18:

... all variations claimed within invoices were for agreed works, and are payable ...

92 The PoD does not provide a list of alleged variations. At TB434 there is a table headed "Offshore Drive Contract Changes", apparently sent to the Owner on 21 December 2011 and identified by Mr Farrelly as the final

³³ [1954] HCA 36

³⁴ [2009] HCA 8

³⁵ [2010] VCAT1202

spreadsheet of changes in a series of approximately 10. I have compared the items in Schedule A and TB434 to determine which correspond, and which do not. As mentioned above, Schedule A causes confusion by including some items which are also claimed in the Scott Schedule. Items in the Scott Schedule are dealt with below under “Alleged Defects and Deviations”, as noted in some items in this section.

- 93 The following items from Schedule A are those where the parties agree that there was an addition to the contract sum:
1, 2, 5, 10, 18, 27-29, 31, 33-35, 39, 40, 42, 47, 49 – 52, and 54. Without taking into account partial credits or repairs sought for these items, which are dealt with further below, the agreed sum for additions was \$31,553.60.
- 94 The following items from Schedule A are those where the parties agree there was a deduction from the contract sum:
4, 16, 17, 24, 30, 43 – 46, 48, and 53. These items equal \$22,676.80.
- 95 The “purported variations” listed below only concern matters where the parties differ over amounts claimed or credited for variations, or where the Owner makes a claim for an alleged defect related to a variation.

1 – Striker plate

- 96 The claim for the cost to rectify is considered below under “Alleged Defects and Deviations”.

3 – Keypad

- 97 For the reasons given under Item 3 of “Alleged Defects and Deviations”, the Builder is entitled to a variation of \$1,092.50.

6 – Bathroom frameless shower screen upgrade

- 98 The issue of whether there was a variation to change this item to a glass blade wall is considered below under “Alleged Defects and Deviations”.

7 – Bathroom niche not tiled

- 99 The issue of whether there was a variation to require tiling is considered below under “Alleged Defects and Deviations”.

8, 11, 19 and 21 - Credit for tiles where replaced by Caesarstone splashbacks

- 100 The credits for tiles are considered below under “Alleged Defects and Deviations”. Item 52 of Schedule A is where the parties agreed the cost of the Caesarstone at \$2,000. I am satisfied that the Builder is entitled to a variation for \$2,000 for this item.

9, 12, 20 and 22 - 40 mm Caesarstone to all vanities - \$340 should have been 40mm thick

- 101 It appears that the Owner claims there was written consent to vary the contract to double the thickness of the Caesarstone, but this was not done. The Owner seeks:
- Item 9 - \$340.20
 - Item 12 - \$340.20
 - Item 20 - \$455.50
 - Item 22 - \$138.60
- 102 Mr Farrelly admitted under cross-examination that the bench tops were to be 40 mm thick but were installed as 20 mm thick. He said that the colour had changed to Walnut “which is a deluxe colour”. I am not persuaded by this explanation.
- 103 The Builder is not entitled to \$1,274.50 to which it would otherwise have been entitled. There is no adjustment to the contract sum for this item.

13 and 23 - Exposed bottle traps

- 104 I am satisfied that the bottle traps were allowed for under the specification and should not have also been claimed as variations. They are not allowed as variations.

14 – Credit for laundry tiles supplied by Owner

- 105 This item is considered below under “Alleged Defects and Deviations”.

15 – Wrong handle installed on rumpus room door - \$150

- 106 The Owner has not adduced evidence concerning this item. No allowance is made.

25 – Kick board under dishwasher

- 107 This item is considered below under “Alleged Defects and Deviations”.

32 – Double bin drawer

- 108 The Owner correctly stated that the double bin draw located in the pantry was in 1st Specs. Under the heading "Joinery", at item 16 in all the specifications, the typed words are "bin – double bin draw" with the hand written words “DBL” and “pantry” on the same line. Both the 2nd Specs and 3rd Specs have typed "bin – double bin draw to pantry".
- 109 TB435, which is the second page of the Builder’s schedule of contract changes, charges \$300 for “bin to pantry est. only. Includes box casket and drawer front.”
- 110 I am satisfied that the Builder was obliged to install the double bin draw in the pantry and that it was not the subject of a variation.

35 – Patio, deletion of exposed aggregate

- 111 The parties agreed the extra cost of timber decking, which is taken into account at paragraph 92 above. The Owner's claim for a credit is considered below under "Alleged Defects and Deviations".

36 – Timber lining boards to patio ceiling

- 112 Mr Farrelly stated³⁶ that the specification called for 6 mm Villaboard to the patio ceiling. He said he added a comment that recommended timber lining boards or cement sheet and when he discussed this with the Owner she asked the price for timber lining boards which he gave as \$750 extra. He said she accepted this and paid the amount.
- 113 Item 9.3.2 of the three specifications deals with soffit linings. In the first specification there is typed in: "Included Hardiflex 2400 x 450 x 4.5mm.". Hand written beside it is: "(eaves)". The other two versions of these specifications are the same, without the handwritten notation.
- 114 In her witness statement in reply³⁷ the Owner referred to item 20.2 of the specifications which appears under the heading "Internal Walls and Ceiling Linings". Item 20.2 states:

Villaboard ceiling linings 6 mm villa to patio ceiling. External plaster is prone to breakdown and requires maintenance for lasting finish. We recommend using another product on ceiling. Timber lining boards or cement sheet with joint strips. [Underlining at TB521]

I conclude that the specification was for 6 mm Villaboard with a recommendation for a different product.

- 115 The Owner was asked in cross-examination how these words could mean that she was entitled to timber lining boards. She said "we discussed it or underlined it". Her response is not convincing, particularly as she agreed to pay extra at a later date.
- 116 I am not satisfied that the Builder has claimed an extra or variation for the Timber lining boards when not entitled to it.
- 117 The Builder is entitled to a variation of \$750 for this item.

37 – External toilet fixtures

- 118 This item is considered below under "Alleged Defects and Deviations".

38 – Garage sliding door

- 119 This item is considered below under "Alleged Defects and Deviations".

39 – Additional electrical upgrades

- 120 Both Schedule A and TB434 show \$1,000 as an addition to the contract sum, but Schedule A also shows \$1,000 as a deletion. In the absence of evidence about this point from the parties, I find it is an addition only.

³⁶ Mr Farrelly's witness statement paragraph 170

³⁷ Paragraph 21

40 – Gates/Locks

121 The parties agreed the extra cost of this item, which is taken into account at paragraph 92 above. The Owner’s claim for a credit is considered below under “Alleged Defects and Deviations”.

41 – Miscellaneous

122 This item is considered below under “Alleged Defects and Deviations”.

55 – Moving refrigerator from Garage upstairs to Pantry - \$100

123 A rather disproportionate³⁸ dispute between the parties concerns the Builder moving the Owner’s new refrigerator from the garage, where it was delivered by the supplier, to its correct position in the pantry on 9 December 2011, the day she and her sons were moving into the home. Both agree that the Builder did this without being asked to do so by the Owner, and she rang and thanked him. The Builder charged the Owner \$100. Her complaint is that no amount was discussed and that she could have had the refrigerator moved by her neighbours without charge.

124 I prefer Mr Farrelly’s evidence that the refrigerator took two men a substantial time and involved removing and reinstating the screen to the balcony. I find that the Builder is entitled to a sum for quantum meruit for this item. The Builder is entitled to \$100 for this item.

56 – Reconfiguration of ducted heating zones - \$200

125 I am not satisfied that the Builder is entitled to a variation for this item.

57 – 2nd double towel rail for bathroom - \$57

126 I am satisfied that the Builder is entitled to the cost of supplying and installing the 2nd double towel rail of \$57.

Conclusion regarding variations

127 I make the following allowances:

Additions

Agreed variations	\$31,553.60
Item 3	\$1,092.50
Items 8, 11, 19 and 22	\$2,000.00
Item 36	\$750.00
Item 39	\$1,000.00
Item 55	\$100.00
Item 57	<u>\$57.00</u>
	\$36,553.10

Deductions

Agreed variations	<u>\$22,676.80</u>
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³⁸ The numbers of words devoted to it in witness statements and the time spent on it during cross-examination is entirely disproportionate to the \$100 value of this item.

ALLEGED DEFECTS AND DEVIATIONS

- 128 It is important that experts give evidence based on a reasonable standard of workmanship, rather than a counsel of perfection. An ideal expert report is one that would be the same, regardless of who had commissioned it.
- 129 The following are numbered and arranged in the same order as the Scott Schedule agreed by Mr McKee, Mr Wilkinson and Mr Lees. All three experts gave evidence concurrently on 12 June 2014. As mentioned above, Mr Wilkinson was reported to be unwell on 13 June 2014 and never appeared again. Mr McKee and Mr Lees gave evidence concurrently on 13 and 16 June and were cross-examined and re-examined later.
- 130 In reply to a question in cross examination, Mr McKee said that he identified defects, but that Mr Wilkinson prepared and costed the scope of works for each item. Mr Wilkinson's absence from the remainder of the concurrent evidence and his non-appearance for cross-examination is therefore a matter of concern. Where his evidence is inconsistent with Mr Lees' I have tended to prefer the latter.
- 131 The Owner criticised Mr Lees' expertise as she said in her final submissions that Mr Farrelly had said she should get a registered, certified building inspector. She also said at page 6 of her final submissions:
- Mr Lees failed to complete the costings in their entirety prior to the [conclave of experts] and as a result stated on numerous occasions during the case that he had made estimated guesses.
- 132 I have no recollection of Mr Lees stating at any time during his evidence that he made "estimated guesses", but in circumstances where he is not quoting for the work, but estimating the cost of undertaking the work, this might have been the impression the Owner received. With the qualification that the scope and costing for the Owner were provided by Mr Wilkinson, I am not satisfied that either Mr Lees or Mr McKee are unqualified to give expert evidence as to defects, incomplete work and costing rectification.

1 Front entry**1a Gaps between lining boards and ceiling - \$3,335.04**

- 133 Mr McKee says there are gaps between the lining boards to the walls and the Villaboard ceiling. Mr McKee stated in the Scott Schedule that the problem has arisen because the ceiling was installed after the lining boards. Mr Wilkinson's scope of works is to remove the ceiling and the lining boards, supply and install new ceiling and then silver top ash lining boards and stain the lining boards. His estimated cost is \$3,335.04.

- 134 Mr Lees said he was instructed that the ceiling was installed late because the Owner had not given the Builder instructions about the material for the ceiling. He said that if required, the gaps could be covered by timber beading.
- 135 Mr Farrelly stated³⁹:
Ms Lee discussed with me that she would prefer to have a recycled timber lining. I verbally gave her an indication that \$300 would be the approximate extra cost. She advised that she wasn't sure if she could afford it and would wait until later in the build to assess her finances and then advise what she wanted to do. I told her I would leave the quad off until she advised what she wanted to do. All that needs to be done is to install quad around the perimeter.
- 136 The Owner stated⁴⁰:
There was never any discussion about timber lining boards to the front entry ceiling nor is there any documentation of this either.
- 137 My observation on site is that the job looks acceptable but beading would improve it.
- 138 During concurrent evidence Mr McKee said installing beading could be done but it would need to be scribed around the profile of the lining boards to prevent the entry of insects. I prefer Mr Lees evidence that the gap between the lining boards and the ceiling can be filled to prevent insects entering and then quad installed at a cost of approximately \$270.
- 139 Mr Wilkinson agreed that if Mr Lees' method were adopted, \$270 would be reasonable.
- 140 I am satisfied that this item requires the rectification suggested by Mr Lees. I allow \$270.

1b Timber missing at front of porch entry - \$266

- 141 There is an area at the front of the home, facing the path of 250 mm long by 75 mm high where the orange termite shield is exposed. Mr Wilkinson recommends that a new plinth be supplied and installed at the cost of \$266. Mr McKee said that the work would involve removing the existing plinth and replacing it with a new plinth approximately 2.1 m long.
- 142 Mr Lees said that not only is this work unnecessary, if it is undertaken, the termite shield will be less effective. He recommended a build up of the quartz pebbles used in the front garden to hide this area.
- 143 Under cross-examination by Ms Lee, Mr Lees said that the effectiveness of the termite shield depends on the ability of the homeowner to inspect every 12 months and check that there has not been a termite attack. He said that the design should have allowed for a plinth that could be screwed off.

³⁹ Mr Farrelly's witness statement paragraph 74

⁴⁰ Owner's witness statement in reply, paragraph 46

144 Mr Farrelly stated⁴¹:

This was discussed with Ms Lee. It is not a defect and is the only way it can and should be done. The timber needs to be finished above ground level to avoid moisture being drawn into it. As I advised Ms Lee, most people simply build up the pebbles around the area or put a pot plant in front of it.

145 The area looks a little strange, but I am not satisfied that replacing the whole plinth is justified, and it is up to the Owner to decide whether she will take a step which might make her home vulnerable to termite attack. In the absence of better evidence I allow one quarter of the cost sought, representing the length of plinth allowed. I allow \$66.50 for this item.

1c Nail holes not filled – allowed for in 1a

146 During concurrent evidence Mr McKee said that face finished timber should have fixings concealed. He said the exposed lining boards require the nail holes to be filled.

147 Mr Wilkinson said that if just this work were to be carried out he allowed to strip back the stain first then fill and seal the nail holes. He would allow six hours to strip the timber, and two hours for each of two coats for new staining. This would be 10 hours labour at \$35 per hour plus materials of approximately \$300; a total of \$650.

148 Mr Lees agreed with Mr Wilkinson's cost but said he did not believe the work is required. He agreed that the holes are visible but said putty can change colour and when compared with the colour of the timber the nail fixing becomes more evident. He also expressed concern about putty falling out.

149 Mr McKee said that maintaining the putty is a maintenance issue.

150 At the site inspection I notice that the nail holes were almost invisible but there were a few larger ones. The appearance is rustic and not unattractive.

151 As discussed under item 1d below, the Owner had another painter re-stain the entrance area. Mr Ryan cross examined her about why she did not have that painter putty the holes. She responded that a lawyer told her not to touch anything. Assuming this is accurate it is surprising that she chose to re-stain the timber cladding.

152 Mr Farrelly stated⁴²:

In my view you should never fill holes in on natural hardwood because it looks unsightly. Natural hardwood has its own natural grooves, holes and imperfections.

153 I accept Mr Farrelly's view regarding the timber in this position. There is no allowance for this item.

⁴¹ Mr Farrelly's witness statement paragraph 75

⁴² Mr Farrelly's witness statement paragraph 76

1d Treatment room door colour - \$831.25

- 154 The Owner's part of the Scott Schedule calls for the door and jamb to be removed, and a new door and jamb supplied and stained because they are the wrong colour and there are other defects. The experts agreed that if only the door were to be stripped and re-stained the cost would be \$375 but Mr Lees agreed that if the jamb and surrounds were to be stained as well the sum of \$831.25 is reasonable.
- 155 Mr Farrelly stated⁴³ that the treatment door was to blend as closely as possible with the cladding and that at the date the Builder left site it was the pale colour that the door is now. He said the Owner changed the colour of the entrance area after the Builder left site. Under cross examination the Owner agreed that the stain now differs "slightly" from the way the Builder left it, but also said the treatment room door was to be walnut colour. She agreed that the entrance area had been stained by someone else, after she and her sons moved into the home.
- 156 Having regard to the photographs Mr Farrelly states that he took on 18 November 2011 and which were tendered by him at exhibit R7, I am satisfied that the cladding of the entrance area matched the natural colour of the door and jamb on that day.
- 157 The Owner said she elected to have all feature doors stained walnut, and they were, with the exception of this door. Mr Farrelly's email to the Owner of 3 November 2011 included "Walnut satin finish to feature doors including front door" with "yes" in lighter type next to it.
- 158 The email does not list the feature doors. Although the door is at the front of the home, opening onto the entrance alcove, it is at 90 degrees to the front door, does not face the street and is a plain flush panel door. The front door is a large door with glass panel insets.
- 159 During concurrent evidence Mr Lees agreed that the door requires adjusting and the top and bottom need to be sealed therefore the door needs to be taken out, have seals applied and be rehung. He remarked on the mark near the bottom of the interior side of the door which I note appears to be the result of an accidental knock or kick, that has then been stained over.
- 160 I am satisfied that providing a new door is justified but I am not satisfied that providing a new jamb is required. I accept the evidence of Mr McKee, Mr Lees and Mr Wilkinson that the reasonable cost of doing so is \$540 inclusive of margin and GST.
- 161 I allow \$540 for this item.

2 Front entry door - \$3,105.55

- 162 The front door is the subject of significant time spent in hearing and significant effort by the experts. I commence by making general comments.

⁴³ Paragraph 77 of his witness statement.

163 The Owner stated⁴⁴ that this door was replaced by the Builder, but is still defective.

164 Mr Farrelly stated⁴⁵:

... the front door, rumpus door and both her bedroom doors have all been replaced. They have been replaced by reason of some very small blemishes in the door. The experience with most contractors (and myself) was that it was simply easier just to give her what she wanted rather than have ongoing battles. Despite having all these doors changed over, she appears still not happy with them. I must say also, when we took the doors off to replace them I placed them in Ms Lee's secure garage. When I on a later date went to retrieve the doors the front door was gone. I asked Ms Lee about this and she claims she doesn't know where it went.

I asked Mr Farrelly whether he had reported this matter to the police and he said he had not.

165 Mr Farrelly stated⁴⁶ that the door suffers minor blemishes, which he is willing to "touch up". He said this can be done "easily and quickly". Mr Farrelly attributed marks around the hinges to removing the door to install weather seals at the Owner's request. He said that he had arranged for the painter to paint the "inside of the door frame" white, to match the rest of the door frame, but the Owner had refused permission for him to do so. He attributed other blemishes to the difficulties experienced with the keyless lock.

166 Under cross examination the Owner said that this area was to be walnut, not white.

167 Both the Owner's experts and Mr Lees costed all that was to be done to the front door in item 2a, but for clarity I include it here.

168 The scope of works described by Mr Wilkinson is to remove the entry door and jamb, supply and stain new entry door using super grey glass, supply and install new entry latch and pin hinges, weather seals, door sills and door furniture and supply and rewire the mechanism for the security latch.

169 Mr Wilkinson costed this item at \$3,105.55. Mr Lees agreed that if all the work described is necessary, Mr Wilkinson's cost is not unreasonable.

170 Mr Lees costed the door work at \$1,476, taking into account all the items he said were necessary for the door, but this is discussed further at 2a-2h below.

171 My overall impression of the door at the site inspection was that it looked attractive and workmanlike, although not perfect.

⁴⁴ Owner's witness statement, paragraph 60

⁴⁵ Paragraph 25(ii) of his witness statement

⁴⁶ Paragraph 78 of his witness statement

2a Gap at top

- 172 Mr McKee's comments specific to this item are that the top of the door appears to have been cut with a saw. He said there are splinters to the face of the plywood. He also noted that the door had not been properly sealed in accordance with the manufacturer's warranty. He said that item 12.02 of the Guide to Standards and Tolerances states irregularities in surface visible from the normal viewing position are defects.
- 173 Mr Lees agreed that extra detailing is required to the top of the door. He said that the door should be sanded or planed on the top edge as part of overall repairs to the front door.
- 174 My own observation was that the defects complained of are almost invisible from the normal viewing position, but the door needs to be removed and rehung for other reasons.
- 175 Mr Farrelly stated⁴⁷:

I accept the top of the door needs to be sanded and stained.

He continued, in apparent contradiction:

On this my painter Joe Issell was told when he went to do paint touch ups that he was to show every single item to the owner and not to leave until she was happy with each and every item. He informs me that she was happy with the door.

- 176 I prefer the evidence of Mr Lees to that of Mr McKee regarding this defect. I am not satisfied that this item justifies replacement of the door and door jamb.

2b Gap on latch side

- 177 Mr McKee reported in the Scott Schedule that there are inconsistent gaps around the top and sides of doors of between 4 and 6 mm, and the door does not seal against the weather seals when closed.
- 178 Mr Lees said that he measured the margins. He noted a gap of 2.5 mm on the latch side, 4 mm on the hinge side and 3 to 4 mm at the head. He said that the home has been occupied for over a year and that it was a maintenance issue.
- 179 Mr Farrelly said⁴⁸ he has never witnessed “howling wind coming through the door”. He said he installed weather seals “at my cost” and remarked that the door and alcove face west, so in strong wind there may be some noise.
- 180 My own observation was that light was visible on the latch side.
- 181 I accept Mr Lees evidence, given concurrently with McKee and Mr Wilkinson, that the door can be adjusted to minimise differences in margins and that the weather seals can be moved to eliminate wind and light.

⁴⁷ Paragraph 81 of his witness statement

⁴⁸ Paragraph 82 of his witness statement

182 I am not satisfied that this item justifies replacement of the door and door jamb.

2c Door hinges

183 Mr McKee gave evidence that the door should be hung from a pivoting "pin" hinge at the top and bottom of the door rather than from butt hinges on the hinge edge of the door. He said this is necessary for any door over 100 kg in weight.

184 In evidence in chief Mr McKee produced a chain of e-mails, which were tendered as exhibit A13, between himself and Mr Sammut of Hume's Doors. Mr McKee had asked Mr Sammut about whether two hinges could be placed at the top of a door of 1.2 m wide, or whether a pin hinge system should be installed. Mr Sammut replied on 21 May 2013:

The doors were supplied with frames over 1020 wide are mostly pivot systems so they are warranted but you builders can hinge them.
[Underlining added]

185 Later the same day Mr Sammut replied again. He said:

As for the larger door frames, we don't warrant them when they leave the factory because our machines aren't set up for hinging with 4x 100 mm hinges so we recommend using the pivot systems which are meant for up to 100 kg plus doors.

But we sell many frames daily and just inform our customers to use four or five good 100 mm hinges to support the door as a cheaper option because pivots cost nearly double.

186 I note that Mr McKee and Mr Sammut appear to have been talking at cross purposes. The doors to which Mr Sammut referred appear to be larger than the front door on the home.

187 Mr Ryan suggested in cross-examination of Mr McKee that there was information from Hume doors to say that the weight of the front door is between 60 and 65 kg. Mr McKee did not say this was inaccurate.

188 Mr Ryan asked, if most builders use butt hinges, why is that incompetent? Mr McKee replied that what "most builders" do does not necessarily make correct. Mr Ryan then asked, if Hume Doors tell their customers that they can use butt hinges, is that practice still to be regarded as incompetent? Mr McKee said yes. These answers give me reason to believe that that Mr McKee's attitude regarding this item is to seek perfection rather than the standard of a reasonably competent builder, the standard that a builder must produce unless there is an agreement otherwise.

189 Mr Lees said that the contract drawings do not show a pivot hinge, with which Mr McKee agreed. Mr Lee said it is not unusual to place an additional hinge at the top of a door to prevent bowing. He added that the door has not dropped so that it cannot be opened and the margins around the door are between 3 and 4 mm. He said the hinge system is working.

- 190 Mr Lees acknowledged that the hinge checkouts are oversized and require repair. He said it is necessary to remove the door and repair the jamb – he said it needs to be finely detailed. He said that the hinge side of the door jamb should be painted and the top of the door sanded with both the top and bottom of the door sealed. The Owner was asked in cross-examination if she is happy for the door jamb to be painted white – she said she is not.
- 191 Mr Lees' scope of works includes fitting an inlay to the jamb and restaining it.
- 192 Mr Farrelly stated⁴⁹ that he disagreed with Mr McKee's evidence. He said the door is not over 100kg in weight, and that his view is supported by information from the supplier, Hume Doors, who told him it is approximately 60kg. He also said Humes suggested the use of butt hinges, as installed. He said that the hinges are evenly spaced, with an additional hinge at the top; that the only work necessary is to sand the checkouts and paint the hinge side of the door white.
- 193 During concurrent evidence Mr McKee expressed concern that the top hinge might be too close to the top of the door and this could lead to splitting of the custom wood in that position. Mr McKee and Mr Lees agreed that there is no apparent splitting at present. I accept Mr Lees evidence that if the door is treated carefully during repair, splitting is unlikely to occur.
- 194 I am not satisfied that the door is more than 100 kg in weight. For this item I prefer the evidence of Mr Lees to that of Mr McKee. I am not satisfied that this item justifies replacement of the door and door jamb.

2d Door bowed

- 195 I observed on site that the bow complained of is approximately 2 mm, which is consistent with the evidence given by Mr Lees. During concurrent evidence, Mr McKee agreed that the biggest bow is about 2 mm. Mr McKee and Mr Lees agreed that this amount of bow would not cause the door to malfunction.
- 196 I am not satisfied that this item justifies replacement of the door and door jamb.

2e Gap at bottom

- 197 Mr McKee reported that there is a "large, rough, uneven gap at the bottom of the door". This was not apparent to me at site inspection and I note that there is a weather seal on the door.

⁴⁹ Paragraph 83 of his witness statement

2f Timber beading to glass

- 198 The experts address this and various other defects under 2c or 2a. I noted on site that there are a few apparent nail holes but there are no raw edges and the beading appears satisfactory.

2g Edges rough

- 199 I noted on site that only the top and bottom of the door are a little rough.

2h Marks on door

- 200 Mr Farrelly stated⁵⁰ that the marks complained of are barely visible at normal viewing distance. I observed on site that the marks complained of were visible, when pointed out to me, but are not necessarily inconsistent with the natural grain of the door.

2e-h concurrent evidence

- 201 Mr McKee, Mr Lees and Mr Wilkinson gave concurrent evidence about items 2e – to 2h together. Mr McKee asked whether Mr Lees was saying that it is necessary to strip back the door to bare wood and whether this amount had been allowed within Mr Lees' estimate of \$1,476.
- 202 Mr Lees said that he did not consider it was necessary to completely strip back the door and that a competent painter would "fudge" staining to improve the marks. Mr McKee repeated that he considers it necessary to strip the door back to bare wood to remove the marks. For this work, he allowed four hours stripping and three hours for resealing, a total of seven hours at \$35 an hour being \$245. He added materials of \$25, being an additional \$270, if Mr Lees' evidence regarding the necessary work were preferred to removal and replacement of the door and jamb.

2i Entry latch and keeper and 2j Intercom won't release the door

- 203 All matters concerning the door latch, keeper and intercom release are considered under item 3.

2k Paint on door defective/incomplete

- 204 The experts agree, as do I, that excess putty has been used to patch areas of the door and jamb. They disagree about the means of rectification. I do not consider that this item necessitate the replacement of the door and jamb.

2n – Super grey glass

- 205 This item was not included in the Scott Schedule, but for completeness, I note this item in Mr McKee's report. He said in part:

Owner claims that the door is to be fitted with "super grey" glass as noted in ... specifications item 14.1.1. [M]anufacturers web site specified in the Hume purchasing selector as grey tint, it would appear

⁵⁰ Paragraph 84 of his witness statement

the glass fitted is of a grey tint. I am not aware if the super grey is of a darker tint. It is assumed the glass install is not of the specified type ... therefore a defect is noted. [Underlining added]

- 206 I do not make the same assumption as Mr McKee. In the absence of evidence that this glass is not super grey, this aspect of the Owner's claim is not proven.

Conclusion regarding the front door

- 207 As mentioned above, I am not satisfied that any of the complaints regarding the door and jamb justify their replacement and I prefer the evidence of Mr Lees to that of Mr McKee and Mr Wilkinson regarding the appropriate scope of work for rectification. The only exception is that I accept Mr McKee's evidence that the door should be fully stripped back at a cost of \$270. For this reason I allow \$1,476 plus \$270; a total of \$1,746.

3 Front door release – intercom - \$750

- 208 Difficulties with this issue have been the source of much irritation between the parties. The Owner wanted a mechanism that would enable those in the kitchen and dining area on the first floor to answer the intercom to the front door, then enable the door to release. However, this was not allowed for in the contract documents. It has been the subject of subsequent variations.

Before variations

- 209 Paragraph 14.1.2 of the 2nd Spec provided that the external door hardware to the entry was "Key cylinder only on front. Handle inside" and the Owner had written "and outside". There was no mention of a door release. At paragraph 17.7 of the 2nd Spec, "Not included" had been typed opposite both "Intercom system" and "Electric Door Bell".

Variations

- 210 The Owner agreed under cross examination that whatever the front door mechanism cost, would be cost to her. The Owner said her concern was raised because she bought an intercom that did not work and then a second striker that did not work either. She agreed under cross examination that the second striker installed had been bought by the Builder.

- 211 Mr Farrelly stated⁵¹:

To save money Ms Lee purchased her own intercom system from Bunnings. It is a cheap system. The electronic striker of the system was not compatible with the front door lock and this is the reason that door release part of it, did not work.

⁵¹ Witness statement in reply, paragraph 55

212 The Owner said Mr Farrelly suggested she purchase the intercom system. She said the contract as varied included installation but not purchase. Under cross-examination she said she agreed that the extra is listed at TB434 included an item of \$110 for "install of striker for intercom" and \$200 for "install only of intercom".

What variation?

213 At item 1 of Schedule A of the FAPoC it is pleaded that on 22 June 2011 there was a request for a variation being:

Installation cost of striker for camera/intercom system to release front door to open.

Item 2 is \$200 for:

Installation cost of intercom system.

Item 3 is \$1,092.50 for:

Installation of Keypad door entry.

The comment relating to this item is:

Builder suggested installing, advising owner of make and model number.

214 The Owner stated that she purchased the system "as per Mr Farrelly's request" and on 24 October 2011 Mr Farrelly emailed her to say the electronic striker plate was not compatible with the front door and that a Lockwood mortice lock needed to be installed at the further cost of \$156.

215 At paragraph 47 of her witness statement the Owner stated that the front door intercom/door release system was agreed by both parties to be installed – if it was the subject of a variation this is true. She also stated:

This was part of the quote with the previous builder and Mr Farrelly was aware of this from the time of providing his quote.

216 This is not relevant to the contract between the Owner and the Builder.

Item 1- striker

217 The Owner claimed that the Builder requested item 1, her consent was given orally, the Builder claimed \$110. This amount is included in the agreed variations.

218 I accept the Owner's evidence that Mr Farrelly offered advice about possible lock sets that could be used on the door.

219 The comment against this item is:

Front door does not release as designed to. Locksmith states a self closing mechanism has to be installed for unit to operate.

Item 2 - intercom

220 TB434 also includes "Install only of intercom" at \$200. The amount is the same in Schedule A to the FAPoC and it is noted as not disputed.

Item 3 - keypad

- 221 Mr Farrelly said that when the front door was replaced in June 2012, the Owner decided to use an electronic keypad on the front door. He said she obtained a quotation from Laser Electrical but it was not a complete quotation. He said he obtained a quotation from a local locksmith, Coastal Locksmith for \$1092.50 and that the Owner agreed to the quotation. He said the builder paid Coastal Locksmith on behalf of the Owner.
- 222 The Owner stated⁵² that a keypad was suggested as an option a few weeks before she and her family moved into the home, but that she could not afford it at that time.
- 223 There is no mention of installation of the keypad in TB434, but the Owner pleads at item 3 of the FAPoC that the Builder sought payment of \$1,092 on 3 July 2012, it has not been paid and liability to pay the claim is not disputed. Builder's invoice 115 of 3 July 2012 is the only invoice relevant to item 3. At my request the Builder provided a copy of this invoice on 3 March 2015. I am satisfied that the amount claimed was for supply and installation of the keypad.

Conclusion regarding variation

- 224 I find that the contract was varied to have the Builder install the striker plate, intercom and key pad for a \$110, \$200 and \$1,092 respectively, with those items to be provided by the Owner. I find that the Builder made suggestions about which system to obtain.

Problems with the front door latch system

- 225 According to the Owner's witness statement, the history of the problems with the system is:
- On 24 October 2011 Mr Farrelly emailed her to say that the electronic strike was not compatible with the front door (which is larger and heavier than many such doors) and that a Lockwood Mortice Lock would be needed at the cost of \$156.
 - Mr Farrelly suggested other options. One suggestion was a keypad, but it was too expensive for the Owner when she had other expenses just before moving into the home.
 - On 21 November 2011 Mr Farrelly said he was going to meet with Lockwood the next day.
 - On 23 November 2011 Mr Farrelly texted to say he had not heard from Lockwood.
 - The Owner and her family moved in to the home on 9 December 2011.
 - The Owner does not give the date but said a striker plate had been fitted and continued:

⁵² Owner's witness statement, paragraph 49

A striker plate was fitted however after moving into the house, the upstairs intercom failed to open the front door and needed yet a[nother] replacement.

- In late February 2012 Mr Farrelly suggested the Owner get a quote for a keypad from Laser Electrical. Laser Electrical quoted her \$880 on 1 March 2012.
- The door continued not to open from upstairs. On 20 June 2012 Mr Farrelly emailed the Owner and said he had discussions with a locksmith and they had a system that could link into the intercom with an exterior keypad and a key override. The cost to install was \$1,092.50. The Owner said she emailed Mr Farrelly to say that he “had me enquiring about locking systems in November 2011 and March 2012.” She said Mr Farrelly told her it was the same system discussed in March, but wired into the intercom system.
- Mr Farrelly’s email of 20 June 2012, at TB863 concludes:
The cost for locksmiths to install the system is \$1092.50. Can you advise if you would like to proceed?
- The keypad was supposed to be installed on 29 June 2012, but was not.
- The keypad was installed on 11 July 2011, but still did not make the front door open from upstairs.
- The Builder sent an invoice for the keypad. The Owner said at paragraph 54 of her witness statement that:
I emailed him on July 15 stating that I couldn’t believe his audacity.

226 The Owner’s evidence about the front door latch system concluded at paragraph 56 of her witness statement:

In October 2012, the keypad would only work intermittently. I contacted Coastal Locksmiths and on October 22, 2012 they assessed the front door and keypad and informed me that the door seals were too tight, forcing the door back into the strike. The locksmiths adjusted the seals to accommodate the function of the electronic strike. The locksmith also stated that as the door is so big it requires an automatic closing mechanism otherwise the delay in the strike will cause the door to swing open with wind as it won’t catch properly. This is yet another cost.

Defective?

227 I find that the system does not work as the Owner and the Builder hoped it would, in that it does not reliably unlatch the front door using the intercom system.

228 Mr Farrelly referred⁵³ to his previous comments regarding the door latch, and added that because of the Owner’s wish to tightly seal the front door

⁵³ Paragraph 85 of his witness statement

to avoid wind noise, it is necessary to have an automatic door closer, to enable the latch mechanism to work. I accept his evidence and also his contention that the cost of such a door closer must be borne by the Owner.

Breach by Builder?

229 The Builder appears to have taken a “trial and error” approach to trying to make the system work. On 24 October 2011 Mr Farrelly sent an e-mail to the Owner which said amongst other things:

... The automatic doors strike for the intercom is not compatible with the front door lock. We would need to install a Lockwood mortice lock to latch in the strike. I will check pricing on these to see if you want to proceed now or leave it till later.

230 The Owner agreed under cross examination that she received this e-mail and she also agreed that Mr Farrelly was investigating compatible locks for the doors striker. The Owner said she received advice from Mr Farrelly approximately 2 weeks later. There is an e-mail from him at TB657 which advised the cost of mortice lock would be "about \$156 plus install". Mr Farrelly added:

... But I need to go over this with you as I don't think it will work how you want to. The only way it can work is to have another cylinder with key turn on the front side.

Conclusion

231 I find that the Builder has done what it promised to do – install the items bought or arranged by the Owner. Although the system does not yet work, I cannot be satisfied that this is the Builder’s fault, given that the Owner has failed to follow the advice of the locksmith and install an automatic door closer.

232 The parties have both suffered frustration over a problem caused by a large door that is not necessarily compatible with the Owner’s desire to have it open remotely.

233 There is no allowance for this item.

4 Bedroom 4 (treatment room)

234 There are two doors into the treatment room. One leads to the front entry, the other to the internal hall.

4a External door – uneven gap between top of door and frame

235 Mr McKee said that when the level was applied to the door jamb it indicated that it was out of alignment by 3 to 4 mm and that the Guide to Standards and Tolerances states that the door must be within 1 mm in the first three months after completion. Mr McKee had already recommended removal and replacement of the door under item 1d.

- 236 Mr Lee said the building had been occupied for over 12 months by the date of his inspection and that this is a maintenance issue that can be rectified by adjustment of the door and sealing the bottom and top edges.
- 237 My observation of the gap on site was that it was approximately 3 mm on the left looking from inside the room and 1.5 mm on the right. It looks acceptable.
- 238 I make no allowance under this item, other than the amount allowed under 1d.

4b External door – dint at base of internal side

- 239 This item is dealt with at d.

4d Internal door – uneven between top of door and frame and 4e Internal door – rattles with draft - \$252.70

- 240 Mr Farrelly denied⁵⁴ that the door rattles.
- 241 Mr McKee gave evidence that the door is out of alignment and that it rattles freely in the closed position. He recommended that doorstops and the striker plate be repositioned.
- 242 Mr Lees said that it is a matter of evidence about when the door being out of alignment was first noticed and that at the date of this report the home had been occupied for over 12 months. As to rattling, Mr Lees recommended that the tongue in the keeper be adjusted at a cost of \$9.74.
- 243 Having regard to the defects list sent by the Owner on 4 July 2012, I am not satisfied that this defect was apparent within three months of occupation. In accordance with Mr Lees' evidence, the Builder must allow \$9.74.

4f Central window does not align with other two - \$1,662.60

- 244 As pointed out to me on site, the outer windows are level and the middle window is approximately 3 mm lower, although it is not obvious and does not appear defective.
- 245 Mr Farrelly commented on the appearance of the windows, which is a matter for the experts, but also stated⁵⁵:
- I note that more than \$1,600 is claimed and the remedy suggested by [Mr McKee] is to remove all the feature windows, pack and reposition them. I don't believe Ms Lee has any intention of doing this. She has never once complained of this and it seems an extreme measure to take.
- 246 Mr McKee recommended that all three windows be removed along with associated trim and architraves, packed and repositioned and replaced. Patching plaster and repainting the front wall would be necessary.

⁵⁴ Paragraph 89 of his witness statement

⁵⁵ Paragraph 90 of his witness statement

- 247 Mr Lees said that the difference between windows was not visually obvious and was so small it could not be accurately measured. He recommended that the windows be accepted as they are and attributed no cost to rectification.
- 248 During concurrent evidence I asked why it was necessary to remove all three windows, to which Mr McKee and Mr Wilkinson replied that it would be possible to just remove and replace the middle window. Mr Lees suggested that the slight discrepancy in appearance could be rectified by adjusting the architraves if anything needed to be done.
- 249 Mr McKee agreed that the architraves could be fixed to give an even eye line and he estimated the cost of doing so including repainting at \$180. I accept that this is a reasonable means rectification.
- 250 I allow \$180 this item.

4i Exterior side of door and frame stained a different colour to front door

- 251 This is dealt with under item 1d.

4j External door – water stains

- 252 This is can be regarded as part of item 1d, but I did not see this alleged defect on site.

5 Entry to centre passageway - \$329.04

- 253 Mr Farrelly stated⁵⁶ that he did not accept that marks at the entry to the centre passageway were caused during construction. He said he believed that they were caused when the Owner and her sons moved in. He continued:

My painter has confirmed that [the Owner] asked him to do many little paint over jobs when he was attending to the defects list, and I believe this would have been one of those.

The Builder did not adduce evidence from the painter about this item and therefore I do not accept this supposition.

- 254 Under cross-examination the Owner stated that these chips and marks were obvious when she moved in, but she also confirmed they were not mentioned on the first two defects lists.
- 255 Mr McKee reported chips and marks that had been painted over, which is evidence that they were present before painting was completed. Mr Lees reported some minor indentations and estimated the cost of rectification at \$180. My own observations concur with Mr Lees’.
- 256 I allow \$180 for this item.

⁵⁶ Paragraph 92 of his witness statement

7 Centre passageway

7a Door between hallway and garage rattles with draft - \$252.70

257 This item is dealt with under item 29b.

7b Bedroom hallway - dints and marks in plaster - \$142.98

258 Mr Farrelly stated⁵⁷ that the Owner and her family had lived in the home for two and a half years at the time of the hearing therefore such marks could not necessarily be attributed to the Builder.

259 Mr McKee reported that marks were visible in the plaster from a normal viewing position. Mr Lees said the mark was extremely small and not obvious. My own observation on site was of a faint mark that was not particularly obvious. Further, there is no mention of this mark on the Owner's list of defects of 4 July 2012. I am not satisfied that it was a building defect and make no allowance for it.

8 Bedroom 2 – paint to widow reveals - \$266

260 Mr McKee reported coarse brush marks to the window reveals in bedroom 2. Mr Lees said that the paintwork is satisfactory and should be accepted. I noted on site that although the paint appeared to provide an adequate cover, the brush marks were readily visible.

261 In concurrent evidence Mr Lees and Mr Wilkinson agreed that this item could be rectified for \$100.

262 I allow \$100 for this item.

9 Bathroom

9a Rough finish to Caesarstone caulking - \$46.16

263 Mr Farrelly stated⁵⁸ that he employed a professional caulker for the entire home, and each area was sealed in the closest colour match available.

264 At the inspection on site the colour match appeared adequate, but the quality of finish was unacceptably rough. I allow the amount claimed of \$46.16.

9b No sealant under vanity basin - \$26.60

265 Mr Farrelly stated⁵⁹ that this, and the other basins, have been sealed. I accept his evidence that the silicon is back from the edge of the basins so that it is not immediately visible. In accordance with Mr Lees' evidence I find the finish acceptable and make no allowance.

⁵⁷ Paragraph 95 of his witness statement

⁵⁸ Paragraph 99 of his witness statement

⁵⁹ Paragraph 100 of his witness statement

9c Cracks to internal joints of plaster cornice - \$106.40

266 Mr Farrelly stated⁶⁰:

The crack has developed recently as it was not present in any of the many defects list[s] discussed with Ms Lee.

267 I note that cracks can develop as the home settles and that both Mr McKee and Mr Lees agree that this item is defective. Mr Lees did not price this item separately but allowed \$397.24 for this item and also item 9h.

268 This item is incorporated into item 9h.

9d Chipped floor tile – costed under 9k

269 Mr Farrelly stated⁶¹ that the Owner had not raised this item before Mr McKee's expert report, and suggested that the chip might have been caused while the Owner and her family were living in the home.

270 Under cross-examination, the Owner said that the chip did not occur after she and her sons moved into the home because of the grout that is in it, but agreed it was not on her earliest defects lists and that she did not see it when she was making the early defects lists.

271 Mr McKee stated that a single floor tile has been chipped during laying, which is evident as the grout from the joint partly fills the chip. I accept his evidence.

272 Mr Lees said that there is only one tile that is chipped and that as it is less than 5 mm, tile replacement cannot be justified.

273 I noticed the chip when it was drawn to my attention on site and in accordance with the evidence of Mr McKee and Mr Lees during concurrent evidence, I allow \$46.16 for this item.

9f Metal trim to tile work around bath - \$226.10

274 Mr McKee has reported that the metal trim to the tile work around the bath area is proud and roughly finished. Mr Lees said that the metal trim has a variation in its length of 1.5 mm and that the bath is approximately 2m long. He said that the trim should be accepted and no further work required.

275 On site I noticed, when it was pointed out to me, that the trim is a little lower at one end than the other but appears acceptable. There is no allowance for this item.

9g Metal trim to niche - \$226.10

276 Mr McKee reported that the metal trim fitted between the wall and horizontal tile is not correctly aligned and has sharp edges that protrude. Mr Lees reported that the trim is satisfactory and should be accepted.

⁶⁰ Paragraph 101 of his witness statement

⁶¹ Paragraph 102 of his witness statement

277 I noted on site that there is a slight gap at the right end of the trim and, as Mr McKee reported, there is an area that is sharp. I accept his evidence as to work required and cost.

278 I allow \$226.10 for this item.

9h Plaster and paint rough - \$1,378.73

279 Mr McKee, Mr Lees and I all agree that the west wall in the bathroom appears to ripple. Mr McKee recommended removing the Villaboard and installing and finishing new Villaboard. Mr Lees recommended standing and filling the Villaboard then repainting the wall so that cornices would not have to be removed. During concurrent evidence it was agreed that Mr Lees' technique would be acceptable, except to allow a further \$15 to stand back the screeding.

280 It was agreed that the appropriate sum is the amount estimated by Mr Lees of \$397.24 plus \$15.

281 I allow \$412.24 for this item.

9j Wall sheeting loose

282 This item will be rectified with item 9h.

9k Diagonal cuts to in situ shower floor tiles - \$2,932.76

283 This item concerns the diagonal cuts in tiles necessary to enable the tiles to be sloped to drain to the shower waste. Mr McKee said that the cuts in the floor tiles should be wide enough so that the joints are the same width as the joints between tiles.

284 Mr Farrelly stated⁶²:

I totally disagree [with Mr McKee's opinion]. The diagonal cuts are aesthetically better. Ms Lee is seeking as a remedy for this almost \$3,000 which involves the removal of the shower screen, base and tiles. I simply do not understand why that would be recommended.

285 Mr Lees also said that the method used by the Builder was aesthetically superior.

286 I am not satisfied that the tile cuts are other than competently performed. There is no allowance for this item.

9l Discoloured grouting and tile cuts

287 Mr McKee reported that excess glue had not been removed from joints. Mr Lees disagreed and said that the slight discolouration is what could reasonably be expected after 12 months use. However Mr Lees admitted under cross-examination that the grouting should be re-done, using an epoxy grout. In the absence of evidence of the cost of doing so, I allow \$100 for this item.

⁶² Paragraph 106 of his witness statement

9o Location of shower and mixer - \$1,855.35

- 288 This item does not concern a building defect, but whether the Owner and Builder agreed that the shower mixer and shower should be moved from the west wall to the south wall.
- 289 Mr Farrelly stated⁶³ that the location of the shower and mixer is in accordance with the Owner's instructions. He said that there were discussions between them about the size of the shower niche, but no mention of the shower and mixer being on the wrong wall. He referred in particular to an email of 25 September 2011, which is TB416. He said:
- ... if this was wrong I would have been made aware immediately.

There is then mention of the email:

... she makes no mention in this email (nor has she ever) that the shower and mixer are on the incorrect wall. The reason she doesn't mention it is because it was put exactly where she wanted it.

Under cross-examination the Owner admitted that if the shower was on the wrong wall she would have raised it.

- 290 I am satisfied that the shower and mixer were placed where the parties agreed they would be placed. There is no allowance for this item.

9p Blade shower wall instead of shower screen - \$2,285.70

- 291 Techno Draw sheet 4 of 21 shows a conventional shower in the bathroom. Item 24.2 of the 2nd Spec shows the shower screen to be semi-frameless although I note that "semi" was crossed out by the Owner, and "blade wall" written in then crossed out.
- 292 The Owner said that the parties agreed a blade wall would be installed instead of the shower screen, but the Builder failed to do so. Her claim for this item is \$2,285.70 in accordance with the Scott Schedule. Mr Lees' allowance was nil, but he agreed that if the work is necessary the amount is not excessive.
- 293 The Owner referred to a number of emails between her and Mr Farrelly. The first was dated 21 July 2011 at 3:58pm where she said:
- ... also as discussed a couple of weeks ago, the bathroom in situ shower is going to now have a sheet of glass (walk in) as opposed to a semi frameless shower screen.
- 294 Mr Farrelly replied, but the reply date is before the date of the original message, at 5:18pm on 20 July 2011, which indicates that the date or time on one of the computers is inaccurate. He said:
- Also the shower down stairs isn't as big as normal showers we do with blade glass screens therefore might be prone to water splashing out of the shower area. I would also recommend a small 10mm set down [to] stop water escaping on the floor.

⁶³ Paragraph 107 of his witness statement

At 12:04pm on 22 July 2011 the Owner wrote:

Thanks again Dave, yes you fully explained about the water potentially splashing out the end of the shower & I accept this as per your explanation. With the 10mm set down, would it be possible to slope it down rather than set it down, just worried the boys may stub their toes walking out of the shower.

Thank you so much for all your suggestions, they are truly appreciated!

By email dated 2:50am on 21 July 2011 Mr Farrelly wrote:

Yes it's possible to slope it down and it does look a lot better however the set down does eliminate water possibly escaping the shower. Especially without a shower screen. [sic – it seems the word “not” might have been left out after “does”]

295 At TB554 there is another exchange of emails. The Owner's is dated 3:43pm on 17/8/2011:

Thanks Dave. Noticed the bathroom shower hasn't been altered on the plans?

Mr Farrelly's reply, dated 17 August 2011 6:43 am is:

Do you mean the shower screen being a blade instead of a screen. Cause that's fine and doesn't bother me not being on plans. The shower will still be the same size as it's on the slab. [sic]

296 At TB555 is an email dated 20 August 2011 at 2:32 from the Owner to Mr Farrelly, which says in part:

The following is a quick look at the alterations I've marked on the plans and written on the specs sheet following our meetings ...

...

Bathroom – semi frameless shower screen omitted – replaced by blade wall

...

297 At TB434, the last version of the Builder's “Offshore Drive Contract Changes”, there are two lines, each with “0” change to the contract sum:

Bathroom – semi frameless shower screen as per contract

Bathroom – frameless shower screen upgrade

Although these lines do not indicate precisely what was to be done, it is clear that the Builder understood there was to be some change.

298 Under cross examination the Owner denied that Mr Farrelly had said using a blade wall in this shower was not a great idea. She also said that the blade was to be the size of the shower as originally designed – 1300mm long. She also denied that she had agreed to the semi-frameless shower screen after visiting the Builder's display home.

299 The Owner stated⁶⁴:

When it came time for the blade wall to be fitted Mr Farrelly informed me that the blade wall wouldn't work as there wasn't enough room. (I later discovered that the bath hob was built out to 200mm as opposed to 50mm on the approved plans which decreases the space, not allowing for the blade wall)

300 In answer to a question from the Owner in examination in chief, Mr McKee said that if the blade wall were installed, water should drain freely back to the waste. He said that water grades to the waste now, but the grade needs to extend out to the length of the blade, and the floor should have been constructed this way.

301 Having regard to the emails between the parties I am satisfied that the parties had mutually agreed to vary the contract by replacing the shower screen with a blade wall. I find that the Builder then unilaterally decided not to comply with the variation.

302 In accordance with the Scott Schedule, I allow \$2,285.70 for this item.

9q Glue on bath - \$66.50

303 Mr Farrelly stated⁶⁵

I don't understand it this is a problem why Ms Lee has not cleaned off this barely noticeable dab of sealant which would take minutes. Instead she seeks \$66 for it.

304 Mr Wilkinson gave evidence that this would take approximately one hour to clean and allowing for cleaning materials would cost \$66.50. Mr Lees described this item and the next as "house cleaning issues". Nevertheless, there is no suggestion that the glue, and the paint on door hinges under the next item, were put there by the Owner.

305 Mr Lees allowed \$35 of the two items. Mr Farrelly may be correct, but the Builder did not take the few minutes necessary to clean the glue.

306 I prefer Mr Lee's evidence to that of Mr Wilkinson about the necessary time for these two items and allow \$35 for them jointly, noting that the time and cost of litigating these items is entirely disproportionate to the amount allowed.

307 I allow \$35.

9r Paint on door hinges - \$39.90

308 At paragraph 109 of his witness statement Mr Farrelly said "same as above", presumably referring to item 9q. This item has been allowed for under the previous item.

⁶⁴ Owner's witness statement, paragraph 27

⁶⁵ Paragraph 108 of his witness statement

9t and u, Location and size of bath niche - \$665

- 309 These are the last items for which Mr Wilkinson was present at the hearing.
- 310 Mr McKee stated that sheet 5 of the Techno Draw plans shows the sill of the niche at 1100 mm but it has been built to an elevation of 700 mm. As to the width, it was to be 180 mm deep but has been built to a depth of 100 mm. Mr Lees agreed that the sill level of the niche is 700 mm above the floor but said that it is 115 mm deep. Mr McKee's solution was to remove the existing niche and rebuild. Mr Lees recommended that the niche be accepted as is.
- 311 Mr Farrelly stated that there was an inconsistency in the drawings. The width of the niche was the same width as the wall, with a toilet on the other side. He said this was discussed with the Owner and she agreed that rather than reducing the size of the bathroom, the niche depth would be reduced to 115mm.
- 312 The Owner was cross-examined about this alleged conversation and said that she did not recall it and continued:
- If that was discussed at a meeting, it would have been documented. If there was a long discussion I would have thought he'd write it down.
- 313 However, she also conceded that she had taken a photograph of shampoo bottles in the shower niche – to illustrate her concern about the space allowed – but had not done the same for the bath niche.
- 314 I am satisfied that there was inconsistency in the drawings as to the depth of the niche and that it could not be constructed as designed. On balance I prefer Mr Farrelly's evidence to the Owner's regarding the depth of the niche, but note that if this discrepancy and variation had been documented properly the time spent on this part of the dispute would have been minimised.
- 315 No reason has been given to set the sill of the niche lower than designed. As the whole of the rectification sought is not allowed, I allow compensation for that discrepancy of \$100.

9v Niche tiling - \$371.74

- 316 The Owner withdrew this item during cross-examination when it became apparent that she had not paid for this proposed variation.

9w Wide ledge on bath - \$1,780.87

- 317 Mr Lees agreed with Mr McKee that if this work were necessary, the price of \$1,780.87 is not excessive.
- 318 Mr Farrelly acknowledged⁶⁶ that the width of the hob as designed is 50mm and that it was built wider. He stated that he had discussed a larger

⁶⁶ Mr Farrelly's witness statement paragraph 112.

hob with the Owner and that she had been pleased with the outcome. He concluded:

I don't know why she would complain about it now when she never has in the past.

319 Under cross examination the Owner said she did not recall any such conversation. Mr Ryan asked the Owner why she did not complain when she realised the hob had been built four times its design width. She replied that she would not necessarily pick it up and did not notice it until October 2012 after she had an operation on her ankle. She said the width of the hob made it more difficult for her to get in and out of the bath without sitting on the edge of the bath. She also said it restricted the space available for the blade wall for the shower, but in concurrent evidence Mr McKee said he had not considered if the change to the hob is necessary to construct the blade shower screen.

320 Mr Farrelly stated⁶⁷ that it is not true that the blade wall would not work with the wider hob. He said that the width of the hob was discussed before it was built and also that the Owner made no complaint about the hob until well after these proceedings were issued.

321 On this point I prefer the evidence of the Owner to that of Mr Farrelly, particularly as there is no documentation to support his evidence that the parties agreed to change the hob.

322 I allow \$1,780.87 for this item.

9x No power point for heated towel rail \$119.70

323 The parties agree that the heated towel rail that was to be serviced by the power point was deleted. There is disagreement about whether the power point was deleted as well.

324 Mr McKee estimates that the cost to install the power point is \$119.70. Mr Lees said that the cost to install such a power point in a safe location is \$269.82. Mr McKee agreed with Mr Lees' estimate.

325 Mr Farrelly stated⁶⁸ that it was no longer necessary to place a power point where originally designated as the Owner had deleted the heated towel rail, but that in total more power points were installed than were shown on the electrical layout. He said:

I will produce all the electrical layouts and invoices for the Tribunal so you can see Ms Lee got a lot more.

326 Mr Farrelly tendered a document⁶⁹ called "Certificate list for [the home]", with a handwritten summary comparing the items supplied with the items specified. There are substantially more supplied than specified.

⁶⁷ Mr Farrelly's witness statement in reply paragraph 20

⁶⁸ Mr Farrelly's witness statement paragraph 113

⁶⁹ Exhibit R14

327 The Owner stated⁷⁰ that she did not sign off on any electrical changes. She continued:

I did elect not to have the heated towel rails included as I could purchase these at a later date.

328 I prefer Mr Farrelly's evidence to that of the Owner regarding this item, as it is credible that removing an item that required electricity would also have the consequence of removing the source of electricity.

329 There is no allowance for this item.

9y Caesarstone replaced by tile splashback – credit sought - \$42.84

330 The issue in this item is the same as for items 10e, 17o and 18h. For each of these items, tiles were documented for the splashbacks but the parties agreed that Caesarstone would be used instead. The question is whether, in calculating the extra amount payable for the variation, the Builder has taken into account a deduction for the tiles.

331 Mr Farrelly's evidence⁷¹ is that the amount charged for the splashbacks is a nett sum, taking into account the deduction for the tiles. Needless to say, if the variations had been properly documented, this would have been immediately obvious.

332 Under cross-examination the Owner said Mr Farrelly did not explain that he took the value of the tiles into account when calculating the value of variation.

333 Mr McKee calculated that the credit for each of these items should be \$42.84. Mr Lees calculated that on the basis of the area involved and assuming the tiles were at \$25 per square metre, the amount for each item would be \$30.25.

334 On balance I find that the extra amount charged for the Caesarstone splashbacks was the net increase, taking into account the value of the tiles which were deducted, given the likelihood that if the Owner had any concerns about this matter she would have raised them promptly.

335 There is no allowance for this item.

9aa Shower leak damaged skirting and door jamb \$667.66

336 Mr McKee estimated cost of repair of this item at \$667.66. Mr Lees estimated it at \$1,020.07. Mr McKee accepted Mr Lees' estimate.

337 The Owner stated⁷² that she became aware of the leak in April 2014. She had a plumber investigate. He cut the plaster to ensure the shower taps were not leaking and then a plasterer was called in to repair the plasterwork.

⁷⁰ Owner's witness statement in reply paragraph 63

⁷¹ Mr Farrelly's witness statement paragraph 114

⁷² Owner's witness statement, paragraph 89

338 The plumber, Mr Nathan Wills, wrote a document headed "To Whom It May Concern" which concluded:

It is my opinion that the sealing around the shower base/shower screen had been incomplete and this could be the cause for the possible damage to surrounding areas.

Using a bathroom silicon I temporarily installed a new seal around all suspect areas, but this would need to be done again once all original silicon has been removed and the surface thoroughly cleaned.

339 Mr Farrelly stated that the leak was probably due to damage to the waterproof membrane by Regency, the shower screen installer. He said that the Owner knew this and first made him aware of the leaking issue in June 2012. He did not support this with evidence of an email or text. He said that the Owner should have acted earlier to minimise her loss.

340 The Owner stated⁷³ that the leak was on the defects list of 14 June 2012 and that Regency came to repair the leak but it did not become evident until a couple of months later that there was water damage to the architrave. She added that in April 2014 she again noticed there was a leak that had caused damage to the carpet and the architrave in the hallway outside the bathroom.

341 At the site inspection it was obvious that the door jamb had "blown" but the carpet did not appear to be damp . The Owner reported that the carpet had been damp approximately six weeks before the site inspection.

342 During concurrent evidence Mr McKee said that he saw no damage to the carpet, and agreed it was dry on the day of the site inspection. Mr Lees said that his costing does not take into account the damage to the skirting and architrave he noticed in the passage way outside the bathroom, and that a further \$100 should be added for these items, with which Mr McKee agreed.

343 I allow \$1,120.07 for this item.

10 Downstairs powder room

10a Backing plate to mixer tap not level - \$113.05

344 The Scot Schedule indicated that Mr McKee and Mr Lees agreed that this item needs to be rectified and they agreed the sum of \$113.05. During concurrent evidence Mr Lees changed his view and said he thought the reasonable cost to rectify this problem would be about \$50. I prefer Mr McKee's evidence.

345 I allow \$113.05 for this item.

10b Rough, thick caulking to edges of Caesarstone - \$46.16

346 Mr McKee and Mr Lees agreed that this item needs to be rectified and they agreed the sum of \$46.16.

⁷³ Owner's witness statement in reply paragraph 64

347 For the reasons given under item 9a, I allow \$46.16 for this item.

10c No sealant under vanity basin - \$26.60

348 For the reasons given concerning 9b, there is no allowance for this item.

10d Marks in plaster below left edge of Caesarstone - \$106.40

349 Mr McKee stated that there is a portion of the plaster stopping that has been patched and damaged and the plaster does not have a smooth finish. Mr Lees said the defects could not be seen from the standard viewing position. I noted at the site inspection that the plaster refer to is a little rough to touch but cannot be seen at 1.5 m, the usual viewing position.

350 There is no allowance for this item.

10e Caesarstone replaced by tile splashback – credit sought

351 There is no allowance for this item for the same reasons as given under item 9y.

10f Claim for credit for bottle trap - \$242

352 Mr Farrelly stated⁷⁴ that this item and related item 18i were extras for which the Owner was quoted, and has paid. The Owner said that they were included in the specification and should not have been charged as extras. All three versions of the specifications include under item 16.5 and 16.6 "Waste – Exposed bottle trap".

353 I am satisfied that the Builder was obliged to provide the bottle traps as part of the building contract and that they are not the subject of a variation.

11 Downstairs toilet

11a Door doesn't lift off hinges - \$389.03

354 Mr McKee gave evidence that sheet five of the approved plans called for "lift off hinges" but that standard butt hinges had been used.

355 During evidence in chief Mr Farrelly changed his evidence to say that he agreed the distance from the toilet pan to the door is less than 1200mm, therefore the door needs to be lift off. He added that it is necessary to have a gap of 8 to 10mm at the top of the door to enable it to be lifted off, which can be achieved by cutting this door because the top rail is 20mm wide.

356 Mr Lees estimated the cost of work at \$200 which would involve removal and modification of the existing door then re-hanging. I prefer Mr McKee's evidence that there may be insufficient rail at the top of the door to enable it to be cut down.

357 I allow \$389.03 for this item.

⁷⁴ Mr Farrelly's witness statement paragraph 120

11b Paint missing on skirting - \$79.80

- 358 Mr Farrelly and Mr Lees agreed in concurrent evidence that the item is defective and the cost rectification is \$79.80.
- 359 I allow \$79.80 for this item.

11c Skirtings and wall sheeting behind toilet - \$437.37

- 360 Mr McKee and Mr Lees agreed in concurrent evidence that further work needs to be done. Mr McKee stated that the skirtings are short on either side of the wall behind the toilet and he recommended that they be removed and replaced and that the bottom plate should be packed patched and plaster painted.
- 361 Mr Lees stated that it is only necessary to seal the junction between the end of the skirting and the toilet pan and this could be done with a small amount of silicon. He disagreed that it was necessary to remove and replace the skirtings. He estimated cost of doing so as \$20.14.
- 362 As I regard Mr McKee's evidence as unduly pessimistic and Mr Lees' evidence as unduly optimistic, I allow \$50 for this item.

11d Rough finish between door architraves and plaster walls

- 363 Mr McKee said that excess flexible filler has not been removed from the gap between the door architraves and the plaster wall. The Owner's claim for this item is \$96.43.
- 364 Mr Lees said he considered the finish satisfactory.
- 365 Having inspected this item on site I am not satisfied that the finish is unsatisfactory and make no allowance for it.

12 Laundry

- 366 Mr Farrelly stated⁷⁵ that the laundry as built does not resemble the laundry shown on the plans:

It is far better and is the result of lengthy discussions with myself, Ms Lee and the Cabinet Maker (Peter Connors).

- 367 Mr Farrelly stated that at his suggestion the planned glass sliding door was changed to a wall and awning window and door, large cupboards were installed instead of small cupboards, and a heating duct was included in one of the cupboards to turn it into a drying cupboard. He continued:

This was all done simply to create goodwill with the client. She loved the ideas and the laundry. ... I note that although a [prime cost] sum of \$1500 was allowed (and I have charged no extra) the cabinet maker's invoice alone is for \$1,980. This doesn't include any of the extra work I did on top of that to save Ms Lee some money.

- 368 The Owner's evidence is that she arranged with Middletons to have the heating vent in the laundry drying cabinet, not with the Builder. This

⁷⁵ Mr Farrelly's witness statement paragraph 123

evidence is surprising as her handwriting on the 1st Spec includes “Drying cupboard in laundry (double doors)”.

369 Under cross-examination the Owner agreed that there was a budget of \$1,500 for the laundry and that the laundry as constructed is very different to the laundry shown in the drawings. She disagreed that she and Mr Farrelly had spoken about retaining the vinyl wrap and that he had said it would cost an extra \$800. When asked why she did not object to the apparently non-compliant doors earlier she said “No idea – can’t comment”.

370 I am satisfied that there was a prime cost item of \$1,500 for the laundry cabinets, and note that the work called for by Mr McKee to correct alleged deviations from the contract (as distinct from defects) exceeds \$5,000. I will consider each of the claims for the laundry separately.

12a Hinge missing on drying cupboard door

371 Mr McKee and Mr Lees agreed that this item needs to be rectified and they agreed the sum of \$49.88.

372 Mr Farrelly stated⁷⁶ the door had been delivered without the top hinge and that after a number of requests, he had been provided with the correct hinge:

... which I believe I still have it however I haven’t been allowed back to fit it. It would take me minutes to fit it.

373 I cannot be sure that the Builder has the hinge. I allow \$49.88 for this item.

12c Large cupboard doors not vinyl wrap - \$628.43

374 Mr McKee correctly states that the specifications called for vinyl wrap doors. However, the doors differ from those shown at page 17 of 21 of the architectural drawings.

375 Mr Farrelly stated⁷⁷ that vinyl wrap could not be accommodated within the prime cost allowance of \$1,500 for the laundry. I accept his evidence and also the evidence that the Owner requested the doors be painted the same colour as the walls.

376 There is no allowance for this item.

12d Uneven gap at top and bottom of large doors

377 Mr McKee and Mr Lees agreed that if the gaps had been evident within three months of completion of the home, they would have been defects. They also agree that Mr Lees’ estimate to rectify of \$24.36 is reasonable.

378 I cannot be satisfied that this gap appeared within three months of the completion of the home. There is no allowance for it.

⁷⁶ Mr Farrelly’s witness statement paragraph 124

⁷⁷ Mr Farrelly’s witness statement paragraph 125

12f Large cupboard door handles sit unevenly - \$29.93

379 Mr McKee reported that the door handles are misaligned. Mr Lees stated that if the doors were adjusted under item 12d, the handles would be likely to come into alignment. My impression at the site inspection is that the misalignment is greater than the difference in door heights. I find the Owner is entitled to the cost of rectification.

380 I allow \$29.93 for this item.

12j Ceiling vent cover loose

381 Mr McKee said the vent cover does not sit entirely flush with the ceiling. The Owner's claim is \$29.93 for this item.

382 Mr Lees said he considered the finish satisfactory.

383 Having inspected this item on site I am not satisfied that the finish is unsatisfactory and make no allowance for it.

12m Omission of laundry chute - \$4,096.40

384 A laundry chute is shown on both sets of the Techno Draw plans, at sheets 4, 6 and 17. Sheet 4 is the ground floor where the chute is in the laundry and sheet 6 is the kitchen on the first floor, which includes the notation "laundry chute under". Sheet 17 is bath, laundry and powder room cabinetry.

385 There was no written variation concerning the deletion of the chute.

386 At paragraph 18 of her witness statement the Owner said:

I was ... concerned about the laundry chute as there was a beam where I understood the chute would be. I questioned Mr Farrelly about this a few times. As per the text message [at TB529] he said all was fine. He mentioned on a couple of occasions that as it was only myself living upstairs that it wasn't really worth it and to consider deleting it, that I'd be better off saving the money and putting it towards upgrades. I said I wanted it for resale purposes. I told him that I had taken a photo and that it didn't look as though it would fit. He then told me that the draftsman hadn't allowed for it and that the floor joists had been laid so it couldn't be altered now. At a meeting on July 19, 2011 it was discussed that the laundry chute would be credited \$200. [Underlining added]

387 The Owner referred to Mr Farrelly's email to her of 19 July 2011 which states in part:

Hi Fay,

Just confirming what was discussed at our meeting tonight.

...

5. I will delete the laundry chute.

388 Under cross-examination the Owner said that she agreed to a credit for the laundry chute, but that with the benefit of hindsight it was not enough money.

389 The Owner said at page 6 of her written submissions that she has relied on emails, text messages and the audio recording to support her case against the Builder regarding a number of matters and continued:

Similarly relation to the laundry chute and the photo of the joist running through where the chute was to be located. Without this proof, it was my word against Farrelly's.

390 I accept Mr Farrelly's evidence that the laundry chute was discussed on a number of occasions, he reassured the Owner that the location of the joist would not prevent installation of the laundry chute and that she requested it be deleted.

391 Although the Builder has not undertaken this variation in the manner required by the contract and the DBC Act, I am satisfied that the Owner acceded to the Builder's recommendation and that a sum was agreed for its deletion. I allow the agreed sum of \$200 for this item.

12n Size of bench top supplied - \$350

392 The consequence of having more full-sized cupboards is that there is less bench. Mr McKee gave evidence that there was to be 4.1 m of post formed laminate bench at 2.7 m have been installed. On this basis he was of the view that a credit of \$350 should be granted.

393 Mr Lees correctly responded that it is a matter of evidence how the omission of the laundry chute is taken into account. I also note the Owner's admission referred to above that there was a PC allowance for the laundry of \$1,500.

394 I accept Mr Farrelly's evidence that he spent more than \$1,500 on the laundry cabinetry but did not charge the Owner for the excess.

395 I am not satisfied that the Owner is entitled to a credit for the bench. There is no allowance for this item.

12o Door finish not vinyl wrap on all cupboards - \$495

396 For the same reasons as discussed under item 12c, there is no allowance for this item.

12p Tiles supplied by Owner

397 Mr Farrelly stated⁷⁸ that he had purchased the tiles when the Owner advised him that she did not want to use the same tiles as the floor tiles. He said that he agreed but said any further tiles would be at cost. He said the Owner was given the tiles by a friend and the Builder installed them.

⁷⁸ Mr Farrelly's witness statement paragraph 130

398 Mr McKee and Mr Lees agreed that if the Owner receives a credit for this item it should be \$8.50.

399 I prevented Mr Ryan cross-examining the Owner on this very small amount because of the time that would be wasted. I do not determine it on the facts but order the Builder to allow the Owner half - \$4.25.

13 Bedroom 3

13c South wall juts into bedroom - \$545.30

400 The door of this bedroom opens along the south wall. Approximately 1 m from the door the wall material changes from a stud wall to plaster over a concrete block wall. At that point, the wall dog-legs approximately 50 mm north, so that the section of the wall nearest the door is the furthest south.

401 Mr Farrelly stated⁷⁹ that the plans provided by the Owner contain an error because they do not allow for battening the brickwork to accept plaster and insulation. Mr Farrelly said he discussed this with the Owner and:

... she agreed with my recommendation to create a recess in which the door would open up into. This was the cleanest way to deal with the issue. The door can open up into the recess which creates a flush appearance with the balance of the wall ...

402 The Owner stated⁸⁰ that this was never discussed with Mr Farrelly. She said in answer to cross-examination that she did not recall any such discussion and that she was unaware of this alleged defect until a friend who is a builder brought it to her attention after she had obtained her first expert report. She said she agreed that if the wall were straightened the door would not open as wide as it does now but said her preference is to have what she contracted for. When asked whether she was going to remedy this alleged defect, she said it depended on how much she was awarded. When asked why it took her so long to see this alleged defect she answered "I don't frequent my son's bedroom".

403 I am satisfied that this discrepancy arose because of an error in the plans provided by the Owner, or perhaps that the finish of this wall was to be painted Benex blocks rather than plaster.

404 On balance I prefer Mr Farrelly's evidence regarding discussions about this wall, particularly as the kink in the wall is very obvious and it would have been unlikely to be missed by the Owner unless she never entered her son's bedroom.

405 There is no allowance for this item.

⁷⁹ Mr Farrelly's witness statement paragraph 131

⁸⁰ Owner's witness statement in reply paragraph 68

13d South wall bows

- 406 I am satisfied that the reported bow is due to a slight build up of plaster on the external angle. I am not satisfied that it is defective and make no allowance for it.

14 Rumpus room

Door, generally

- 407 The Owner stated⁸¹ that this door was replaced by the Builder, but is still defective.

14a Door – unpainted timber in cavity visible through glass - \$1,453.69

- 408 I observed on site that the interior of the architrave around the section of wall the door slides into has not been painted and can be seen through the glass panels.
- 409 Mr McKee recommends replacement and staining of a new rumpus room door at the cost of \$1453.69. Mr Lees acknowledged that the glazing beads around the glass had not been stained and allowed \$138.66.
- 410 I note that this item does not relate to glazing beads, but I am not satisfied that the defects in the door and its surrounds require it to be removed and replaced. The cost attributable to the door is discussed further in the next item.

14b Door – raw edges of beading visible through glass

- 411 Mr Farrelly stated⁸² that Hume Doors did not agree the door was defective but to keep the Owner happy they had their maintenance people come and take the beading off and put new beading on. He said the tradesperson was instructed to ensure the beading was stained but failed to do so.
- 412 The Owner stated⁸³ that the beading was replaced but not stained and is a smaller width than the original beading. Having seen the doors, I agree with the Owner's assessment that the beading is too small and painting the inside of the cavity architrave is necessary as it can be seen through the glass..
- 413 During concurrent evidence, Mr Lees said that the cost to remove the door, paint the visible timber and replace the glazing beads is \$240. Mr McKee agreed that if the door is not to be replaced the sum recommended by Mr Lees is reasonable.
- 414 I allow \$240 for this item and the previous one.

⁸¹ Owner's witness statement, paragraph 60

⁸² Mr Farrelly's witness statement paragraph 132

⁸³ Owner's witness statement in reply paragraph 69

14c Door not correct size – uneven stiles when closed

- 415 Mr Farrelly stated⁸⁴ that the door installed is as per specification. He said that the appearance of unevenness is because the end of the door protrudes into the cavity sliders very slightly. He added that if the Owner wanted to door which appeared to have the glass panels centred, the door would have to be purpose-made with the panels off centre.
- 416 The Owner attributes the apparent unevenness to the hallway being built narrower than designed. She said that it was to be 1,290 mm wide but measures 1,206 mm. The doorway is 1,000 mm wide and the door is 1,100 mm wide therefore 100 mm sits within the cavity. Mr McKee said that only 20 mm or so should sit within the cavity. I am not satisfied that the door is defective because 100 mm sits within a cavity.
- 417 I accept Mr Farrelly's evidence that a purpose-made door would be expensive and that the Owner never made such a request.
- 418 I make no allowance for this item.

14d Door – marks

- 419 Mr McKee stated that there are marks on the door and there are areas where the staining is bare or “starved” with blemishes and irregularities. Mr Lees said that the finish is satisfactory and the marks cannot be seen when standing at 90° to the door in the standard viewing position.
- 420 I observed on site that the marks are faintly visible from the normal viewing position and in the absence of evidence about this item in particular, I allow \$100 for this item.

14e Timber in-fills to top of door require painting - \$29.93

- 421 Mr McKee and Mr Lees agreed that this item needs to be rectified and they agreed the sum of \$29.93, which the Builder must allow to the Owner.

14f Cracked pelmet above cavity sliding door - \$159.60

- 422 Mr Farrelly stated⁸⁵ that there is no crack but there are two separate pieces of wood.
- 423 Mr McKee’s evidence is that the timber trim had been removed after painting therefore the paintwork appeared to be cracked. He allowed for supply and installation of a new pelmet. Mr Lees’ evidence was consistent with that of Mr Farrelly. He said there are two separate pieces of timber designed to be removable for maintenance and that there should be no allowance.
- 424 I prefer Mr Lees’ evidence and make no allowance.

⁸⁴ Mr Farrelly’s witness statement paragraph 133

⁸⁵ Mr Farrelly’s witness statement paragraph 136

425 At paragraph 91 of his witness statement, Mr Farrelly commented about plaster items under item 4(g) – this item does not appear in the Scott Schedule. He said that he would discuss issues concerning plaster and paint finish there, and refer back to it. He said that he discussed paint colour and finish with the Owner and told her that the contract price included a level 4 finish. He reported that he told her that if there was a light coloured wall in direct sunlight, at certain angles the plaster join line would be visible, he gave her the option of increasing the contract price to get a level 5 finish and that she declined. He also referred to a note in the specifications:

***Note:** If a light colour is selected, an additional coat may be required and additional costs will be charged to the building owner. Walls which have a lot of direct sunlight are likely to show plaster join lines. A level 5 finish can hide this and is available to these walls at extra cost to the building owner.*

426 On the 10th hearing day, the Owner played the recording of the walk-through conversation she secretly recorded. At one point Mr Farrelly criticised the general standard of his painter and then said:

If I had my time again and knew how you look at things I would have insisted on a level 5 finish where you plaster over everything. A level 5 finish would have added \$20,000 to your house.

427 It is noted that some of the walls complained of, including this wall, do not have direct sunlight shining on them, but do suffer from glancing light, where light from a window reflects off the wall at certain angles.

428 The Owner stated⁸⁶ that she was not told she could have a level 5 finish before a walk through on 3 October 2012. However, she acknowledged that the note appears in the specifications.

429 Mr McKee said that under natural light and from the normal viewing position ridges can be observed. He recommended that the wall be sanded and patched to remove peaks in the plaster, then those areas repainted.

430 Mr Lees disagreed with Mr McKee. He said on the day he inspected the wall, when viewed from a normal viewing position it did not show deviations.

431 At the site inspection, the wall appeared acceptable from the normal viewing position of 90° to the wall in question and 1.5 m away. Some deviations in the plaster were visible when the same wall was viewed from the hallway as light from the rear window glanced off the wall.

432 I am not satisfied that this wall falls below the standard required of a level 4 plaster and paint finish. There is no allowance for this item.

⁸⁶ Owner's witness statement in reply paragraph 54

14h Top of architrave to south window not straight - \$162.26

433 I accept Mr McKee's evidence that there are inconsistent gaps between the sides and middle of the top of the architrave. In accordance with his evidence I allow \$162.26.

14i Patch mark to ceiling not painted - \$177.63

434 Both Mr McKee and Mr Lees remarked that minor patching and repainting is required. In accordance with Mr Lees' evidence, I allow \$177.63.

14j Ceiling power point not installed - \$146.30

435 Mr Farrelly stated⁸⁷ that the Owner originally intended to install a ceiling projector, but decided not to because of lack of funds. He said he told the Owner that he could not install the power point until he knew the exact size of the projector. He said that on her instructions the power point was deleted but the wiring has been roughed in to enable her to install the power point later, should she wished to do so.

436 The Owner stated⁸⁸ that she did not receive any documentation in relation to the electrical layout and was not asked to confirm choices. Under cross-examination the Owner was asked if TB953, an email from the Builder to the electrical sub-contractor dated 31 August 2011 noting the deletion of power for the projector (among other things) "refreshed her mind". She said that it did.

437 I prefer Mr Farrelly's evidence and make no allowance for this item.

14k South window 100mm too low - \$1,482.95

438 At paragraph 17 of her witness statement the Owner stated that she noticed this window was too high at a site meeting in June 2011 and told Mr Farrelly. She said Mr Farrelly acknowledged that the window was too high, and had the sub-contractors remove some blocks and rebuild it. She said she noticed it again on 20 June 2011 and sent Mr Farrelly a text to which he replied that "all is fine with ... rumpus at 1m ...".

439 The text is at TB529 and continues: "Will explain more in email." The Owner's response was ":-)".

440 Mr Farrelly stated⁸⁹ that the plan shows the window at 1200 mm. He said that the plans also show the window is "working to brick" – heights are determined by complete blocks, rather than cutting them to get a precise height. He said the Benex blocks ideally should not be cut, which would mean the window would sit at either 1300 mm or 1100 mm so that it works to block. He said he discussed this with the Owner and she advised 1100 mm. He said it was done accordingly.

⁸⁷ Mr Farrelly's witness statement paragraph 137

⁸⁸ Owner's witness statement in reply paragraph 72

⁸⁹ Mr Farrelly's witness statement paragraph 138

- 441 Under cross-examination the Owner said she wanted the window at 1m – that her complaint was that it was too high rather than too low. She said she did not recall a conversation where Mr Farrelly gave her the choice of higher or lower.
- 442 Regardless of the constraints of the materials, builders are obliged to build in accordance with the design or to obtain a variation. Nevertheless, I prefer Mr Farrelly's evidence that the Owner agreed the window height be constructed as it is. There is no allowance for this item.

15 Internal stairwell

15a Marks on landing floor

- 443 Mr McKee referred to "spots of paint splatter or varnish finish of the stairs... Not readily visible from a normal viewing position". I accept Mr Lees' evidence that if the item is not readily visible from the normal viewing position it is not a building defect. There is no allowance for this item.

15b Match-up between skirtings and stairs - \$704.90

- 444 Mr McKee said "concern relates to short pieces of skirting abutting stair stringers at top and bottom of the stairs". Mr Lees said that the finish is satisfactory and there are no rough edges. He said that the stringers and skirtings have different dimensions and therefore there would always be minor steps or quirks at the intersection.
- 445 Mr Farrelly stated⁹⁰ that this was the only way the skirtings and stringers could be interconnected.
- 446 I accept the evidence of Mr Lees and Mr Farrelly. There is no allowance for this item.

15c Stair side rails protrude past wall lines

- 447 I am not satisfied that this item is defective. There is no allowance.

15d Handrails sharp and rough at landing - \$532

- 448 Mr McKee and Mr Lees agree that the finish underneath the handrails at the change of direction on the landing is less than workmanlike. Mr Wilkinson costed his scope of works at \$532. Mr Lees' cost of the work necessary at \$307.30.
- 449 As discussed during concurrent evidence, I allow \$400 for this item.

15g Non-slip surface to stairs - \$1,596

- 450 Mr McKee and Mr Lees agreed that there must be a nonslip finish to the stairs. Mr McKee recommended sanding back the stairs and repolishing them with a nonslip treatment. Mr Lees recommended supplying and

⁹⁰ Mr Farrelly's witness statement paragraph 140

installing clear nonslip strips to the nosing of the stairs at a cost of \$299.80.

- 451 Mr Farrelly amended his witness statement. His original statement⁹¹ was that the specifications did not provide for non-slip polish and that non-slip tape was discussed with the Owner but she said she did not want it because it would look terrible.
- 452 He amended his witness statement to say that the finish is a mat water-based product called Bona Traffic which is classified as slip resistant and which has been approved by the building surveyor.
- 453 In cross-examination Mr Ryan asked the Owner if it was true that she had been provided with nonslip tape on the day of handover. She said "I categorically deny that conversation" and I accept her evidence.
- 454 Under cross-examination Mr Farrelly was unable to satisfactorily answer the question of why his evidence about using Bona Traffic was inconsistent with the cross-examination of the Owner.
- 455 Although there was reference to "water-based" finish in exhibit A29, my attention has not been drawn to any document that indicates Bona Traffic was used. I find that it is necessary to render the stairs non-slip.
- 456 During concurrent evidence I asked Mr McKee why he had opted for sanding and recoating rather than installation of a nonslip strip. He agreed that the nonslip strip would address the slip issue, but said that his opinion was based on the quality of finish of the stairs.
- 457 As the specifications did not call for nonslip treatment of the stairs, but it is necessary to ensure the stairs are nonslip, installation of tape is sufficient.
- 458 I allow \$299.80 for this item.

16 Bedroom one

16a Skirting to both sides of entry to walk in robe not straight - \$282.63

- 459 Mr McKee gave evidence that the skirtings to both sides of the entry to the walk-in robe are not straight because of external and internal corners built up excessively with plaster. He said that the standard calls for walls not to deviate more than 4 mm over a 2 m length and that as these walls are shorter than 2 m the tolerance should be reduced proportionately. He recommended removal of skirtings to both sides of the walk-in robe entry and supply installation and painting new skirtings.
- 460 Mr Lees measured the bow and found it to be less than 2 mm and said it should be accepted. I accept Mr Lees' evidence. There is no allowance for this item.

⁹¹ Mr Farrelly's witness statement paragraph 141

16b Gap between double doors - \$46.55

- 461 Mr McKee stated that the gap between the double doors to bedroom one is between 3 and 5 mm wide and he recommended the installation of a "D mould", otherwise known as a mushroom stop.
- 462 Mr Lees agreed that a mushroom stop has not been provided but said it was not a specified item.
- 463 On site I noted that the gap was between 3 and 4 mm wide and looks decidedly strange, particularly as the door is at the centre of the passageway which leads to the foot of the Owner's bed. I find that normal building practice would call for a mushroom stop.
- 464 I allow \$46.55 for this item.

16c –f Doors – marks, rough finish to edges, rough fitted bolt keeper and edges not sealed - \$2,049.53

- 465 As noted by the member who assisted with the completion of the Scott Schedule, Mr Lees' estimate for the work to be done is only \$29.63 less than Mr McKee's.
- 466 The Owner stated⁹² that this door was replaced by the Builder, but is still defective.
- 467 Mr Farrelly⁹³ stated that he was told by the painter, Mr Issell, that this was pointed out to the Owner and she accepted it. Although the Tribunal is not bound by the rules of evidence, hearsay evidence remains weak evidence. The Builder could have had Mr Issell give evidence about this but did not. I disregard Mr Farrelly's evidence on this point.
- 468 I allow the average being \$2,034.71.

17 Ensuite

17a Gap around cover plate to shower rose - \$99.75

- 469 Both Mr McKee and Mr Lees agreed that patching and touchup is required to the ceiling. Mr Wilkinson's opinion was that the amount necessary was \$99.75. Mr Lees' opinion was that the correct amount is \$48.72.
- 470 In the absence of Mr Wilkinson I accept Mr Lees opinion. I allow \$48.72 for this item.

17b Tiles on west wall proud of others, ponding to floor tiles - \$2,088.10

- 471 Although this item refers to ponding, the work recommended is limited to the ensuite walls. Mr McKee reported that there is lippage of the tiles which exceeds 1 mm. Mr Lees reported that the tiles are 450 x 450 mm and that the lippage does not exceed 2 mm.

⁹² Owner's witness statement, paragraph 60

⁹³ Mr Farrelly's witness statement paragraph 143

472 I accept Mr Lees evidence that the tiles are not defective. There is no allowance for this item.

17c Metal trims – sharp edges and rough at mitred corners - \$226.10

473 Mr McKee and Mr Lees agree that the metal trims have sharp edges and are rough and uneven at mitred corners. Mr McKee's rectification is limited to removing the metal trims and supplying and installing new metal tile trims.

474 Mr Lees' method of rectification is to selectively remove tiles and trims from around the Windows and the niche and replace them at a cost of \$1,947.20. I prefer Mr Lees evidence on this point.

475 I allow \$1,947.20 for this item.

17d Grades on internal window sills inconsistent - \$950.95

476 Mr McKee's opinion was that there are inconsistent grades on the sill tiles laid horizontally. Mr Lees agreed with that view and took it into account in the previous item.

477 Mr McKee also said that the windows on the west side should abut one another and not have a tiled column constructed between them. Having regard to Techno Draw sheet 6, and to the mark in the location of the tiled section between the windows, I am not satisfied that this is accurate, and note that under cross-examination Mr McKee's solution was based on appearance rather than function. In particular, support for the corner of the window, and the structure above, cantilevers from the window edges. The small support column reduces the length of the lever.

478 Mr McKee supported Mr Wilkinson's scope of works of removing the ensuite window and all associated trims, architraves and related items, repositioning the windows to abut one another and replacing the trim where applicable.

479 I am not satisfied that Mr Wilkinson's scope of works is necessary and the cost of some regrading of these windowsills has been taken into account in the previous item.

480 There is no further allowance under this item.

17e Rough finish to top of tiles around window - \$179.55

481 At the site inspection, the relevant tile edges pointed out to me were approximately 2 m above floor level. I am not satisfied that they are defective.

482 There is no allowance for this item.

17f Gaps between windows and plaster - \$66.50

483 Mr McKee and Mr Lees agree that some detailing is required around window frames including cleaning the window frames and gap sealing between plaster and the aluminium window frames.

484 Mr McKee estimated the cost of doing so at \$66.50. Mr Lees estimated \$157.40. I prefer Mr Lees opinion.

485 I allow \$157.40 for this item.

17g Diagonal cuts to in situ shower floor tiles - \$4,049.60

486 Mr Farrelly stated⁹⁴ with respect to this item and the next one that he raked out the grout and reapplied it with a clear silicon seal as requested by the Owner. He said he asked her not to shower until it had settled and dried but she did shower which caused the problems complained of.

487 The Owner stated⁹⁵ that the grout became dislodged and could not be reapplied as the gap between the tiles was not wide enough. She added that the shower was not used as Mr Farrelly had stated. She said the grout comes out when using a scrubbing brush to clean the showers.

488 For the same reasons as given under item 9k, there is no allowance for this item. Loose grout is allowed for under the next item.

17h Grout around shower outlet coming out

489 Mr McKee and Mr Lees agree that the grout around the shower waste is coming out and requires reapplication. The Owner's costing was included in the previous item. However Mr Lees costed just this item at \$217.36.

490 For the same reason as discussed under item 9l, I allow a further \$100 for raking out the grout and applying a flexible epoxy.

491 I allow \$317.36 for this item.

17i Grout varies in colour

492 This item concerns a very slight difference in grout colour where wall tiles have been relaid. It was only visible to me when drawn to my attention.

493 There is no allowance for this item.

17k Gap around light switch cover - \$29.93

494 I accept Mr McKee's evidence that the light switch needs to be relocated so that it is hard against the wall.

495 I allow \$29.93 for this item.

17l Uneven gap between skirting and plaster - \$146.30

496 Mr Farrelly stated⁹⁶ that this fill is intentional to provide a straight tile bed. However Mr McKee and Mr Lees agreed that it is defective and the cost of rectification is \$146.30.

497 I allow \$146.30 for this item.

⁹⁴ Mr Farrelly's witness statement paragraph 147

⁹⁵ Owner's witness statement in reply paragraph 76

⁹⁶ Mr Farrelly's witness statement paragraph 148

17m Double power point in cupboard under bench - \$157

- 498 Mr Farrelly stated⁹⁷ that the location of this power point was discussed with the Owner and she agreed to it.
- 499 Mr McKee stated that the power point has been located in the cupboard under the bench where it is not easily accessible.
- 500 The Owner said under cross-examination that this power point was supposed to be on the east wall – not in the north wall cupboard.
- 501 At the site inspection it was obvious that this power point was in a very inconvenient position. I accept the Owner's evidence that she did not agree to this change.
- 502 I allow \$157 for this item.

17n Power point too close to taps - \$186.20

- 503 Mr McKee and Mr Lees agreed that this item needs to be rectified and they agreed the sum of \$186.20.
- 504 Mr Farrelly stated⁹⁸ that if power point needs to be moved it should be at the cost of the Owner because after electrical rough in had been done she wanted to move the two basins further apart. This caused the basin to be closer to the wall.
- 505 I am not satisfied that it is reasonable for the Builder to breach a safety requirement because there has been a variation. Any such variation should take the safety requirement into account.
- 506 I allow \$186.20 for this item.

17o Caesarstone replaced by tile splashback – credit sought - \$45.90

- 507 There is no allowance for this item for the same reasons as given under item 9y.

17p Power point for heated towel rail not installed - \$119.70

- 508 This item was determined under Variations. There is no allowance for it.

17r Ensuite/Master bedroom opening is too wide - \$571.90

- 509 The opening between the ensuite and master bedroom does not have doors. It is designed at 1200 mm wide but has been built at 1275 mm. Mr McKee recommends work to reduce the width of the opening. Mr Lees states that the extra width makes no difference to the use of the area and that it should be accepted as constructed because there is no loss of amenity.
- 510 Under cross-examination the Owner denied that she had discussed the matter with Mr Farrelly and agreed that the opening be extended a further

⁹⁷ Mr Farrelly's witness statement paragraph 149

⁹⁸ Mr Farrelly's witness statement paragraph 150

75 mm to allow for the installation of two standard doors at some stage in the future.

511 Mr Lees conceded that if the work is to be undertaken the amount estimated by Mr McKee of \$571.90 is not excessive. I am not satisfied that the Owner agreed to this variation.

512 I allow \$571.90 for this item.

18 Toilet- powder room

18b Door latch keeper damaged - \$252.70

513 Mr McKee's description is that the striker plate/keeper is misaligned so that the latch does not fully enter the hole in the plate. In consequence the door rattles in a jamb. He recommended that the keeper/striker plate be repositioned and that the door might need to be rehung.

514 Mr Lees reported that on the day he inspected the latch worked. At the site inspection the latch worked on one occasion and then not on another.

515 I accept that the latch is defective and allow the amount estimated by Mr Wilkinson of \$252.70.

516 I allow \$252.70 for this item.

18c Paint on Caesarstone vanity bench top - \$29.93

517 On site all saw that there was a small amount of paint on the Caesarstone. In accordance with the agreement of the experts on that day, I allow \$5.

18d No sealant under vanity basin \$53.20

518 For the same reason as given under item 9b, there is no allowance for this item.

18e Rough finish to Caesarstone caulking - \$46.16

519 For the reasons given under item 9a, I allow \$46.16 for this item.

18f Tiles sitting proud on floor - \$758.10

520 Mr McKee's evidence was that where the joint width of tiles is 3 mm or less lippage should not exceed 1 mm. The tiles in question are large and have a slightly rounded finish. The joints measured on site were between 3 and 4 mm wide. Mr McKee made the somewhat surprising suggestion that "joint width" relates not to the size of the joint at the surface, but the size of the spacer that has been used to create it. I do not accept this evidence.

521 I accept Mr Lees' evidence that the lippage was less than 2 mm and is acceptable.

522 There is no allowance for this item.

18g Backing plate to mixer tap not level - \$113.05

523 For the same reasons as given for item 10a, I allow \$113.05.

18h Caesarstone replaced by tile splashback – credit sought

524 There is no allowance for this item for the same reasons as given under item 9y.

18i claim for credit for bottle trap - \$242

525 For the same reasons as given at 10f, the Builder is not entitled to a variation for this item.

19 Walk in linen

19a Gap between top of door and frame and 19b Gap between side of door and frame on latch side - \$252.70

526 Mr McKee stated that the Guide to Standards and Tolerances requires clearances between door heads and frames to be uniform and within 1 mm. As to item 19b, he said that a straight edge applied to the face of the door jamb reveals a bow of between 2 and 4 mm.

527 Mr Lees states that item 8.04 of the Guide to Standards and Tolerances imposes a time limit of three months and after that it becomes a maintenance issue.

528 At the site inspection I observed that the gap between the top of door and frame is only a little more than 1 mm different but that there was a distinct bow.

529 I am satisfied that this item is defective. I allow \$252.70 for this item.

20 Sliding linen

20a Linen cupboard double door frame out of square - \$119.70

530 Mr McKee describe this item as "linen cupboard double door frame out of square and/or plumb – doors only close evenly one way".

531 Mr Farrelly stated⁹⁹ that the sliding doors on the linen cupboard close properly in one direction but appear out of plumb in the other. He said:

As I told Ms Lee just simply close it properly. It closes in one direction, not two directions. Close it in the correct direction.

532 The Owner stated¹⁰⁰:

Sliding doors on the linen cupboard shouldn't have to close and line up in one direction.

I find this is an admission that the sliding doors sit properly when closed one way. I find this is sufficient.

533 There is no allowance for this item.

⁹⁹ Mr Farrelly's witness statement paragraph 156

¹⁰⁰ Owner's witness statement in reply paragraph 79

21 Study

21a Join line on plaster walls visible - \$571.90

- 534 My comments regarding item 14g also apply to this item. I find the finish is similar to that claimed at item 14g – there is no allowance for this item.

21b Return air cover not fitting snug - \$1,123.85

- 535 Although the description of this item is the cover does not fit neatly against the wall, most of the cost to rectify is because Mr McKee concluded that the air duct faces the wrong way and must be repositioned. He said that sheet 7 of the Techno Draw plans calls for it to face the kitchen rather than the passageway.
- 536 Mr Farrelly's evidence¹⁰¹ related to the position of the return air duct rather than the fit of the cover. He stated that it has been placed in the location agreed with the Owner.
- 537 Sheet 7 does show an indentation facing towards the kitchen. However, it seems to have been included to enable the lettering to be read. The thinner area of wall does not appear on drawings that do not carry the notation such as sheet 11 of the Techno Draw set, and it is not shown on section 1, which is at sheet 10. I am not satisfied that the plans call for the duct to face a particular direction.
- 538 Mr Lees said that the vent is sitting flush to the plaster but I find some adjustment is necessary such as the application of a little silicon. In the absence of evidence about the cost of such minor adjustment, I allow \$25 for this item.

22 Kitchen

- 539 As is discussed in greater detail below, the major issues concerning the kitchen are not defective works, but whether the works are in accordance with the contract as varied. The lack of variations in writing has allowed a dispute to flourish that would have been unlikely to exist if there was proof that both parties agreed to certain changes.
- 540 The Owner said at page 6 of her written submissions:

In relation to the kitchen cabinetry, Mr Farrelly changed his statement as did the cabinetmaker, Mr Connors who then also stated he not only got the dates wrong however I wasn't present at the meeting when drawing the cabinetry on the floor as first thought. They conveniently had the same stories prior to cross examination of Mr Farrelly and then both changed it to another date, being the same date as each other again. Then when Mr Connors is shown in the photo of the kitchen where no cabinetry markings were on the floor, he not surprisingly gave the exact same reason straight up as what Mr Farrelly said, "covered by plaster dust".

¹⁰¹ Mr Farrelly's witness statement paragraph 158

Mr Connors, when asked repeatedly if I had given approval for the kitchen cabinetry finally admitted that I hadn't given my approval to him, that Mr Farrelly had e-mailed Mr Connors and said "go ahead". The same applied with the waterfall ends... when I informed Mr Connors that Mr Farrelly stated it wasn't on any of the quotes so why would we even be discussing it, if that was the case...he replied [No] we definitely discuss it then changed it to, we would of discussed it. [Sic]

541 Mr Farrelly amended paragraph 159 of his witness statement, then later replaced it entirely with a handwritten document that now appears at TB375A.

542 Mr Farrelly's unamended evidence was that the kitchen was designed after lengthy consultation between himself, Mr Peter Connors and the Owner.

543 This was contradicted by a statement of the Owner¹⁰²:

The kitchen was designed by myself as per the approved plans prior to signing a contract with Mr Farrelly. Never at any point were the plans discussed at length between myself, Mr Farrelly and Mr Connors (as per my witness statement). The first time I met Mr Connors was at his factory in New Gisborne on August 20, 2011. I then received rough drawings from Mr Farrelly via e-mail. The kitchen was designed specifically to allow for a custom-made dining table that I had ordered in March 2011 to the handmade by a work colleague.

544 Mr Farrelly's witness statement in reply concerning this point is¹⁰³:

Ms Lee also says that she did not meet cabinetmaker on site. She did.

545 On 10 June 2014, on the first day of the hearing, the Owner said she did not meet with cabinetmaker on site and that she wished to be told the date that was supposed to have occurred.

546 Mr Farrelly changed his evidence to say that the consultation was between himself and Mr Connors alone on 17 July 2011 at the home. His evidence continued that he and the Owner travelled to Mr Connors' workshop in New Gisborne on 20 August 2011 where they had detailed discussions about kitchen. He said that he left after about one and a half hours and the Owner stayed to discuss more details with Mr Connors.

547 Mr Farrelly said that on 17 July 2011 he and Mr Connors drew two outlines of the kitchen on the chipboard floor - one as designed and the other as he and Mr Connors recommended. He said:

This was done to give Ms Lee an idea of how the extra space between the wall and the island bench was needed.

548 Concerning the meeting on 20 August 2011, Mr Farrelly said:

We went through all the proposed recommendations and how it differed from the plans, including the need to adjust the position of the

¹⁰² Owner's witness statement in reply paragraph 80

¹⁰³ Paragraph 17

island bench from that on the plans so as to open up the access to the kitchen.

He concluded:

The markout stayed on the chipboard floor until the floor went down which was just prior to the kitchen installation.

549 I note that in the original paragraph 159, Mr Farrelly made reference to the owners "budget of \$12,000" for the kitchen, but as mentioned above under "The Owner's Budget", the specification did not provide a prime cost item for the kitchen.

22a Range hood flue not fitted correctly up to ceiling - \$59.85

550 Having seen this item at the site inspection I accept Mr McKee's evidence that there is a distinct gap. I allow \$59.85 for this item.

22b, c and d Kickboard under dishwasher

551 Mr McKee and Mr Lees agreed that these items needs to be rectified and they agreed the sum of \$224.85, which I allow.

22h Glass splashback longer than overhead cupboards - \$3,325

552 Mr McKee states "mirror projects past end of cabinetry". The mirror to which he refers is the splashback. As Mr Lees correctly states, the splashback aligns with the benchtop but it runs past the end of the overhead cupboards by approximately 30 mm. The upper and lower cupboards align, but as the benchtop has an overhang of 30mm, the bench extends further east than the overhead cupboards.

553 The summary of Mr McKee's report which appears in the Scott Schedule includes:

Benches noted on plans as having "waterfall ends". Cupboard along north wall doesn't have waterfall ends and top overhangs 30 mm, this is longer than overhead cupboards, there is length of the bench unit. Works not in compliance with approved plans. Modify existing cabinetry to north wall to ensure compliance with drawings (no allowance for modification to island bench).

554 Sheet 6 of the Techno Draw plans notes waterfall ends at both ends of the island bench but nowhere else. As Mr McKee said during concurrent evidence, if the bench is acceptable, the splashback is not defective.

555 Under cross-examination the Owner agreed that this is the second splashback installed, because there was a mark in the first. She said she first became aware of the discrepancy after moving in. She agreed that the first splashback was replaced on 15 February 2012. She said that she had raised the issue of the length of the splashback, but that Mr Farrelly had advised against a splashback shorter than the bench because it would look "hideous".

556 TB991 is a sheet of the shop drawings by Lancefield Classic Kitchens that shows the elevation of the kitchen cupboards on the north wall. The

Owner asked Mr McKee in re-examination whether he agreed that this drawing shows the bench top terminating to the east end without an overhang. He agreed, as do I.

557 Nevertheless, I find the owner agreed to the dimensions of this splashback when the first splashback was replaced.

558 There is no allowance for this item.

22i Ceiling mounted light fittings over dining table uneven - \$29.93

559 Mr McKee and Mr Lees agreed that this item needs to be rectified and they agreed the sum of \$29.93 Mr Farrelly stated that this is a maintenance item but failed to demonstrate how this could be so. I am satisfied that the item needs to be rectified in accordance with the evidence of Mr McKee and Mr Lees.

560 I allow \$29.93 for this item.

22j Overhead cupboards not as per plan

561 This item is dealt with in item 22h.

22k Overhead cupboard short on north wall, east end

562 This item is dealt with in item 22h.

22l Claim for deduction for tile splashback - \$196.80

563 The summary of Mr McKee's opinion in the Scott Schedule is:

No deduction for tile splashback as per specifications. Credit for supply and install of tiles.

564 The summary of Mr Lee's opinion is:

Drawing shows glass splashback. No tiles were included.

565 The contract documents are contradictory. The 1st Specs, 2nd Specs and 3rd Specs show the tiled kitchen splashback under item 22.7 and it is noted as "Included to oven bench only". The 1st and 2nd Specs include the Owner's handwritten note striking out "included to oven bench only" and writing in "mirrored glass". Elevation "Kit A" of sheet 16 of the Techno Draw plans has "glass splashback" written in two positions, indicating that it was for the entire length of the bench, not just immediately adjacent to the oven.

566 I note that in accordance with TB434, which was the Builder's schedule of contract changes, an additional \$1,600 was paid for the mirrored glass splashback.

567 I am satisfied that no credit has been given for deletion of the tiled splashback and that the amount estimated for the Owner is reasonable.

568 I allow \$196.80 for this item.

- 569 The Owner stated¹⁰⁴ she perceives her kitchen bench tops have become increasingly difficult to clean. She said she contacted Caesarstone and was visited by a representative who said the product did not appear to be their product but he could not be 100% certain.
- 570 Mr McKee said in answer to a question asked by the Owner in examination in chief that there might be variations in the base colour and density, but the fleck does not change. Given the uncertainty of an employee of Caesarstone, I question Mr McKee's ability to say positively whether the material is, or is not, Caesarstone.
- 571 The Owner said she had a cabinetmaker cut into the substrate to find marking in order to determine whether the product used was Caesarstone or something else.
- 572 The Owner stated that she received a letter from Caesarstone dated 11 November 2013, which is TB704. The letter is to her from Craig Christie of Caesarstone and the relevant part is:
- The image supplied of the stone top at [the home] has markings that are not consistent with the Caesarstone® brand and therefore is not recognised as Caesarstone®.
- 573 Mr Farrelly stated¹⁰⁵:
- I have paid for Caesarstone, have an invoice the Caesarstone, have been told by the Cabinet make it is Caesarstone. It certainly looks like Caesarstone and the letter the Owner has produced does nothing to convince me it is not.
- 574 Under cross-examination it became apparent that Mr Farrelly failed to understand that if something other than Caesarstone had been supplied, even if he was ignorant of this, the Builder would still be liable to the Owner. Mr Farrelly said that Hans International had provided Caesarstone to the cabinetmaker, Lancefield Classic Kitchens, who had in turn provided it to the Builder. The Owner tendered a letter to the Builder from the cabinetmaker dated 3 April 2013¹⁰⁶. The letter states that the cabinetmaker "ordered the Caesar Stone in Osprey [colour]", and the invoice from Hans International of 20 October 2011 includes:
- Supply & install kitchen in Osprey
- The price is \$3,800.
- 575 At the site inspection I was shown a sample of Caesarstone in close proximity to the kitchen bench. I am unable to say, by comparing the sample to the bench, whether they are the same product. The colour is almost identical, but the texture of particles within the sample was a little different to the texture in the bench.

¹⁰⁴ Owner's witness statement, paragraph 84

¹⁰⁵ Mr Farrelly's witness statement paragraph 164

¹⁰⁶ Exhibit A35

- 576 I attempted to see markings on the bottom of the “Caesarstone” through the hole cut in the bench substrate, but they were very unclear.
- 577 Mr Ryan asked the Owner under cross-examination if anyone from Caesarstone was coming to give evidence. Her answer was: “Not that I’m aware of”.
- 578 The Owner said that a representative of Caesarstone inspected the bathroom stone and confirmed that it was theirs. She agreed that he was unsure of whether the kitchen stone was their product, but later confirmed that it was not on the basis of photographs of the branding she sent them.
- 579 On the balance of probabilities I am not satisfied that the product used is other than Caesarstone. The letter from Mr Christie falls short of a positive statement that it is not Caesarstone, and the Owner failed to bring a witness to attest to its unauthenticity.
- 580 There is no allowance for this item.

22n Changes in cabinetry lay out

- 581 Mr McKee’s report indicates that he has adopted the Owner’s concerns that allowances for Caesarstone set out in item 16.1 of the specifications have not been provided. He has not stated that the island bench is too small – it is noted that the deletion of the laundry chute led to the north wall bench being shorter than originally designed.
- 582 For this item, 22o and 22q there was no separate costing – it was allowed for within item 22m. The allowance I make is shown under 22q.

22o Size of wall bench

- 583 Mr McKee states the Caesarstone allowed for the north wall bench was 4.3 lineal meters and it measures 4.15 lineal meters. I accept his evidence.

22p Size of island bench - \$3,724

- 584 Mr McKee states the Caesarstone allowed for the island bench was 4.8 lineal meters but it measures 3.8 lineal meters. He did not explain what could account for this discrepancy. There has been no suggestion that the overall dimensions of the island bench were insufficient. The only explanation appears to be that this measurement took into account the waterfall ends on this bench.
- 585 As the waterfall ends are claimed at item 22w, there is no allowance under this item.

22q Size of island bench overhang

- 586 Item 16.1 includes “Extended Top 350mm overhang for breakfast bar”.
- 587 Mr Farrelly stated¹⁰⁷ that the 350 mm overhang could not be achieved and that the Owner was aware of this. I remark that the impossibility of achieving this result should have been determined before the contract was

¹⁰⁷ Mr Farrelly’s witness statement paragraph 165

signed, not after. When a builder enters an obligation, that is what they must achieve, unless there is a reason why a reasonable builder could not know that the item is impossible.

588 Mr Farrelly also stated that the cupboards needed to be 620 mm wide to ensure they ran flush with the built-in dishwasher, the bench tops were 900 mm wide and so the overhang was around 280 mm. Mr Farrelly said the Owner agreed with this. He said the only other option was to substantially increase the size of the benchtop but the Owner did not have the money to do this and it would also have required substantial steel support and a further price.

589 The Owner said under cross-examination that this was not discussed and I accept her evidence on this point. In the absence of evidence about rectifying this item without rectifying all items claimed relating to Caesarstone, taking into account the Builder's evidence that the stone must be supported by metal brackets, I allow \$1,000 for this item.

22r Island bench overhang to west and north sides and 22s Overhang to wall bench

590 The Owner claims that the overhang of 30mm to the south and east sides of the north bench, and to the west and north ends of the island bench, should not have been included. The plans that support that view are those by Lancefield Classic Kitchens, which are at TB987 to TB992.

591 As mentioned below, the Owner has also claimed for waterfall ends to the west and north ends of the island bench and to the east side of the north bench. Although waterfall ends are noted on sheet of the Techno Draw plans, they are not drawn on the Lancefield Classic Kitchen plans. I refer in particular to TB991.

592 As the Owner has chosen to prefer the Techno Draw design to that of Lancefield Classic Kitchens, she cannot insist that every detail in the latter is performed.

593 There is no allowance for this item.

22t Island bench location- \$18,323.93

594 The Owner claims that the island bench is 400 mm too far to the east (towards the rear of the home) in accordance with Mr McKee's report. The work recommended by Mr Wilkinson is demolish the bench (retaining the doors for reuse), remove the existing floor boards to the kitchen/dining, supply and install new floor boards and supply and install a new carcass in the correct location.

595 Mr Lees stated in his report that the kitchen was constructed in accordance with shop drawings prepared by Lancefield Classic Cabinets. He continued:

It is assumed that the owner provided some input in the preparation of the shop drawings and also approved the designs before the kitchen was manufactured and installed.

...

The cabinets have been constructed to a high standard and should be accepted.

Mr Lees recommended that there be no further work.

- 596 Sheet 6 of 21 by Techno Draw shows the “L” shaped island bench commencing 1036mm from the pantry wall at its west end, with an east-west length of 2695mm. As the east-west dimension from the pantry wall to the external east wall was designed as 7095mm, the space allowed for the dining area was 3364mm.
- 597 In her witness statement the Owner said that in April 2011 she had enquired of Mr Farrelly about meeting Mr Peter Connors of Lancefield Classic Cabinets in Torquay, but because Mr Connors had suffered a bereavement, it was not arranged then. She stated that she and Mr Farrelly met Mr Connors at his factory in New Gisborne on 20 August 2011 where she picked the style, colours and handles for the doors and drawers and chose the Caesarstone colours for the kitchen, ensuite, bathroom and powder rooms.
- 598 The Owner stated¹⁰⁸ that Mr Farrelly sent her kitchen drawings from Mr Connors but she thought the drawings were 3D images of the design in the approved plans. This is unconvincing, as some of the drawings were clearly not 3D.
- 599 She said the drawings did not contain her name, number or address and no changes from the approved plans were drawn to her attention. She said she did not sign off on the cabinetry works.
- 600 The Owner exhibited the drawings she received, and they are included in the Tribunal Book at TB544 to TB548. TB544 is of particular interest, because it is the detailed plan of the layout shown on page 7 of 21 by Techno Draw. It does not include dimensions of the spaces between the pantry wall and the west end of the island bench, and the north end of the island bench and the bench against the north wall of the kitchen.
- 601 Under cross-examination the Owner agreed that the documents she exhibited were poor copies of documents that had been copied and included in the Tribunal Book by the Builder at TB987 to TB992. TB987 is the equivalent of TB544. The dimensions on the west and north are in typeface, as are some dimensions shown on the island bench. Seven dimensions are in handwriting, including the distance between the pantry wall and west end of the island bench of 1450mm, and the east-west length of the bench of 2700mm. This leaves available room for the dining area of 2945mm; a deficit, in accordance with Mr McKee’s report, of a little over 400mm.
- 602 Mr Connors said, in answer to my question, that the handwriting on TB987 is his. When I asked him why some dimensions were typed and

¹⁰⁸ Owner’s witness statement, paragraph 22

others were in handwriting, he said it was early days in his use of that software.

- 603 The Owner agreed in cross-examination that the only difference between TB987 and TB544 was the lack of handwriting.
- 604 The Builder tendered exhibit R3, a copy of TB544 with circles around three spots which could be consistent with someone having whited out arrows showing the distances between the pantry wall and island bench and the north wall cupboards and bench. On that day I expressed concern that such a suggestion was made in the absence of forensic evidence, but note that the marks which remain on TB544 are not inconsistent with the hand-written additions having been whited out.
- 605 A matter which is consistent between the sheet 6 by Techno Draw and TB987 is that the eastern end of the bench on the north wall (minus the laundry chute) lines up with the eastern end of the island bench. The explanation is that there are eight overhead cupboards shown on TB987 and only six indicated on Techno Draw sheet 6. I note that the Owner has not complained that there are too many cupboards and this discrepancy is not noted by Mr McKee.
- 606 On Tuesday 10 June 2014 the Owner said she had the original of TB544 at home and would bring it to the hearing on 12 June 2014. On Thursday 12 June the Owner said she had searched her home but had no idea where the original was. She admitted that she received the original with the handwriting on it and in answer to my question, thought that she probably received it on 25 August 2011, at about the time when Mr Farrelly said he had it printed out, and before the kitchen was installed. She said she did not know where the original of TB544 came from, and because she could not find it she thought she might have shredded it by accident. When asked by Mr Ryan whether she had shredded any other exhibits she said “definitely not”, a surprising response if it is assumed that the Owner shredded this document by accident.
- 607 She never provided a satisfactory explanation for the plans without dimensions.
- 608 The Owner denied Mr Farrelly’s evidence that she met Mr Connors on site and agreed the layout. She said her only meeting with him was on 20 August 2011 at the factory.
- 609 In cross-examination Mr Ryan referred to Mr Farrelly’s statement that he marked out the kitchen location in grey lead pencil on 25 August 2011 on the yellow-tongue particle board which is the substrate to the timber floor. The Owner denied having seen this marking at any time, although according to Mr Ryan’s questions it was visible until the timber floor was installed on 29 September 2011. Under cross-examination Mr Farrelly said the marks would have been obscured by plaster dust, after the plaster sheet had been stopped and sanded. Mr Farrelly remained adamant that he had marked the floor and the Owner had seen it. The Owner remained adamant that she had not.

610 Mr Ryan also asked the Owner about meeting Mr Connors on 1 October 2011 when he was in Torquay to install a kitchen in Mr Farrelly's own home. Again, the Owner denied meeting Mr Connors in her home and on the 10th day of hearing, 26 June 2014, she provided evidence that she was not in Torquay that day.

611 During cross-examination on the 14th day of hearing the Owner asked Mr Farrelly about a letter from Mr Connors, the cabinet maker of 17 September 2013, stating that the floor had been marked out in front of the Owner. Mr Farrelly said he discovered recently that the letter was inaccurate. For a letter which is "inaccurate" it is very specific. It includes:

The location of the Island Bench was marked out on the floor by the builder & myself in front of [the Owner] onsite & was plotted out in our Factory on our computer software that produces 3D images & plans. Fay viewed these images on our software in our factory & she approved & agreed to the details.

All final drawings of th kitchen & layout were approved by Fay at our Factory & onsite where the Island Bench was marked out on the ground in its location. [sic]

612 I am not satisfied that I can rely on the accuracy of Mr Connors' evidence.

613 The Owner stated that she discovered the discrepancy two weeks after moving in, when she had the family Christmas at the home. She said it became evident that the space was not as big as it should have been, given that she had designed the home to incorporate a custom designed dining table. She concluded:

As the house was completed and I hadn't picked up on it, my thoughts were it's a bit late now to say anything. Disappointed, I let it be, thinking it was my miscalculation with the design plan.

614 Under cross-examination the Owner admitted that although she was "outraged" about the discrepancy between the kitchen layout and what she claimed was the agreed design, and although she communicated extensively with the Builder regarding other alleged defects, she did not mention her concern regarding the location of the island bench until 16 months after she took possession. I also note that it was not one of the many items mentioned in her audio recording made 3 October 2012.

615 I am not satisfied that the island bench is located in the wrong position, particularly having regard to the shop drawings provided to the Owner before the kitchen was constructed.

616 There is no allowance for this item.

22u Space between island bench and wall bench

617 This item is dealt with under 22t.

22v Space between island bench and pantry

618 This item is dealt with under 22t.

22w Waterfall ends to island bench not installed - \$2,394

619 The reference to waterfall ends is in sheet 6 by Techno Draw. They are not specifically mentioned in the specifications, but as mentioned at 22p above, the lineal meters of Caesarstone allowed for the island bench might include an allowance for waterfall ends.

620 Mr Farrelly stated¹⁰⁹:

Ms Lee also knows too well that she deleted the waterfall ends because they were far too expensive. Trying to fit everything into her \$12,000 budget the waterfall ends were approximately \$1500 each end. Further these were deleted very early on and not in the specifications.

621 As mentioned previously, there was no prime cost item for the kitchen or the cabinet work in the kitchen and no other basis upon which it could be asserted that the Owner had budgetary responsibility for the kitchen.

622 I am satisfied that sheet 6 by Techno Draw called for waterfall ends on the island bench, which appears to be confirmed by item 16.1 of the specifications, as discussed above under item 22p.

623 Mr Wilkinson costed this item in his report based on the supply and installation of two waterfall ends. I allow \$2,394 for this item.

23 Pantry

624 Mr Farrelly's evidence relied on a letter from Mr Shawn Paul of Regency Shower Screens and Wardrobes Pty Ltd which appears at TB 385. Mr Paul's letter states the pantry was installed not in accordance with the specifications and this was then rectified at Regency's cost. He continued:

Whilst out on site the customer wanted to change the design whilst we are in the middle of installing the pantry. We accommodated as best as possible with the board is supplied, (we also used stock). The finished product was a lot more than quoted for in the specs, and entailed multiply [sic] trips to complete, but the customer was not charged.

625 Although constructing the pantry might have been frustrating for all concerned, my task is to consider each of the items complained of.

23a Pantry wall (west wall of kitchen) not straight - \$558.60

626 Mr McKee and Mr Lees agreed that this item needs to be rectified but they disagreed on the amount. The work is similar, but Mr Wilkinson allowed \$558.60 for this item and \$1,331.33 for the next two, a total of \$1,889. Mr Lees allowed \$1,175.22 for this item and the next.

¹⁰⁹ Mr Farrelly's witness statement paragraph 165

- 627 Mr Wilkinson's scope of work for this item is to remove the plaster from the west wall of the pantry, straighten the existing studs supply install and paint plaster and supply and install architraves skirtings and trim.
- 628 The only difference between Mr Wilkinson's scope and Mr Lees' scope for this item is that Mr Lee suggests adjusting the position of the cavity slider rather than straightening the existing stud.
- 629 In accordance with Mr Lees' evidence I allow \$1,175.22 for this item and the next.

23b Warped right door of pantry - \$1,331.33

- 630 Mr McKee's description of this item in the Scott Schedule is that the inside edge of the cavity frame appears bowed resulting in scratches or marks to the face of the door. Mr Wilkinson's scope of works is to remove the pantry doors and to supply install and stain new pantry doors and reinstate the door furniture.
- 631 My observation on site was that the doors are not perfect but are fairly good. It is taken into account in item 23a.

23c Double door wall cavity not painted - \$1,889

- 632 Mr McKee's description of this item is that the inner portion of the timber edge of the framing of the cavity slider has not been painted. He said this is visible through the glass and when the door is fully open. Mr Lee said that this cannot be seen from the standard viewing position and therefore is not a defect. I prefer Mr McKee's view.
- 633 I accept Mr Wilkinson's scope of works except that I am not satisfied it is necessary to replace the doors. In the absence of evidence about the value of the doors, I reduce the amount allowed by Mr Wilkinson by \$400.
- 634 I allow \$1,489 for this item.

23e Bin – in the contract or a variation?

- 635 This item was considered above under variations.

24 Patio- Al fresco

24a Poor finish on Benex blocks and 24b Voids in Benex blocks - \$1,630.18

- 636 Benex blocks are similar to a concrete block, but incorporate polystyrene.
- 637 Mr Farrelly stated¹¹⁰ that the Owner came to his house to look at the Benex blocks that he had installed. According to Mr Farrelly, she liked them. He said:

Her only concern was the little air holes that are within the block work. She said she was going to paint over the block to hide these holes. She told me she would be painting them a grey colour. My specifications stated "*Sealing of Benex with grey coloured sealer by*

¹¹⁰ Paragraph 25(i) of his witness statement.

client". After this dispute arose I became aware that Ms Lee had actually contacted Benex and threatened to "take Benex to VCAT".... She demanded they pay for the blocks to be painted. Benex inspected and found nothing wrong with the blocks at all but agreed to paint them to avoid going to VCAT.

638 Mr McKee described this alleged defect as:

Majority of joints (north face) have a proud appearance as though mortar was applied to the face of the joints unlike the opposite side.

639 Mr McKee and Mr Lees disagree about whether the blocks have different textured faces. Having seen the blocks on site, and as admitted under cross-examination by Mr McKee, Mr Lees' evidence is accurate that the blocks have a dressed face and a rough face, and that the rough face is exposed to the patio.

640 Surprisingly, during concurrent evidence Mr McKee was still suggesting that the appropriate treatment of the wall would be to grind off the paint and repaint.

641 An e-mail from Mr Kerry Bennett to the Builder dated 3 April 2013 confirms Mr Farrelly's evidence, although the Owner stated¹¹¹ that she never threatened to take Benex to VCAT.

642 I note that all correspondence between the Owner and officers of Benex at TB765 to TB774 appeared to be polite. If there was a written threat by the Owner, it has not been brought to my attention by the Builder.

643 Mr Farrelly also stated¹¹² that the Owner knew one side of the block was textured. He said that this aspect of the build was discussed with the Owner.

644 Under cross-examination, the Owner said she intended to use clear sealer rather than grey sealer. When asked if Mr Bennett came down from Sydney and cleaned and painted the blocks and whether the blocks were not now defective, the Owner said that the defect has been covered up and she did not want to have textured paint.

645 I accept the Owner's evidence, in accordance with an e-mail from Mr Armitage of Benex dated 28 September 2012 that it was his suggestion to use textured paint rather than the Owner's request.

646 In cross-examination it was put to the Owner that Mr Farrelly was unaware that the Owner had arranged for Benex to undertake work. Her response was that she did not recall.

647 I accept Mr Lees' evidence that the wall of Benex blocks is not defective.

648 I find that the Owner reached an agreement with Benex about treatment of the blocks of which the Builder was unaware. I am not satisfied that there are any remaining defects to the Benex blocks, and if there were, I could not be satisfied that they were due to poor work by the Builder.

¹¹¹ The Owner's witness statement in reply, paragraph 16

¹¹² Mr Farrelly's witness statement paragraph 167

649 There is no allowance for this item.

24c Gas and water outlets too close of decking - \$359.10

650 Mr Farrelly stated¹¹³ that the outlets were roughed in when it was planned that the patio would be exposed aggregate concrete without decking. He said the Owner made a late change to decking.

651 Mr McKee said that the decking was installed as an extra and it is evident that the plumbing was in place prior to construction of the decking. He said the height of the finished floor level is just below each connection and prevents its use. The amount claimed is to relocate the gas and hot and cold water outlets higher.

652 Mr Lees said that there is sufficient room for other connections to be made to the outlets. The Owner cross examined Mr Lees about whether there is room for a nut to go on the threads of the outlets. His response was that it will be tight, but there will be sufficient room.

653 On the 6th hearing day, 17 June 2014, the Owner volunteered an admission that the plumbing certificate does not contain an exception regarding the hot and cold water outlets.

654 I am not satisfied that the position of the outlets is inconsistent with being able to connect them, and even if it were, given that the decking is a later variation, the cost of moving the outlets would also be a variation.

655 There is no allowance for the item.

24d Credit for aggregate - \$1,987.70

656 This item was withdrawn by the Owner during the hearing.

24e Timber lining boards over-payment claim - \$750

657 This items was considered under variations.

24f Timber infill above windows and doors - \$1,562.75

658 Mr McKee correctly stated that Techno Draw sheet 10 shows block work above the door on the east elevation of the ground floor The Builder installed a timber infill instead of blockwork. The scope of works recommended by Mr Wilkinson is to remove the timber infill and replace with block work.

659 Mr Lees said that the Benex system utilises bond beams above door and window openings and the beams must align with the block courses therefore if the window head does not align with the block courses an infill will be required. He said the blocks are not like bricks where the gauge can be altered slightly. Mr Lees recommended that no work be done.

660 Mr Farrelly stated¹¹⁴ that this issue was discussed with Mr Cherubin, the engineer. Mr Farrelly said the architectural plans show blockwork but the

¹¹³ Mr Farrelly's witness statement paragraph 168

engineering plans show a timber lintel and blocks in this position were impossible.

661 The Owner rhetorically, but correctly, asks¹¹⁵:

If this was discussed with the engineer and changes were to be made, why as the owner wasn't I consulted or notified as per the building contract [clause] 13.1?

662 I find that the Builder has breached the contract and that the breach is obvious. In the absence of evidence from Mr Lees about the cost to rectify, I allow \$1,562.75 for this item.

25 External toilet

25a No space behind the toilet door - \$9,332.28

663 The discussion of this item also includes discussion of item 25c and e.

664 Mr McKee stated that the door to the external toilet is too close to the rear wall of the toilet. He said that based on sheet 18 by Techno Draw the hinge side of the door should be approximately 300 mm from the south-east corner of the toilet.

665 Mr Lees correctly stated that the detailed drawings do not show dimensions and there is no practical reason why the door needs to be moved. Further, I accept Mr Lees evidence that if the door were moved north, there is a risk that it would hit the toilet pan.

666 The specifications identify this toilet as “external WC” at 13.1.1, but the Owner has said that the last two items under 18.1.1 of the specifications refers to the external toilet. They are:

Powder Room Wall Basin	Porcher studio 350 w/basin white
Powder Room taps	Base basin mixer 40mm

667 The notation in the Owner’s handwriting on the 2nd Specs is “For external toilet not deducted”. At TB434, the Builder’s spreadsheet of contract changes, is the item:

Wall basin to external WC (\$500 labour only)

This item does not carry through to an addition to or a deduction from the contract.

668 Item 37 of Schedule A to the FAPoC is “Purported Variations to the Building Contract”. The Owner’s claim for this item is \$1,528.57 for wall basin, mixer, towel ring, splashback tiling and mirror not installed. Under “Comments” is “PC item states \$600 allowed for [those items plus] toilet suite”.

¹¹⁴ Mr Farrelly’s witness statement paragraph 171

¹¹⁵ Owner’s witness statement in reply paragraph 84

669 Mr Farrelly stated that the Owner's claim for further space behind the toilet door is not in accordance with the contract drawings because they do not show a basin in that position.

670 Under cross examination the Owner admitted that the parties had agreed to delete the hand basin and associated items, but said she still needed the room because "I was going to put it in later". She also acknowledged that she did not complain in writing about the lack of space in this area until Mr McKee's report of 5 June 2013.

671 I am not satisfied that the position of the door is defective. There is no allowance for this item.

25b Lift off hinge door not installed

672 Mr McKee and Mr Lees agree that the contract called for lift off hinges on this door but that ordinary hinges have been installed. They also agreed that given the position of the door now, lift off hinges are not necessary.

673 In the absence of evidence about the difference in value between the two types of hinges, I allow \$10 for this item.

25c and e Cost of wall basin, mixer and towel ring not deducted - \$1,562.75

674 Mr Farrelly repeated that the basin was not on the plans. He said that the Owner had considered installing a basin at one stage but decided against it due to the cost. He referred to document TB434, which includes "wall basin to external WC. (\$500 labour only)" but does not extend to an addition to contract or a saving to contract. Mr Farrelly said that if the basin were to be installed, it and the mixer and towel rail were items to be paid for by the Owner.

675 I am satisfied that there is inconsistency between the plans and the specifications. As provided under clause 3.2 of the building contract, where there is an inconsistency that is not resolved by agreement of the parties, the specifications take precedence over the plans.

676 I find that these items were deleted by agreement, but that they were allowed for in the specifications. The only evidence of their value is Mr Wilkinson's costing of \$1,562.75, which I allow.

25e Other specified items not deducted

677 This item is taken into account in 25d.

27 First floor balcony

678 The biggest issue concerning the balcony is that it was not built in accordance with the building contract. This issue is discussed below under 27i.

27a Glass sliding doors – brush seals cut too short - \$279.30

679 Having seen the seals at the site inspection I accept Mr McKee's evidence that the brush seals have been cut too short. I do not accept Mr Lees'

evidence that they have merely slipped. I also accept Mr McKee's evidence that it might be necessary to take the doors off to insert the seals.

680 I allow Mr Wilkinson's costing of \$279.30 for this item.

27d Eaves lining deflecting and loose - \$2,174.28

681 Mr McKee reported that the eaves sheets move and flex without a great deal of force, indicating that the supporting frame is questionable. Having seen the eaves sheets at the site inspection and tried them by hand, I prefer Mr Lees' evidence that the degree of flex was not great, and that the sheet did not lift off the top of the fascia cladding as would have occurred if inadequately fixed. I also do not accept Mr McKee's evidence that the eave sheets have sagged.

682 Mr Lees described two ways that the sheets might have been fixed. Mr Farrelly confirmed it was the first – the fascia has a groove in it that holds the sheet. Exhibit R15 tendered by Mr Lees on behalf of the Builder illustrates a section of the fascia manufactured by Colorbond.

683 I am not satisfied that this item is defective. There is no allowance for it.

27e Window frames not flush with cladding – greater margin at top - \$3,754.92

684 Mr McKee and Mr Lees agree that work is necessary but disagree about its scope and costing. Mr McKee reported that the windows vary from flush with the Shadow Clad walls to 10mm gaps. I confirm that this is what I saw and noted one difference from flush to 15mm, being flush at the base and proud of the wall by 15mm at the top of the window.

685 Mr McKee recommended that the shadow clad be removed and the walls and windows repacked and straightened. New shadow clad would then be supplied, installed and painted. The cost assessed by Mr Wilkinson was \$3,754.92.

686 Mr Lees' opinion expressed in the Scott Schedule was that the cost of rectification would be \$2,776.15. He revised this down to \$833.44 in accordance with exhibit R4, his "Cost Estimate Adjustment" dated 12 June 2014. He described the work as "Adjust the position of the windows and install extra aluminium trims". He allowed 4 hours work by a carpenter and 1 by labourer, plus make good work by a painter.

687 In his report (TB146) Mr McKee said:

Variations of this type are normally associated with either walls not being plumb and true, windows not being plumb and true, variations in width of framing timbers et cetera.

688 Surprisingly, Mr McKee did not give evidence that he had a spirit level to determine whether it was the windows, the walls or both that were not plumb.

689 I prefer Mr Lees' evidence – I allow \$833.44 for this item.

27f Poor flashing to tops of windows and door frames - \$174.76

690 Mr Lees said this was allowed for under 27e. Mr McKee allowed a separate item, but described the defect identified by the Owner as:

Join in the flashing has opened very slightly ... the flashing join has a slightly poor appearance.

691 I am not satisfied that work other than that allowed for under 27e is necessary. There is no allowance for this item.

27g Inconsistent margins between window and door frames and wall lining

692 See item 27e.

27h Rusting gate hinges and metal work - \$7,056.86

693 Mr McKee identified rust to the welds of hinges, mitre joints and where steel has been worked and sprayed with a metal coating. Mr Lees also recognised that there are a number of welded areas that should have been treated with galvanising paint. His recommendation was to repaint the hinges and the welded areas with cold galvanizing paint at the cost of \$352.27.

694 At the site inspection it was apparent that the rust was even more extensive than described by Mr McKee. Mr McKee recommended that once made, the frames should have been hot dipped galvanised. He said the work necessary is to remove the existing gate and screens and supply and install new hot dipped galvanised gate and screen frames and hinges and new silver top ash cladding. The work was costed by Mr Wilkinson at \$7,056.86.

695 I prefer Mr McKee's evidence to Mr Lees. I allow \$7,056.86 for this item.

27i Balustrade loose - \$22,387.36

696 The title of this item does not indicate the extent of the Owner's claim. It is that the balcony has not been built in accordance with the design that forms part of the contract. There is no question – it does not. The structure supporting the balcony differs from that designed, although the appearance of the balcony is in accordance with the design. The design called for two structural systems – a roof below and a separate, although inter-related, deck above. The Builder constructed an integrated system of roof and deck.

697 As discussed below, a change to the design had to be made because the space available to construct the balcony structure was insufficient and the architectural and engineering designs of the balcony were inconsistent. If the Builder had been acting in strict accordance with building contract, the Owner would have been notified in writing as soon as the discrepancy was discovered, a variation would have been raised by the Builder, signed by the Owner (or a change to the variation negotiated) and the work would then have been done without the Builder or Owner enduring the cost and expense caused by this aspect of the dispute. Nevertheless, under

cross-examination by the Owner, the Builder said that the Owner did know about the design inadequacies and that he had raised them with her early in the construction phase.

698 I note the change to the engineering design was made without obtaining a revised design from Mr Cherubin, the design engineer, or to any other engineer.

699 The issue is whether the balcony as constructed is as good or better than that designed, and even if it is, whether the Owner is entitled to the cost of demolishing and rebuilding the balcony.

Mr McKee

700 Mr McKee is a building consultant, but not an engineer. Under cross-examination he said that he could neither agree nor disagree with Mr Yttrup's evidence, the expert engineer who gave evidence for the Builder, because engineering is not his area of expertise. He also said that he recommended neither for nor against demolishing the balcony – the suggested scope of works was by Mr Wilkinson. The costing of \$22,387.36 was also by Mr Wilkinson.

701 Mr McKee reported he was instructed that the Owner became aware of movement in the balustrade when someone lent on the rail and movement was visible over the length of the balustrade. He said that a glass balustrade with aluminium frame has been installed. It is fixed in parts to the screen on either end and the bottom of the intermediate posts are fixed through the top of the decking into flat 90 x 45 mm treated pine noggings located between the floor joists.

702 He referred to BCA¹¹⁶ part 3.9.2.3(d) which states that the balustrade must be designed to take loading forces in accordance with AS1170.1. He said that the fixing of the post is critical to achieving the required strength.

703 Mr McKee referred to section 2 on sheet 21 by Techno Draw and section 3 of sheet 7 of the engineering drawings. He noted that the beam which supports the balcony and which he identified from the Techno Draw section as 190x45 F17 HW beam (shown on the engineering drawing as “smart joist SJ40090”) has not been installed.

704 An email from Mr Farrelly to Middletons, the air-conditioning subcontractor, of 26 May 2011, indicates the product that was used. It says in part:

Attached are her plans and the draftsman has called up for 400 hyjoist which are not readily available. I want to change to 360 hyjoist ...

705 The “Owner's Expert's Comments” in this section of the Scott Schedule (TB319) include:

The builder has opted to construct the roof and decking using a single floor joist rafter system with tray roofing and capping between and over each joist, this is contradictory to the plans and deleted the F17

¹¹⁶ Building Code of Australia

hardwood beam that the balcony posts were to be fixed to. ... treated pine timber has been fixed to the top of the Colorbond capping, fitting over each joist to allow the fixing of the decking boards. When consulted, Colorbond advised that treated pine cannot be fixed to their material as premature corrosion will result. Fixing of timber is assumed to be mechanical (batten screws) and will possibly affect the weatherproofing of the flashing.

Mr Lees

- 706 Mr Lees is also a building consultant, not an engineer.
- 707 Mr Lees said that H3 Losp treated timber was used and a pad of silicon was inserted to isolate the timber from the roofing. Mr Farrelly confirmed¹¹⁷ that silicon pads were used in this manner.
- 708 Mr McKee also said during concurrent evidence that the Colorbond spouting is retaining water and that it sits down on the flashing, when Techno Draw sheet 21 required it to be proud of the wall, not on top of the roof to the external WC.
- 709 I asked Mr McKee during concurrent evidence whether there is a more economical means of rectifying the balcony than demolition and rebuilding. He responded that if an engineer has designed it and issued a Certificate 1507¹¹⁸, then it should be built as designed.
- 710 Mr Lees stated in his report that the roofing system that has been installed is less likely to become blocked than the tray deck system that has been designed. He said that the issue in question is whether the handrail fixing is adequate. He said the balustrade system used is a proprietary type system – although the noggins between the joists are somewhat unsightly and should be covered. He said the handrail and deck construction has been inspected by the building surveyor and has been approved. He added that, as further assurance, the design engineer should be engaged to inspect and certify the deck construction. Mr Lees did not attribute any amount to this item.
- 711 During concurrent evidence Mr Lees relied on the report of Mr Peter Yttrup, engineer, to say that the design of the balcony as constructed is good.
- 712 The Owner said in her written submissions:
- At no point in time did Mr Farrelly come to me with variations in reduction of floor joists or methods of construction of the rear balcony.
- Whether Mr Farrelly or Mr Leddin's opinion is that they "think" it's better or not, under the contract Mr Farrelly had a requirement to build in accordance with the approved plans and building permit.

¹¹⁷ Mr Farrelly's witness statement paragraph 178

¹¹⁸ S238(1)(b) of the *Building Act* 1993 provides that the relevant building surveyor may rely on the certificate of another registered building practitioner which is in the form prescribed by Building Regulation 1507. Reg. 1506 provides that one of the classes is engineers.

I paid for engineers' plans as part of my building plans. The Registered Building Surveyor, Gerard Leddin accepted and relied upon the Certificate 1507 and engineers design to obtain the building permit. The rear balcony hasn't been constructed in accordance with the building permit.

Mr Cherubin

713 As mentioned above, Mr Cherubin was the design engineer for the project.

714 It is unsurprising that the Owner was alarmed that the balcony as construct differs from the balcony as designed. She said that in late April 2014 she had Mr Cherubin inspect the balcony and his e-mail of 1 May 2014 includes:

Note that a preliminary computational check of the balustrade posts to the deck frame was found to be inadequate. I would advise that a crowd not be permitted on the deck until a comprehensive computational check has been conducted and any required rectification is undertaken.

715 Mr Cherubin sent an email to the Owner dated 27 May 2014¹¹⁹. The relevant parts are:

I have read the PJ Yttrup report and have the following comments in general.

General comments

The architectural drawings are unclear as to the extent of the roof under the deck. My office had interpreted the drawings so that the roofing under the deck did not extend full width of the building.... My drawing shows that we nominated the roof over the Bed 3 only, not extending to the area indicated as paving outside the living room.... David Farrelly did ask me if he could substitute the deck and separate rafters for a single system, to which I responded that his proposed system would be structurally adequate. No mention was made as to whether your approval of the proposed change would be obtained, nor was any mention made of the extent of the roofing.

...

PJ Yttrup report;

Original design;

As stated in the report, there is a discrepancy between the overall depth on the designer's plans and the total depth when adding each component.

...

Comments on method used;

The method used is stiffer than the one my office proposed, but that does not mean the proposed method was unacceptable. If a frame

¹¹⁹ Exhibit A15

member is designed and fulfils all the required design criteria then enlarging the member will make it stiffer, but this only serves to fulfil the criteria by a greater amount. Both are acceptable based on the design criteria.

716 There was another e-mail from Mr Cherubin to the Owner dated 12 June 2014. It was:

Hi Fay

Clarification of the rear balustrade connection to the deck frame.

As discussed, I did not undertake a design for the installation of the balustrade to the rear deck at [the home]. I did, however, undertake a preliminary computational check of the connection and if a 10 mm coach screw 100 long was used in the connection fails the computational requirements as the screw is likely to pull out under full ultimate loading based on AS1170.1

If the deck and roof frame had not been constructed in a manner shown on the architectural and engineering drawings and the balustrade connected in the same manner, then the connection would also be likely to fail as the failure mechanism is related to the hold down screw into the provided block.

717 The next day Mr Cherubin sent an email to Glen Turnbull of Surfcoast Aluminium, the provider and installer of the balustrade. It was:

Hi Glen,

As per our discussion (13 June 2014)

I have only undertaken a design check on the connection of the balustrade post bracket to the deck frame members. My opinions are expressed in my report to [the Owner].

This was not a full comprehensive design check as I stopped the checking process upon finding a compliance issue.

The issue noted in my report was the connection of the post bracket using assumed 10 mm diameter coach screws to the timber fixing block provided between the joists.

Although you have confirmed that a single 12 mm diameter coach screw was used for each post, these are still non-compliant for connection into the side grain of the timber.

A suitable method to rectify this particular issue would be replacement of the coach screw with a 10 mm diameter or greater bolt to the existing timber block and a new metal bracket.

The metal bracket would be needed to reinforce the existing timber block. The proposed post bolt would need to pass through the metal bracket. This added bracket would need to be directly bolted to the deck joists on either side of the post with 2-M10 coach bolts to each joist in a manner compliant with AS1720.1 – Timber Structures.

I am able to provide details of the new bracket arrangement on request.

Note that as you have indicated you have obtained engineering documentation providing the balustrade bracket and bracket to post integrity, I make no comment on this part of the balustrade.

- 718 Mr Ryan said on behalf of the Builder that if the other witnesses concerning the balcony did not have to attend, it was willing to concede \$396 for the coach bolt and metal bracket.
- 719 Mr Cherubin also wrote to the Builder on 23 June 2014 and 29 September 2014. Those letters were tendered at the hearing by the Builder and are exhibits R20 and R21 respectively. In the first Mr Cherubin confirmed that Hyjoist HY36090 at 450 centres would be suitable for a maximum span of 5000mm. In the second he said there was a typographical error in the first letter and that HY36090 should have read HJ360 63 at 450 centres, capable of spanning up to 6100mm, therefore in excess of the required distance of 5110mm.

Mr Yttrup

- 720 As mentioned above, Mr Yttrup is an engineer who provided expert evidence for the Builder. His report is dated 20 May 2014.
- 721 Mr Yttrup said that the design details for the balcony (referred to by him as the “open deck”) by Techno Draw and by Andrew Cherubin & Associates are different. He said Techno Draw gave the total depth of the deck construction as 420mm to fit with the depth of the floor construction within the residence, but the items included in the Techno Draw design total 440mm. He continued, that the total depth required by the Cherubin design was 490mm.
- 722 Mr Yttrup criticised the selection of F17 hardwood by Techno Draw as:
... likely to be an Ash species of eucalyptus and is not durable and is not readily treatable. The treated pine elements proposed by Cherubin are suitable for use in an external deck situation.
- 723 Mr Yttrup emphasised that the role of a design engineer is to nominate the size of structural elements and then the designer should correct the documents to take those sizes into account.
- 724 Of the balcony as constructed, Mr Yttrup said:
The 290 x 45 treated pine joists are structurally adequate in fact significantly stronger and stiffer than those specified by (a) the designer and (b) the structural engineer.
The treated pine used by the builder, and proposed by the engineer, are suitable for external use. The detail used by the builder protects the joist from the elements by flashing over and at the sides with the roof trays; a good detail for durability. That is, the builder’s design and detailing are superior to those provided by the designer.
[Underlining added]
- 725 In evidence in chief on 2 October 2014 Mr Yttrup said that the balcony as built is 6 times stronger and 16 times stiffer than the balcony as designed. He said durability is best ensured by preventing the structure from getting

wet and this has been achieved by flashing between the joists, in the form of pans, and over them. He described the method adopted as “unusual and very durable”. In answer to my question about the possibility of water entering via fixings into the joists, he answered that the tops of the joists are flashed with malthoid, which is bituminous, and seals around screws and nails.

- 726 Mr Yttrup agreed that the Builder had to produce a solution to inconsistent designs that he described as “an adaptation to circumstances that works”.
- 727 The Owner cross-examined Mr Yttrup on whether a structure can be changed without amending the building permit, and he answered that it can. Mr Yttrup said that Mr Cherubin’s design was strong enough, but would not fit into the space allowed of 420mm.
- 728 Under cross-examination Mr Yttrup said he derived his information about the balcony from the plans and also from inspection. He confirmed that the design showed the Hyjoist size as 400. The Owner asked him what the Builder should do if the Hyjoist size is reduced to 360. Mr Yttrup said he would need to check the adequacy, but there are a variety of joists. Mr Yttrup said he was not aware that the Builder had made that substitution. When asked if it makes a difference to the balcony design, Mr Yttrup said that it would make a difference to the depth available for the structure.
- 729 After being told about the Hyjoist size Mr Yttrup said that another Certificate 1507 could be issued for the structure as constructed and that this is not uncommon. He insisted that the structural system had been enhanced.
- 730 In re-examination Mr Ryan asked Mr Yttrup if the change from Hyjoist 400 to Hyjoist 360 changes his findings. Mr Yttrup replied:
- My commission was to look at the new deck [as built]. It ticks all the boxes.
- 731 I allowed the Owner to ask further questions in cross examination. Mr Yttrup confirmed that he was only asked to consider the balcony structure, not the balustrade.
- 732 I remark that the Builder’s failure to advise Mr Yttrup of the inaccuracy of his assumption regarding the Hyjoist size has not made the evidence easier to understand.

Mr Leddin

- 733 Mr Leddin, the Relevant Building Surveyor, gave evidence on the 15th day of the hearing. He was asked in examination in chief whether he was told of the change to the balcony. He replied:
- Yes, by [Mr Farrelly]. It was in my office. He wanted to use an alternative construction method. We looked through the span tables. I was satisfied it was better than the original design. I gave it approval.

- 734 Mr Leddin said that he also knew and approved that the Builder had changed the depth of the floor joists through the rest of the home from 400mm to 360mm.
- 735 Under cross-examination Mr Leddin agreed that Mr Cherubin's 1507 certificate forms part of the building permit for the home. He said that he did not need to get a change to the 1507 certificate because the altered design was "superior" to the original design. I remark that if Mr Leddin was not qualified to assess the engineering part of the design without a 1507 certificate, it is surprising that he could be qualified to assess the amended design as superior to the original.
- 736 Mr Leddin did not satisfactorily answer the Owner's question about how he could have issued the Occupancy Permit on 8 December 2011 when the plumbing compliance certificate was dated four days later.
- 737 At the end of his evidence Mr Leddin said he was willing to write to the local council to say that the balcony as constructed is not identical to the design for which the building permit was granted.

Other evidence and submissions

- 738 The Owner quoted s16 of the *Building Act* 1993 ("Building Act") which prohibits work without a building permit, and requires work to be carried out in accordance with the Building Act, the building regulations and the permit. She also quoted s30 of the Building Act, requiring the relevant building surveyor to give copies of permits and various other documents to the relevant council within seven days of their issue, and to s3, which requires the council to keep a register of such documents.
- 739 The Owner asked Mr Farrelly in cross examination why he had not asked Mr Cherubin to amend his design. Mr Farrelly said that Mr Cherubin did not tell Mr Farrelly that he needed to do so, and neither did Mr Leddin, the building surveyor.
- 740 Mr Leddin produced a document dated 1 October 2014 that stated he was unable to attend the Tribunal due to personal reasons. He gave a number of reasons why the design as built complies with deemed to satisfy provisions of the BCA and concluded:

As the Building Surveyor I used my discretion and didn't request an amended plan as the timber framing installed satisfied the requirements of AS1684. Please refer to Andrew Cherubin and Associates structural design sheet five of eight – First Floor Frame Layout Plan which states "ALL MEMBERS TO BE INSTALLED TO MANUFACTURERS DETAILS AND AS1684 AS APPROPRIATE."

I understand that further verification of the compliance of the above structure has been obtained and I would be happy to receive copies for filing purposes.

- 741 When asked about Mr Leddin's attitude to the changes to the design, Mr Yttrup said that he is not a registered building surveyor but that he deals

with them on a weekly basis and it is not unusual for an RBS to approve a change that makes a structure stronger.

- 742 In her written closing submissions, handed up on 24 November 2014, the Owner submitted that Mr Leddin did not have the authority to override a Certificate 1507. She also said:

Incidentally, Senior Member [Lothian]'s request for a letter to be provided by RBS Mr Gerard Leddin to Surf Coast Shire and myself hadn't been heeded. As of last Friday [21 November 2014] Surf Coast Shire hadn't received any letter or documentation from Gerard Leddin nor have I.

- 743 I suggested that the Builder arrange for Mr Leddin to write such a letter at the end of the hearing on 4 October 2014. At the hearing of the final submissions Mr Ryan said that this had been overlooked by Mr Leddin because he was immediately occupied with a serious matter in his family following the hearing that day. Mr Ryan arranged for Mr Leddin to write to the Surf Coast Shire and a copy of the letter was sent to the Tribunal and apparently to the Owner.

- 744 The Owner expressed general concern about Mr Leddin's accuracy and competence. She gave two examples. The first was that Mr Leddin only stamped one page of the plans, not all pages, which she described as:

... Either him lying under oath or he clearly has no idea of his obligations under the building regulations.

The second concerned the preconditions for the occupancy permit. She said:

In relation to certificate of occupancy, the plumber's compliance certificate is dated 12/12/13 yet Certificate of Occupancy is dated 8/12/13 and we moved in on 9/12/13.

- 745 On the 14th day of the hearing – 2 October 2014 – Mr Ryan said on behalf of the Builder that Mr Cherubin was preparing a revised 1507 Certificate and that Mr Leddin was preparing a revised building permit.

- 746 On 24 November 2011, the day of the final submissions, Mr Ryan said that Mr Leddin had omitted to write to the council but he would do it that day.

- 747 The letter from Mr Leddin was sent to the Tribunal by Mr Ryan on 24 November 2014. It was attached to a message from Mr Leddin to Mr Ryan saying that Mr Leddin hand-delivered letter to the Surf Coast Shire. Surprisingly, in light of Mr Ryan's statement that Mr Leddin would write to Surf Coast Shire, the letter was dated three days earlier; 21 November 2014.

- 748 Excluding the formal parts, Mr Leddin's letter to Surf Coast Shire is as follows:

Building Permit: BS-L33542/2011 3463/0

Please be advised that the structural frame of the rear balcony at the above address was built differently to that on the approved plans.

Although changes were made the structure still complies with the Building Code of Australia and relevant standards.

Please contact the undersigned if you have any questions relating to this matter.

749 Mr Leddin's covering note to Mr Ryan included:

I was able to confirm in person with Graeme Giddings (Municipal Building Surveyor) and Reg Wallace (Council Building Inspector) that this document will be archived along with previous documents submitted relating to the property in question. Both Graeme and Reg were happy to cooperate and ensured this would happen.

750 I remark that Mr Leddin's letter to the Surf Coast Shire gives no details about the way the frame has changed and is not supported by a 1507 certificate.

Conclusion regarding the balcony

751 Although I am inclined to accept Mr Yttrup's evidence that that balcony as constructed is stronger than the balcony as designed, the Builder's failure to inform him of the change of beam size and Mr Yttrup's understandable failure to clearly describe the impact of that change raise serious concerns about the adequacy of the design as built. Further, I am satisfied that the Owner did not get what she bargained for and was not consulted when it became obvious that changes had to be made. The absence of a revised 1507 certificate, despite Mr Ryan's assurance that Mr Cherubin would provide one, leads me to decide in favour of the Owner.

752 I allow \$22,387.36 for this item, which includes the cost of rectification of the balustrade.

27k Insufficient width

753 Mr McKee reported that the width of the balcony was designed as 2835mm but measured 2760mm. It was measured in my presence on site at 2800. The disparity is minimal.

754 There is no allowance for this item, but in any event it is unnecessary to consider this item further as any disparity can be rectified under the previous item.

28b External stairs

28b Stain has dripped/other need to demolish - \$6,947.92

755 Mr McKee reported that there are runs down the backs of the stairs from staining the tops of the treads that can be seen from the back yard. He also said that the stairs will need to be demolished to rectify the balcony issues. Mr McKee did not give evidence as to why such demolition would be necessary and Mr Wilkinson was not present to support the schedule of works he proposed for this item. Mr Wilkinson estimated the cost of demolition and reconstruction at \$6,947.92.

- 756 Mr Lees acknowledged that the stain had run and recommended staining the backs of the stairs to conceal it, at a cost of \$449.70.
- 757 Mr Farrelly stated ¹²⁰ that staining these stairs was not within the scope of the Builder's work. He said that when the balcony decking was stained he told the Owner that he would also arrange for a free coat to the top of the stairs, then leave the stain for her to do the rest herself or have someone else do it.
- 758 Item 311 is also relevant because it identifies that some of the gaps, when measured vertically, are greater than 125mm. Mr Lees recommended installing a timber trim to the underside of the stair treads to reduce the gap, at a cost of \$719.52.
- 759 Mr McKee agreed that if there was no other reason to demolish the stairs, \$449.70 plus \$719.52 would suffice.
- 760 I allow \$1,169.22 for this item and item 311.

29 Garage internal

29b, c and d Entry door to house - gap between top of door and frame, gap at bottom and latch keeper roughly fitted - \$252.70

- 761 The other side of this door was mentioned under item 7a, but is considered here. Mr McKee identified a gap of 5-6mm at the top of the door and a large gap at the bottom, resulting in a draft. Mr McKee and Mr Lees agreed that the striker plate requires attention. Mr Wilkinson estimated \$252.70 to rectify these items.
- 762 Mr Lees estimated \$169.71 to rectify the door. At the site inspection I noted that there is a gap of 10mm to the left of the door and 8mm to the right.
- 763 I prefer Mr McKee's evidence. I allow \$252.70 for these items.

29e Rebates for front and rear roller doors too large - \$4,861.15

- 764 The experts have included item 31e with this item.
- 765 There are two exterior doors to this garage. They are the full-sized panel lift door to allow cars to enter and a smaller roller door at the rear of the garage. In both cases the rebate in the concrete to enable a smooth transition from outside to inside is longer than it needs to be and extends under the polystyrene cladding.
- 766 Mr McKee's report states in part:
- Ingress of water along the rebates may result in dampness issues that could affect the dwelling and timber framing if it is standard pine, not flashed, et cetera and the plaster and skirtings. I have observed that the foam rendered cladding to the front of the garage does not lap the garage slab as nominated by Ezyclad specifications.

¹²⁰ Mr Farrelly's witness statement paragraph 179

- 767 Mr Wilkinson recommended that the Masterwall cladding to the garage be removed, the external floor and walls of the garage be tanked or plastic flashings be supplied to the base of the cladding then new Masterwall cladding be supplied and installed.
- 768 At the time of preparation of the Scott Schedule, Mr Lees said that he had not inspected this item. He noted that the garage is a class 10 part of the building and is not afforded the same protection as is required for habitable areas and that the proposed Scope of Works does not make clear the extent that cladding is to be removed and replaced and where the proposed tanking is to be installed. He also said that it appears the system as installed has been performing as there is no sign of water damage.
- 769 At item 31e Mr Lees noted that the gap between the concrete paving and the bottom of the polystyrene cladding is approximately 20 mm. He said that it can be seen that a PVC protection angle has been installed at the base of the panel but that the line is somewhat uneven and the render requires trimming. His scope of works was to make good the render and make sure it is above the concrete paving. His estimate was \$2,218.52.
- 770 In answer to a question in examination in chief, Mr McKee said that there appears to be some efflorescence (build up of salt crystals) in those areas, which could be caused by water gathering there. Mr Lees said in examination in chief that there appears to be no damage to plaster or paint in the garage.
- 771 I prefer Mr Lees' evidence. No damage to the cladding was visible at the site inspection. I accept his proposed scope of works. I allow \$2,218.52 for this item.

29h Rear storage area not in accordance with the plans - \$1,238.45

- 772 Techno Draw sheet 4 shows a sliding door to the storage area at the rear (east) of the garage, parallel to the roller and the panel lift door. At TB435, the Builder's spreadsheet of contract changes, is "Garage sliding door deletion" with a credit of \$100. Item 38 of Schedule A to the FAPoC: "Purported variations" acknowledges that there was agreement to delete the door, but queries the amount - \$210 stated on the Builder's contract changes of 29 August 2011 and \$0 on the contract changes of 21 December 2011.
- 773 Under cross-examination Mr McKee agreed that there was inconsistency between the Techno Draw and engineering plans, and that steel column C1 on drawing S5 would have prevented the sliding door from opening.
- 774 There is also a dispute about the extent of change agreed. The Owner said under cross-examination that she agreed to the door being omitted, but not to the cavity in the wall, so that she could install the door later if she wished to. She also said a credit of \$210 was agreed, which evidence I accept. I am not satisfied that the deletion was of the door alone but not of the cavity within the wall. I am not satisfied that the Builder built the wall shorter than the parties agreed.

775 I allow \$210 for this item.

30 Garage external and driveway

30b Cracks and rough concrete at entry to garage - \$332.50

776 In accordance with the Owner's evidence, and as I observed at the site inspection, there are cracks to the edge of the garage slab, where it meets the paving. Mr Wilkinson had estimated \$332.50. In concurrent evidence Mr Lees described these cracks as minor and said the cost to repair would be less than \$100.

777 I accept Mr Lees' evidence about the cost to repair. I allow \$100 for this item.

30e Dark grey coloured driveway fading in patches - \$7,207.20

778 The driveway is sound and functional. It is grey with exposed aggregate and as I saw at the site inspection there is a little variation in colour. The greatest colour discrepancy is in the area where the Owner admitted she dropped a bag of cement. Her response under cross-examination was: "It was his [the Builder's] bag of cement."

779 Mr Wilkinson's scope of works is to remove and replace the driveway.

780 Mr Farrelly stated¹²¹ that both he and the landscaper, Stephen Powell, advised the Owner to use a protective seal on the driveway to minimise the effects of wear and tear. Mr Farrelly said the Owner did not wish to do that.

781 The Owner admitted under cross-examination that she did not order the driveway to be sealed because: "I did not want a shine on it".

782 I am not satisfied that the colour of the driveway is defective, apart from the area where the Owner dropped a bag of cement, and if it were defective, the fading would have been less likely to occur if the Owner had followed Mr Farrelly's advice and had the driveway sealed.

783 There is no allowance for this item.

31 Dwelling external

31a and g East end of north wall – flashing missing -\$5,567.38

784 Although these items are headed "flashing missing", Mr McKee's description of the alleged defect is more extensive. The north elevation Techno Draw sheet 9 shows Colorbond horizontal cladding extending east along the first floor north elevation so that it terminates at the balcony balustrade. As can be seen at in the photographs on TB163, which is page 111 of Mr McKee's report, the Colorbond has been replaced by a wooden slatted screen.

¹²¹ Mr Farrelly's witness statement paragraph 184

785 Mr Farrelly stated¹²² this was discussed with the Owner and was done to match the other side of the building. Under cross-examination the Owner denied this conversation.

786 The Owner admitted under cross-examination that she had agreed to the substitution, but added: "But it's not in accordance with the approved plans". The Owner failed to provide evidence that either the building permit or the Quay Committee needed to approve this change.

787 I find that there is flashing missing and I accept Mr Lees' evidence that the cost to rectify this \$450, which includes \$350 for the hire of a cherry-picker.

788 I allow \$450 for this item.

31c Window sills - \$2,447.20

789 Mr McKee identified a lack of fall to the Benex window sills, and also that a "sill lintel" has not been installed. Mr Wilkinson's scope of works is to remove the existing capping blocks under the lintels and supply and install the Benex window sill lintels, re-bag and repaint the sills to match the walls.

790 Mr Lees said that there is no evidence the windows are leaking and therefore they are fit for purpose. Nevertheless, on-site it was obvious that there is no fall on the sills. Mr Lees also said that if the work is necessary the amount estimated by Mr Wilkinson of \$2,447.20 is reasonable.

791 I allow \$2,447.20 for this item.

31e Render bottom of polystyrene cladding

792 This item has been included in item 29e.

31f Side gate drags on concrete - \$1,290.10

793 The experts agree that the site gate drags on the concrete that was installed by someone other than the Builder during landscaping. Mr McKee also noted that the gate hinges have become bent. Mr Wilkinson's scope of works is to remove the existing gate, steel hinges and post and supply and install new steel hinges and post.

794 Mr Lees' scope of works is to install a roller or wheel at the base of the gate to support the gate and stop the gatepost from deflecting.

795 Mr Farrelly stated¹²³ he advised the Owner that the roller would be installed on the gate as soon as she finished the landscaping, but the landscaping was delayed.

796 The Owner stated¹²⁴ that Mr Farrelly never mentioned a roller would be placed on the gate and there is no documentation to substantiate this. Under cross-examination she admitted that this was mentioned during the

¹²² Mr Farrelly's witness statement paragraph 380

¹²³ Mr Farrelly's witness statement paragraph 188

¹²⁴ Owner's witness statement in reply paragraph 88

audio recording, but added "it was not discussed that the gate would be pulled off its hinges". I accept her evidence on this point and find that the Builder should not have left the gate and post vulnerable to damage.

797 I allow \$1,290.10 this item.

31h Colourbond - fixings missing from on north side

798 The experts agree that there are a number of screws or nails missing from the Colorbond on the north side of the home. Mr Wilkinson's scope of works included this in item 31a, but as the only allowance under that item has been for the flashing, this needs to be considered separately. Mr Lees had originally allowed \$412.23 for this item but revised his estimate down to \$168.64 on the basis that there were fewer holes requiring screws or nails than he had previously estimated.

799 Mr Farrelly stated¹²⁵:

Ms Lee has had people out there when she complained of a gas leak (there was no gas leak). Whoever investigated this seems to have forgotten to put the screws back.

800 The Owner stated¹²⁶ that she has an inspector investigate a gas smell but that he did not remove any screws from the Colorbond. I regard Mr Farrelly's explanation as speculative and accept that the screws must be put in place.

801 I allow \$168.64 for this item.

31i Colourbond – north side – overlap and rust marks

802 Mr Wilkinson included this within the scope of works for 31a. Mr McKee said that the sheets which overlap the blockwork gap a little either because of a slight misalignment in the frame or of the blocks. Mr Lees said that there are some minor gaps but it is still considered acceptable.

803 I prefer Mr Lees' evidence for this item. There is no allowance.

31j Exhaust covers lacking sealant - \$345.80

804 Mr McKee said that the hole cut in the Colorbond for the exhaust cover is larger than the cover and there are gaps that have not been sealed. Mr Wilkinson's scope of works to was to supply and install flashing to the external exhaust covers.

805 Mr Lees said that the exhaust vents come with a rubber flange that fits around the wall penetration behind the vent cover and no further work is required. The rubber flange referred to by Mr Lees was not visible on site. During concurrent evidence Mr Lee suggested that this could be rectified by use of silicon.

806 I prefer Mr McKee's evidence. I allow \$345.80 for this item.

¹²⁵ Mr Farrelly's witness statement paragraph 189

¹²⁶ Owner's witness statement in reply paragraph 89

31k Colourbond – insufficient screws to west side - \$478.80

- 807 The experts agreed that there are some screws missing from the horizontal Colorbond cladding immediately below the roof on the west face. I accept Mr Lees evidence that there are approximately 5 screws missing, but note the difficulty of access because of the height. Mr Wilkinson's allowance of \$478.80; Mr Lees is \$112.43.
- 808 During concurrent evidence Mr McKee agreed that Mr Lees' estimate is adequate if the same cherry-picker used under item 31a is used for this item. I allow \$112.43 for this item.

31l External stairs/balustrades

- 809 This item is included in item 28b.

31m Gap around entry to external toilet

- 810 Mr McKee identified a gap between the side of the door and the timber edging. He did not make a separate allowance for it as he allowed for an under item 25a. Mr Lees said that this is an outside toilet and does not require weather seals.
- 811 I noticed that the site inspection that the door appears to be a little warped and I consider weather seals are required. Further, I accept Mr McKee's evidence that the external toilet is on the same slab as the rest of the home and that ingress of water into that area could cause damage to the home. Mr Lees said the installation of weather seals would cost "less than \$100".
- 812 I allow \$100.

31n Gap between back of door frame and floor tiles

- 813 The experts agree that there is a small gap between the floor tiles and the back of the threshold of external toilet. I accept Mr Lees' evidence that the cost of rectification is \$30.
- 814 I allow \$30 for this item.

31o Gaps in window seals - \$505.40

- 815 Mr McKee's evidence confirms what I saw at the site inspection. The rubber seals to the windows do not extend all the way to the window reveals, leaving gaps. Mr Lees' evidence was that the windows have been sealed with flexible sealant to the Benex blocks and that the rubber flanges should be accepted. I prefer Mr McKee's evidence.
- 816 I allow \$505.40 for this item.

31q Roof – north west corner - \$1,862

- 817 As can be seen on Techno Draw sheet 6, there is a small set back of the first floor, when compared to the ground floor, on the north side of the west face. The design calls for a low parapet around this roof, to the north and to the west. It has been constructed to the west, but not to the north.

Mr Wilkinson costed his scope of works to restore this area to as designed at \$1,862.

818 Mr Farrelly stated¹²⁷ that he discussed this area with the Owner. He said he advised that the proposed box gutter would be likely to clog with leaves and debris and that she agreed the roof be constructed as it was.

819 The Owner stated¹²⁸ that this was not discussed with her. Under cross-examination she said that she was not aware of the change until it was pointed out to her by a member of her family. I also note that there is no reference to this change at TB434-5, the Builder's "Contract Changes".

820 Regardless of whether the way the roof has been installed is superior to the contract documents, the Owner is entitled to get what she paid for. I prefer the Owner's evidence to the Builder's about subsequent conversations.

821 I allow \$1,862 for this item.

31r Roofing and wall cladding over garage - \$1,123.85

822 To the south, the first floor is stepped back from the southern perimeter of the garage wall. There is a short skillion roof along that side. The experts agree that there is some fixing and roof plumbing work required and that the cost to do so is \$1,123.85.

823 I allow \$1,123.85 for this item.

32 Electrical

32a Missing double power point

824 This item has been addressed at item 14j.

32b Missing single power points

825 This item has been addressed at items 9x and 17p.

32c One two-way switch missing

826 Mr McKee and Mr Lees agree that a two way switch is missing, but disagree about the cost of installation. Mr Wilkinson estimated the cost of installation at \$428.57; Mr Lees at \$200. Despite the absence of Mr Wilkinson, Mr McKee said that if the appropriate wiring had been installed at frame stage, \$200 would be sufficient, but if it had not the cost of rough in and fit off would be \$428.57.

827 Because of the uncertainty regarding rough in, I allow the average. I allow \$314.29 for this item.

¹²⁷ Mr Farrelly's witness statement paragraph 193

¹²⁸ Owner's witness statement in reply paragraph 90

33 Gates – Locks

33a Keyed child-proof pool locks not installed on front gates - \$452.20

- 828 The parties agree that child proof locks have not been installed to gates to restrict access to the back yard. As mentioned above under Accuracy of Evidence, Mr Farrelly volunteered that he had been mistaken about whether these locks were allowed for in the contract – they were – and had not been provided.
- 829 Mr Lees said he did not believe the locks would be quite as expensive as Mr Wilkinson had allowed, but did not have a firm view of their cost. I accept Mr Wilkinson’s evidence.
- 830 I allow \$452.20 for this item.

33b Gate near tank dropped

- 831 This item is dealt with under item 31f.

Miscellaneous

34a Living room TV cavity insufficiently deep - \$857.14

- 832 The Owner’s complaint is that the niche to accommodate the television on the south wall of the living room is only 90mm deep, which is insufficient to comfortably accommodate the cords.
- 833 Under cross examination the Owner agreed that the cabinetry that was to be installed on the west wall was deleted, and she received a credit of \$4,600 for that. She also said that if she had known how deep the niche would be, she would not have made the decision she did. Nevertheless, I am not satisfied that the niche is unworkmanlike, or that the Owner and Builder agreed precisely how deep it should be.
- 834 Mr McKee said in concurrent evidence that it “possibly could have been made deeper during construction”.
- 835 In concurrent evidence Mr Lees said that he did not believe the niche could be deeper because of the presence of the heater flue behind that location. I accept his evidence – there is no allowance for this item.

34e roof insulation - \$478.80

- 836 During concurrent evidence the experts agreed that the roof insulation should be spread more evenly and the cost to do so is \$350.
- 837 I allow \$350 for this item.

Summary regarding alleged defects and deviations

- 838 The Builder must allow the Owner:

1a	\$270.00
1b	\$66.50
1d	\$540.00

2	\$1,746.00
4d	\$9.74
4f	\$180.00
5	\$180.00
8	\$100.00
9a	\$46.16
9d	\$46.16
9q	\$226.10
9h	\$412.24
9l	\$100.00
9p	\$2,285.70
9q and 9r	\$35.00
9t and u	\$100.00
9w	\$1,780.87
9aa	\$1,120.07
10a	\$113.05
10b	\$46.16
11a	\$389.03
11b	\$79.80
11c	\$50.00
12a	\$49.88
12f	\$29.93
12m	\$200.00
12p	\$4.25
14a and 14b	\$240.00
14d	\$100.00
14e	\$29.93
14h	\$162.26
14i	\$177.63
15d	\$400.00
15g	\$299.80
16b	\$46.55
16c-f	\$2,034.71
17a	\$48.72
17c	\$1,947.20
17f	\$157.40
17g and 17h	\$317.36
17k	\$29.93
17l	\$146.30
17m	\$157.00
17n	\$186.20
17r	\$571.90
18b	\$252.70
18c	\$5.00
18e	\$46.16
18g	\$113.05
19a	\$252.70

21b	\$25.00
22a	\$59.85
22b-d	\$224.85
22i	\$29.93
22l	\$196.80
22q	\$1,000.00
22w	\$2,394.00
23a and 23b	\$1,175.22
23c	\$1,489.00
24f	\$1,562.75
25b	\$10.00
25c and e	\$1,562.75
27a	\$2790.30
27e	\$833.44
27h	\$7,056.86
27i	\$22,387.36
31l	\$1,169.22
29b, c and d	\$252.70
29e	\$2,218.52
29h	\$210.00
30b	\$100.00
31a and g	\$450.00
31c	\$2,447.20
31f	\$1,290.10
31h	\$168.64
31j	\$345.80
31m	\$100.00
31n	\$30.00
31o	\$505.40
31q	\$1,862.00
31r	\$1,123.85
32c	\$314.29
33a	\$452.20
34e	<u>\$350.00</u>
	<u>\$74,087.17</u>

BUILDER'S SET OFF

839 Mr Farrelly stated¹²⁹ that there were a number of items the Owner requested the Builder to provide, and which it did provide, in about June 2012. They were the keypad to the front door for \$1,092 paid by the Builder to the locksmith, a double towel rail and an invoice from Middleton's for a further heating zone in her home, the latter at a cost of \$200. He said it was also a balance outstanding on the final invoice of \$580, making a total of \$1,929.50.

¹²⁹ Mr Farrelly's witness statement, paragraph 49

840 The keypad and double towel rail were allowed to the Builder under variations and the heating zone disallowed. The final invoice is not relevant – it is part of the calculation of the reconciliation.

RECONCILIATION

841 On 4 October 2014, which was the last day upon which evidence was given, I asked both parties to prepare submissions that included "the sums" as follows:

Original contract sum	\$
Plus/minus nett variations	<u>\$...</u>
Contract sum as adjusted	<u>\$...</u>
Less defects and discrepancies	\$
Sum payable	<u>\$...</u>

842 The Owner's reconciliation, at page 7 of her written submissions, is:

Total invoices paid	\$444,503
Discrepancy/dispute amount	<u>\$3,889</u>
Total invoices paid & discrepancy	<u>\$448,392</u>

Contract price	\$433,000
Variations listed throughout the build totalled up by Mr Farrelly equalled	<u>\$13,433</u>
Contract sum as adjusted	<u>\$446,433</u>
Net discrepancy $\$448,392 - \$446,433 = \$1,959$	
Defects \$93,947	
Variations (not approved) \$82,155	
Net discrepancies \$1,959	
Sum payable by Respondent	\$178,061

843 The Builder's reconciliation, at page 45 of its written submission, is:

A. Contract Price (including variations ...)	\$446,422.50
B. Amount paid	\$444,453.00
C Amount payable to builder	\$1,9690.50
D Amount of defects/discrepancies admitted At cost to builder ...	\$10,850.95
Amount payable (D minus C)	\$8,991.45

Discrepancies

Variations

- 844 The Owner included “Variations listed throughout the build ...” at \$13,433. The Builder’s calculation of variations can be derived from A in the Builder’s reconciliation above, less the contract price of \$433,000 – a total of \$13,422.50.
- 845 My own calculations, as can be seen above under “Conclusion regarding variations” is that Builder is entitled to a nett sum for variations of \$13,876.30.

Amount paid

- 846 No evidence was given about the total paid. I note that the Owner claims \$444,503 was paid and the Builder claims \$444,453.00 was received; a difference of \$50. Rather than obtain any further evidence, at expense to the parties, I adopt the average as the amount paid, being -\$444,478.

Calculation

- 847 The Builder must pay the Owner \$71,688.87 as follows:

Contract sum	\$433,000.00
Plus nett variations	<u>\$13,876.30</u>
	\$446,876.30
Less paid	<u>\$444,478.00</u>
Owing to Builder	\$2,398.30
Less defects and deviations	<u>\$74,087.17</u>
	\$71,688.87

INTEREST AND COSTS

- 848 The parties have not yet addressed me about interest and costs. Interest and costs are reserved with liberty to apply. Any party claiming interest and/or costs must provide a brief outline of their claim with the application. Such application will be heard by me on a date to be fixed with an estimated duration of two hours.

SENIOR MEMBER M. LOTHIAN