

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

VCAT REFERENCE NO. D749/2008

**DOMESTIC BUILDING LIST**

**CATCHWORDS**

Domestic Building Dispute – evidence – credibility of witness – allegation of reliance upon builder not made out – variations – non-compliance with s.37 of the Domestic Building Contracts Act 1995

<b>APPLICANT</b>	Thi Diep Luu
<b>RESPONDENT</b>	Thanh Huu Thai
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member R. Walker
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	8-12 February 2010
<b>DATE OF ORDER</b>	12 May 2010
<b>CITATION</b>	Luu v Thai (Domestic Building) [2010] VCAT 646

**ORDER**

1. The respective claims set out in the Application and the Counterclaim are set off.
2. Order the Respondent to pay to the Applicant \$39,900.00.
3. Costs reserved.

**SENIOR MEMBER R. WALKER**

**APPEARANCES:**

For the Applicant	Mr A.P. Dickenson of Counsel
For the Respondent	Mr T. Cogley of Counsel

## REASONS

### Background

- 1 The Applicant (“the Owner”) is the owner of a piece of land in a shopping strip in Spotswood. The Respondent (“the Builder”) is a registered builder.
- 2 In about mid 2004 the Owner, having decided to build a licensed grocery and dwelling on the land, engaged a draftsman, Mr Caruana, to draw plans. A planning permit was obtained from Hobson’s Bay City Council on 17 December 2004. On 27 June 2005 the Owner obtained a building permit.
- 3 The plans provided for the building to be constructed of preformed concrete panels and for there to be a veranda cantilevering over the footpath and extending for 3 metres. The whole of the ground floor was to be occupied by the shop and associated rooms and the whole of the upper floor was to be a 3 bedroom dwelling with a study, rumpus and living room. Light was to be provided to the internal rooms of the dwelling by means of 2 light shafts. The ceiling height of the shop was to be 3.2 metres with a gap of 600mm above that, between the false ceiling and the underside of the upper floor slab for the provision of services.
- 4 The Owner originally proposed to carry out the work herself as an owner-builder with the help of Mr Caruana. She said that she then changed her mind because she thought the project was too complicated. She denied that it was because the bank would not lend her the money if she did not have a builder and it was not established that such was the case.
- 5 In December 2005 the Owner met with the Builder and gave him a copy of the permit and the endorsed town planning drawings and asked him for a quotation to construct the building. She says that she approached the Builder to do the work because he spoke Vietnamese. He advised her that the building could be built more cheaply by using light with materials and he re-designed it for her. He quoted a price of \$350,000.00 plus GST to construct the building in that way.

### The contract

- 6 A form of commercial building contract was signed by the parties on or about 18 January 2006. It is not in accordance with the provisions of the *Domestic Building Contracts Act 1995* (“the Act”) in many respects and was not designed to be so. It provides for a contract price of \$350,000.00, plus GST, and for the building to be constructed in accordance with the attached plans which were signed by the parties. These had been prepared by the Builder.
- 7 According to the Owner she signed the contract and these plans at the request of the Builder but was unable to understand them. She said that her English was very poor and that she had previously had no experience in

reading building plans. She said that, as a consequence, she relied entirely upon the Builder and signed whatever he gave her to sign.

- 8 The Owner said that she did not notice that the plans attached to the contract provided for a ceiling height of only 2.74 metres in the shop or that instead of providing for a pitched roof draining to both sides, they provided for a single skillion roof draining to only one side. Further, she said that she did not notice that they did not provide for the construction of the veranda over the footpath.

### **Construction period**

- 9 The redesign of the building and a change of building surveyor delayed the commencement of construction. The slab was poured on 12 April 2006 and construction proceeded until August 2007 when, after a falling out between the parties, the Owner took possession without the Builder's consent.
- 10 During the construction period there were claims for payment submitted to the Owner by the Builder which were paid by her bank. There were also many variations, both during and before construction. The dispute between the parties lies principally in the Builder's claim for variations and the Owners claim for damages for defective and incomplete work. There is also a dispute as to what ought to have been included within the scope of works.

### **The hearing**

- 11 The matter came before me for a 5 day hearing on 8 February 2010. Mr Dickenson of Counsel appeared for the Owner and Mr Cogley of Counsel appeared for the Respondent. Evidence was given by the Owner and the Builder and their respective experts, being Mr Lees for the Owner and Mr O'Meara for the Respondent. There was also a site visit with the experts which was very helpful.

### **The witnesses**

- 12 The Owner was not an impressive witness. She admitted to having received various documents from the Builder but was unsure when she received them. Many details of the discussions she was alleged to have had with the Builder were put to her in cross-examination but she said that she did not remember. Either she has a poor memory or she did not want to acknowledge that the matters put to her were discussed. As will appear below, there were other aspects of her evidence that I thought were unsatisfactory.
- 13 She was reluctant to acknowledge that she received advice in her negotiations with the Builder but I think it is clear from the evidence that she did. I accept that her English is relatively poor but I think she exaggerated the extent to which she did not know what she was signing and relied upon what the Builder told her. It does not sit easily with her obvious business experience and the length of time she has lived in Australia.

- 14 Some of the documents that she signed would have been hard to understand, even by someone with relatively good English and I accept that she may have had trouble understanding the plans that were shown to her but she took the plans and showed them to other people.
- 15 I cannot accept that she placed total reliance upon the Builder. This was a major project that she was undertaking and she is an experienced business woman. She had not known the Builder previously and despite the fact that he spoke Vietnamese, it is unlikely that she would have been so naïve as to sign whatever he put in front of her without reading or understanding it. According to her own evidence, Mr Caruana had told her not to trust the Builder.
- 16 This is not to say that I think that she was a dishonest witness. Rather, I think that she has exaggerated and coloured her evidence in order to present herself as a vulnerable person reliant upon a builder who has taken advantage of her position. I do not find that to have been the case.
- 17 As to the Builder, I was not impressed by the quality of much of the work or some of the advice that he gave to the Owner, particularly in regard to the height of the ceiling of the shop. I was also not impressed by his attempt to have the Owner sign away any rights that she had at the end of the construction period by a document styled “Certificate of Practical Completion”. However, as to the contractual negotiations and what was to be done, I have no reason to disbelieve the Builder’s evidence.

#### **Was the case settled?**

- 18 The Builder contends that the parties agreed to settle the dispute by the payment by the Owner to the Builder of the sum of \$40,000.00. It does appear from the documents that it was the Owner’s intention to settle on this basis but the payment was never made. The Owner claims that the bank would not provide any money to enable her to do so because there was no Certificate of Occupancy for the ground floor. The Builder claims that he spoke to the Bank manager and was told that the Owner would not sign the requisite documents. The bank manager was not called by either side.
- 19 Whatever the reason, the proposed settlement sum was not paid. When the offer was made by the Owner the Builder prepared a document containing a number of conditions, including a release from all claims for defects. The Owner did not agree to those terms. Because the Builder did not accept the offer made but instead attached conditions which were not agreed to, no agreement was reached. There was a later offer for a lesser sum made by the Owner’s solicitors by letter but that was not accepted by the Builder. I am not satisfied that the dispute has been settled.

#### **Was a veranda included?**

- 20 The Owner contends that it was agreed that the scope of works would include the veranda that the Town Planning permit required. She seeks

rectification of the contract to include the veranda on the basis that, by excluding it from the plans that he drew without her knowledge, the Builder was guilty of unconscionable conduct. The basis of the argument appears to be that the Owner was lead to believe that the veranda was to be included.

- 21 Certainly the original plans prepared by Mr Caruana included a veranda and the Town Planning Permit required one. The Builder agreed that a veranda was discussed but said that the Applicant asked him to exclude it to save costs. He said that she pointed out to him that the shop next door had lost its veranda and that it was not replaced. He said that he advised her that it would be better to build the veranda with the rest of the building but that she did not follow this advice.
- 22 A veranda was not constructed by the Builder. The Owner has had one constructed since by another contractor. The Builder claims that it is not according to the engineering design and that it has caused damage to the rest of the building. Whether the veranda is compliant with the permit for its construction is not something that I have to deal with because it was not built by the Builder. That is a matter between the Applicant, the other contractor and the Council. The issue that I have to determine is whether the veranda was within the scope of works. I should add that I am not satisfied that this later addition to the building has caused any of the defects about which the Owner complains.
- 23 The Builder claims that he provided a written quotation to the Owner dated 7 January which is in evidence. This specifically excludes the veranda. The Owner denies that she ever received the quotation
- 24 As to what the plans require, notwithstanding the suggestion that they are ambiguous, I am satisfied that they do not provide for a veranda. Those plans were prepared by the Builder and not by the Owner. The Owner said that she trusted the Builder to design the building correctly, that she could not read plans and was unaware that they did not provide for the veranda. How the Builder obtained a Building Permit for the construction is unclear since the contract plans, by excluding the veranda, were not consistent with the Planning Permit. I note that the Building Permit was issued by a different Building Surveyor sourced by the Builder.
- 25 I accept the Builder's evidence that there were extensive discussions before the contract was signed. The Owner did not deny asking for changes to the floor plan of the residence and agrees that she asked him to put windows in the storeroom in the shop. She denied the suggestion put to her in cross-examination that the contract was entered into after some hard negotiation or that that she was assisted at these discussions by a builder friend, Mario, or the original designer Mr Caruana. She admitted that there was a meeting with the Builder at Mr Caruana's house but said it was because the Builder needed some paperwork from Mr Caruana.
- 26 Although she denied she received the quotation of 7 January there is handwriting on it that seeks to make it more favourable to her. The Builder

said that the Owner brought this copy of the quotation to a meeting that he had with her and told him that her friend Mario had written those words on it. She denied that but it does not appear to be the Builder's handwriting. Neither Mario nor Mr Caruana was called. It seems more likely that the project was discussed between the three of them as the Builder suggests and that the handwriting is that of Mario as the Builder claimed.

- 27 It was put to her in cross-examination that Mr Caruana attended a meeting with her at the Builder's office on 15 March 2006. She agreed that there was such a meeting but was unsure about the date. It was suggested to her that, at that meeting, Mr Caruana complained to the Builder about the deletion of the veranda. She first said that she could not recall what was discussed. It was then put to her that the Builder responded by saying that the veranda was not in the contract. She said that she was sure that he did not say that.
- 28 The importance of the quotation is that it specifically provided that no veranda was included. She denied any discussion about that but I think it unlikely that Mario would not have noticed such an important exclusion from the quotation and if he had seen it there would have been something noted there. Since the Owner denies having discussed the veranda and since I am satisfied that the veranda must have been discussed I accept the Builder's account of that since that is the only evidence that I have of the discussion. As a consequence, I am not satisfied that the veranda was within the scope of works.

### **The ceiling height**

- 29 Mr Caruana's plans provided for the ceiling height of the ground floor shop to be 3.2 metres. It was to be a false ceiling with a 600 mm gap above that and below the underside of the first floor slab for the provision of services. The Builder advised the owner to reduce it to 2.7 metres to save money and she accepted that advice. The contract plans therefore provided for a ceiling height in the shop of only 2.7 metres. When one considers the area of the shop and the fact that the only natural light that the interior has is from the front windows, this was quite unreasonably low. The contract was signed on 18 January. Only three days later the Builder suggested that the height be increased to 3 metres and quoted her \$9,000 as an extra to do it. The Owner admits that she agreed to pay an extra \$9,000 to increase the ceiling height of the shop to 3 metres.
- 30 Mr Dickenson says that the Builder's conduct in this regard was unconscionable and that I should not allow that variation because it would, he said, be patently unfair to do so.
- 31 I accept the Builder's evidence that the original reduction in height was an attempt to save money and that the Owner was most concerned to reduce the cost of construction. Implicit in this is that the contract price would have been more if the contract plans had originally provided for a ceiling height

of 3 metres. The variation to change it back to 3 meters was in writing and the Owner signed it. According to her evidence she knew that it was to increase the height of the ceiling to 3 metres and that the cost would be \$9,000. She said she “did not consider the claim at the time”. The Builder gave evidence as to how he had arrived at the figure of \$9,000. I do not believe that it would be unconscionable to allow this variation.

### **The other variations**

- 32 Many of the variations claimed by the Builder are acknowledged and are generally supported by Variation claims signed by the parties. However, where the Act applies, the mere fact that a builder has a signed variation is not in itself sufficient to justify payment. In most instances, whether or not a particular claim is properly the subject of a variation is something which will be understood by a builder but not by an owner who might have little understanding of such matters. The owner will often rely upon the builder in this regard.
- 33 In the case of what one might call builder’s variations, protection for owners is provided by s37 of the Act. That section provides as follows:

#### **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.”

34 The form of each of the variations the Builder submitted in the present case is not as contemplated by this section. That might be because the contract itself was not in accordance with the Act and the Builder did not contemplate having to comply with the Act. In each case the variation document purports to be an agreement between the parties that the work described in the form will be done. Generally, no extra time is claimed with respect to any of the variations and the price for the alleged additional work is stated in each case. The Owner has a substantial defects claim that proceeds upon the basis that the work done was within the scope of the

contract. In respect of those aspects of the work it would be most unfair to the Builder to make him responsible for the work and at the same time refuse to allow him a reasonable price for it.

- 35 In some instances the Owner disputes the amount claimed and there is evidence that the amount claimed is excessive. Others are not properly extras but are within the scope of works. The construction of the rear tiled balcony and dwarf wall form part of the Owner's defects claim and she acknowledges having asked for the work to be done.
- 36 In regard to the disputed matters I find that the following sums should be allowed:

(a) **The ducted heating - \$8,910**

The Builder claimed \$8,910, but that included an amount of \$1,723 for "Administration". That is not justified by the terms of the contract. The administration in regard to a variation is taken up in the Builder's margin, in this case 20%. When this is taken off and the margin and GST are adjusted the figure becomes \$6,635.64 which I will allow.

(b) **Site meetings with AGL - \$495**

I do not accept that this is an extra.

(c) **Connection of water from the opposite side of the road - \$3,630**

This item has similar add-ons which are rightly included in the Builder's margin. When these are removed and the figures re-adjusted, the figure becomes \$3,300.00.

(d) **Connection of gas line to Hot Water Units \$1,452**

The plumber charged \$1,000.00. With margin and GST the variation is rightly \$1,320.00.

(e) **Connection of water points - \$665.50**

The plumber charged \$500.00. With margin and GST the variation is rightly \$660.00

(f) **Gas point to heating - \$726**

This should also be \$660.00. The extra was for plastering which appears to have been due to poor co-ordination.

(g) **Search sewerage plan - \$89.10**

This is not a variation but administrative work which would properly be included within the Builder's margin.

(h) **Application to the Building Control Commission re change of permits and Building Surveyor - \$1,012**

This is not a variation but administrative work which would properly be included within the Builder's margin.

(i) **Soil removal - \$4,576**

Some soil removal must have been allowed for in the Builder's price. This seems a very large amount for extra soil removal from such a flat site but the Builder said that extra excavation was required because of contamination and produced an invoice from a subcontractor saying that 104 cubic metres had been removed and a further invoice as to the removal of "3 loads of dirt". The total spent by the Builder in soil removal exceeded the amount claimed. I am satisfied as to this item. The other variations were either not disputed or simply required to be proven.

### Conclusion as to variations

37 The variations to be allowed are therefore as follows:

Variation no.	Details	Amount allowed
5	City West Water	\$1,059.00
7	Privacy sets to doors	\$ 120.00
8	Shower roses	\$ 300.00
9	Increase in ceiling height	\$9,000.00
10	Extra Hot water	\$5,600.00
14	Water/sewerage	\$5,075.00
18	Doors to built in robe	\$ 550.00
19	Ducted heating	\$6,635.64
20	Doors to living room	\$ 660.00
21	Site meetings with AGL	- nil
22	Three phase power	\$ 550.00
23	Extra power points	\$ 462.00
24	Laminated door	\$ 455.00
25	Extra fluoro lights	\$ 831.60
26	Exit lights	\$ 580.80
27	Emergency light	\$ 290.40
28	Power to heating and cooling	\$ 169.40
29	Arrange underground power	\$ 330.00
30	Exhaust fan to toilet	\$ 312.18
32	Smeg cook top	\$ 330.00
33	Four exhaust fans	\$ 609.84
34	Gas to hot water	\$1,320.00
35	Water from across road	\$3,300.00
36	Gas to Hot Water	\$ 660.00
37	Gas to heating	\$ 660.00
38	Vanity unit	\$ 246.84
39	Mixer tap	\$ 44.00
40	Rear veranda	\$3,630.00
41	Remove and relocate fence	\$ 792.00
42	Soil removal	\$4,576.00
43	Search sewerage plan	- nil
44	Remove concrete pad	\$ 935.00
45	Application to Commission	<u>- nil</u>

Total

\$ 50,084.70

### **The alleged defects**

38 Expert Evidence as to the defects alleged was given by Mr Lees on behalf of the Applicant and by Mr O'Meara on behalf of the Respondent. Both prepared detailed reports and gave concurrent evidence. I also had the advantage of their presence at the on-site inspection.

39 I find the following defects proven.

#### **(a) Shop front windows and doors**

The doors and windows are in anodised aluminium frames. The frames have been positioned out from the external face of the front wall of the shop, leaving a gap all around. There is also no flashing apparent. This same defect is repeated at the upper level on the balcony and at the rear of the building. There is also render on the frames. I accept Mr Lees' evidence that the doors and windows will need to be repositioned. I do not think that Mr O'Meara's suggestion of putting additional sections around the doors and windows is a satisfactory option because, apart from the appearance, it does not address the flashing aspect of the problems. I also accept Mr Lees' evidence that a rubber seal needs to be placed at the bottom of the door. In regard to this work I accept Mr Lees' costing of \$1,700.

#### **(b) Water leaking and consequential damage and plastering**

There is water leaking from the balcony which has caused damage to the ceiling plaster. I also accept Mr Lees' evidence that the joints in the ceiling have been inadequately finished and need to be sanded back. This will necessitate plastering and repainting. I accept Mr Lees' evidence that there is water leaking at the rear of the shop but I do not accept the need for any remedial painting here because I saw no paint damage at the inspection. I note however that the painting is dealt with in another item. The costing for the plasterwork is \$3,301 and I accept this figure.

#### **(c) Rear doors to the shop area**

I accept Mr Lees' evidence that these have been inadequately fixed to the frame. I agree with Mr O'Meara that scratches and paint traces on the door indicate they have been hit by pallets but the Builder knew that the door was to be used as the access to the rear of a supermarket and the door should have been constructed to be reasonably robust. As it is, the fixing seems to have been very flimsy indeed. I accept Mr Lees' costing of \$215.

#### **(d) Construction of the rear balcony**

This area was originally to have had a veranda constructed but by a variation it became a rear balcony. There is some dispute as to the stage construction had reached when this variation was made. I agree with Mr Lees that the slope on the balcony is excessive if it is to be used as such. I also accept his evidence that the timber particle flooring from which it is

constructed is quite unacceptable in an external environment as is the fibro cement substrate used for the tiles. Despite the Builder's assurance, I am not satisfied that there is a membrane or at least, a functioning membrane, between the timber particle floor boarding material and the underlay because a video taken by the Owner's son during a rain storm shows water running down between the sheets on the underside of the balcony in several locations. I think Mr O'Meara's suggestion that this water is entering behind vertical tiles against the back of the dwelling is an unlikely one. I accept Mr Lees' evidence that the balcony needs to be reconstructed. This will necessitate the reconstruction also of the rear light weight wall and the inadequate bracing material installed by the Builder. For all of this I accept Mr Lees' figure of \$15,807. However that figure includes \$1,500.00 for engineering and \$2,119 for a guttering and downpipe system. I think both of these would have been allowed as extras to the Builder and so \$3,619 should come off Mr Lees' figure, reducing the allowance to \$12,188.

**(e) Cladding to the east wall**

The east wall has been clad in fibro cement connected by plastic joiners. I accept Mr Lees' evidence that the layout of the sheets shows lack of proper planning and the small cuts located in the central part of the wall are quite unsightly and quite unworkmanlike. I also accept his evidence that the nailing is insufficient. Some nails have been over-driven and some under-driven and there are not enough of them. As with the western windows the windows and doors on this side have been mounted out from the vertical face of the wall and need to be removed and refixed. I accept Mr Lees' costing of \$4,140.

**(f) The front balcony**

There is a tiled balcony extending from the front boundary line to the front wall of the dwelling on the upper floor. Below it is the front section of the shop. As with the rear balcony it has been built on timber particle board flooring material which Mr Lees says is unacceptable. It also does not appear from the photographs that there is any membrane material underneath the tiles. As stated above, there are leaks in the ceiling of the shop below indicating water penetration. I accept Mr Lees' evidence that the balcony will have to be demolished and reconstructed and I accept his costing of this of \$10,795.

**(g) Timber cappings to the side wall of the balcony**

It was apparent on inspection that these have deteriorated. I accept Mr Lees' evidence that they are not treated timber and have to be replaced. Mr Lees has costed this item at \$385.00 whereas Mr O'Meara has costed it at only \$100.00. Since I am allowing other items which will mean that a carpenter will be on site I will allow Mr O'Meara's figure of \$100.00.

**(h) Balcony doors**

The door handles have been installed upside down and need to be reinstalled. Door seals are also required to the base of the door. I accept Mr Lees' costing of \$355.

**(i) Cladding to the front wall**

There are no articulation joints in the front wall, which is the wall seen from the street. Cracks have appeared around two of the windows. Mr O'Meara said that they are within tolerance but there are no articulation joints. I accept Mr Lees' evidence that articulation joints should have been constructed in these positions and accept his costing of \$1,685. Although that seems a substantial sum for installing articulation joints, it is rendered blue board on a light weight frame. The big cost for this item lies in repairing the render which will be to the whole of the front of the building because according to Mr Lees the render cannot be patched.

**(j) Internal door installation**

I accept Mr Lees' evidence that the mitred corners to the majority of the architraves have been poorly executed, the margins around the doors very significantly and the door jambs have been cut too short at the entrances to the wet levels. I do not accept Mr O'Meara's suggestion that the mitres might have moved since the date of construction because there are no cracks in the paintwork to indicate any such movement and Mr Lees said that there would have been such cracks had the joints moved. I accept Mr Lees' costing of \$3,500 for this work because of the extent of the work required.

**(k) Floor tiling to wet areas**

The grouting to the wet areas is very poor indeed and is coming away. It is easily crumbled between the thumb and forefinger. I accept Mr Lees' evidence that the tiles to all wet areas will need to be re-grouted. This will involve raking out all of the grout and then re-grouting. The area involved is considerable and Mr Lees assessed the cost at \$6,100. There are several bathrooms, two balconies and the kitchen. During evidence Mr Lees conceded that perhaps he had allowed a little too much in terms of time for the doing of this work but said nonetheless it would take 80 hours. Adjusting his figures and taking into account what Mr O'Meara said I will allow \$4,000.

**(l) Shower recesses**

The shower recess in the en suite has been installed 90° from where it ought to have been installed, with the result that the side wall of the shower screen is mounted on the side of the base where the entrance should have been. As a consequence, there is no lip in the base to direct water that runs down that part of the screen back into the shower recess and water is leaking out the corner of the shower recess. I accept Mr Lees' evidence that the shower base needs to be replaced and the area retiled and accept his costing of \$1,469.

**(m) Wall tiling**

The tiles around the taps in the en suite shower and around the taps of the bath have gaps where the tile has been cut away too much. The gaps are unsightly and will allow the entry of water. Mr Lees says that the tiles will need to be replaced. Mr O'Meara said that it would be sufficient to remove the outer cover of the taps and insert some filling material or perhaps a cut section of tile. Mr Lees said that that would not be a satisfactory resolution and I accept his evidence in that regard. I also accept his costing of this item of \$245.

**(n) Applicant of sealant**

Silicone sealants in the wet areas have been very poorly applied. This item was not disputed except as to the cost and in that regard I accept Mr Lees' figure of \$645.

**(o) Skirtings and trim**

These have been left short in a number of locations and this item again was not disputed except in regard to the quantity. As to that I accept Mr Lees' figure of \$250.

**(p) Plastering on the upper level**

At the on-site inspection I was not able to see the upstairs plaster very well due to the lack of natural light. The Owner had covered the front balcony to prevent water ingress and this reduced the light from outside considerably. I accept Mr Lees' evidence that the joints between the plaster sheets and ceiling are obvious under normal light and that the joints need to be re-done. It was also conceded that a cornice near the kitchen was uneven although Mr O'Meara queried why it would need to be replaced as it was difficult for anyone to see. The Owner is entitled to have the work done in a proper and workmanlike manner and it is not unreasonable to direct that it be rectified. I accept Mr Lees' figure of \$2,351.

**(q) Timber flooring**

A timber veneered floating floor has been installed in the upstairs area. There is some minor scuffing in the floor which Mr Lees said was a defect but Mr O'Meara said was within tolerance. There is also a quite unsightly construction joint across the passage floor. Mr Lees says that the joint ought to have been constructed using unobtrusive materials whereas instead, a metal strip that is normally used to connect different flooring materials has been used. I accept Mr Lees' evidence in this regard but I accept Mr O'Meara's evidence that the flooring itself is otherwise within tolerance. I will allow \$150 for the removal of the metal strip and the construction of something less obtrusive.

**(r) Range hood**

The range hood is quite obviously out of plumb and needs to be repositioned. I accept Mr Lees' figure of \$100.

**(s) Painting**

The specification required two coats of acrylic paint. Mr Lees said that it is apparent to him that the plasterboard had not been sealed prior to the application of the paint and that instead, two coats of acrylic had simply been put over the bare plaster. He said that this was not good building practice. Mr O'Meara said that there are paints on the market which can be applied in this way. Mr Lees agreed but pointed out that they are very expensive and so are not generally used by tradesmen. There is no evidence that such paint was used in this building. In view of Mr Lees' observations I am not satisfied that any special paint has been used and I accept his evidence that the painter has simply applied two coats of acrylic paint over bare plaster. I accept Mr Lees' evidence that this is a defective and I also accept his figure for rectification of \$10,245 for the whole building. However I will discount that figure to take account of the fact that painting is not required to the rear of the building. That was a comparatively small area so I will reduce the figure to \$9,000.

### Conclusion as to defects

40 The total to be allowed for the defects that are proven is \$56,189 calculated as follows:

(a) Shop front windows and doors	\$1,700.00
(b) Rectification of plasterwork	\$3,301.00
(c) Rear doors to the shop area	\$ 215.00
(d) Construction of the rear balcony	\$12,188.00
(e) Cladding to the east wall	\$4,140.00
(f) The front balcony	\$10,795.00
(g) Timber cappings to the side wall of the balcony	\$100.00
(h) Balcony doors	\$355.00
(i) Cladding to the front wall	\$1,685.00
(j) Internal door installation	\$3,500.00
(k) Floor tiling to wet areas	\$4,000.00
(l) Shower recesses	\$1,469.00
(m) Wall tiling	\$245.00
(n) Applicant of sealant	\$645.00
(o) Skirtings and trim	\$250.00
(p) Plastering on the upper level	\$2,351.00
(q) Timber flooring	\$150.00
(r) Rangehood	\$100.00
(s) Painting	<u>\$9,000.00</u>
	<u>\$56,189.00</u>

41 This represents 87.33% of the total allowed in Mr Lees' assessment. I accept that an allowance must be made for preliminaries. He assessed these at \$16,020 and so I will allow the same proportion (87.33%) of that figure, which is \$13,990.

42 I accept Mr Lees' evidence that a 20% margin should be added for the rectifying builder as well as GST. The quantification is therefore:

Rectification cost	\$56,189	
Add Preliminaries	\$13,990	\$70,179
Add Builder's margin (20%)		<u>\$14,036</u>
		\$84,215
Plus GST		<u>\$8,421</u>
Total allowance		<u>\$92,636</u>

### **Interest and Liquidated damages**

- 43 In the pleadings, the Builder made a claim for Interest and the Owner made a claim for Liquidated damages. Neither claim was made out on the evidence.

### **The final accounting**

- 44 The amount payable under the contract was \$385,000, being the contract price of \$350,000 plus GST. It is unclear how much the Builder has been paid. According to the Points of Claim, the Owner has paid the Builder \$379,482.00. That allegation was admitted in the Points of Defence and positively asserted in the Points of Counterclaim. In the evidence in chief of the Owner and also in the summary prepared by Mr Dickenson setting out the figures, the total paid was said to be \$385,851.00. The Builder said in evidence that he had been paid \$382,349.00. Since I think the Builder is a more reliable witness than the Owner I will accept his figure.

- 45 The final reconciliation is as follows:

Contract price including GST		\$385,000.00
Add Variations		<u>\$50,084.70</u>
		\$435,084.70
Less: Payments made	\$382,349.00	
Rectification of defects	<u>\$ 92,636.00</u>	<u>\$474,985.00</u>
Balance due to Owner		<u>\$ 39,900.00</u>

- 46 There will be an order that the Builder pay to the Owner \$39,900.00. Costs will be reserved.

**SENIOR MEMBER R. WALKER**