

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP470/2015

CATCHWORDS

Termination of domestic building contract by owners after paying deposit but before building permit obtained; whether builder has breached the contract; whether contract complies with the *Domestic Building Contracts Act 1995*; ss 31, 33, 37; whether builder has varied the contract; whether repudiation by the builder; whether owners entitled to full refund of deposit; whether owners entitled to damages.

APPLICANT	Ms Monika Lynch
RESPONDENT	Long Island Properties Pty Ltd (ACN 124 154 990)
WHERE HELD	Melbourne
BEFORE	Member F. Marks
HEARING TYPE	Hearing
DATE OF HEARING	14 July and 10 September 2015 and Directions Hearing on 28 October 2015. Final submissions received on 27 November 2015
DATE OF ORDER	15 March 2016
CITATION	Lynch v Long Island Properties Pty Ltd (Building and Property) [2016] VCAT 378

ORDERS

- 1 The respondent must pay the applicant \$3,970.20.
- 2 The respondent must reimburse the applicant the amount of \$925.40, comprising the filing fee of \$525.60 and the hearing fee of \$399.80.

MEMBER F.A. MARKS

APPEARANCES:

For the Applicant

Ms Monica Lynch in person

For the Respondent

Mr S McDonald, director of the respondent, in person

REASONS

1 This proceeding is about whether the owners have validly terminated a building contract, and if they have, whether they are entitled to a refund of the remainder of their deposit and damages.

Background

2 Ms Monika Lynch and Mr Jason Dalton own land in Highton (the “**owners**”). The applicant, Ms Lynch has issued proceedings against the builder, Long Island Properties Pty Ltd (the “**builder**”). I find that Ms Lynch has issued proceedings on behalf of the owners against the builder.

3 On 22 October 2014 the owners entered into an HIA domestic building contract with the builder for the construction of a double storey brick veneer home on their land (“the **contract**”). The contract price was \$392,458. The owners paid the builder a deposit of \$19,622.90.

4 In February 2015, the owners terminated the contract on being advised that the contract price had increased by \$46,252. At the time of termination the builder had not obtained a building permit nor started the building works. It is accepted that the contract is at an end. The builder has refunded \$15,652.70 of the deposit and withheld \$3,970.20.

5 Ms Lynch is claiming the return of the remainder of the owners' deposit of \$3,970.20. She also claims that the builder has breached the contract and has not complied with the statutory provisions of the *Domestic Building Contracts Act* 1995 (the “**DBC Act**”). She claims damages of \$11,874.30, being the deposit and a further \$7,904.10.

6 The builder denies Ms Lynch’s claim. It says that it was not at fault when Ms Lynch terminated the contract. It says the contract allowed it to retain a reasonable amount for its expenses and work performed under the contract. The builder has not issued a counterclaim.

7 The issues for determination are:

- (a) Whether the owners have validly terminated the contract;
- (b) Whether the builder has repudiated the contract;
- (c) Whether the builder has breached the contract;
- (d) Whether the contract complies with the DBC Act;
- (e) Whether Ms Lynch is entitled to a refund of the deposit and damages;

The hearing

8 I heard the proceeding on 14 July and 10 September 2015. At the end of the hearing I made orders that the parties file short submissions of no more than 4 pages. On 17 September 2015 Ms Lynch filed and served submissions to which she attached a number of documents which related to the owners' new contract with their new builder. These documents were not in evidence. On 23 September

2015 the builder filed submissions which were not responsive to Ms Lynch's submissions. I listed the proceeding for directions.

- 9 On 28 October 2015 I made orders at the directions hearing that the parties file submissions relating to the matters dealt with at the hearing. The parties have filed further submissions. Ms Lynch filed her final submissions on 27 November 2015.
- 10 Ms Lynch appeared in person and gave evidence. Ms Lynch relied on numerous documents which she provided to the builder and the Tribunal. Mr McDonald, director of the builder, appeared and gave evidence for the builder. Mr McDonald was not directly involved in managing the building project. None of the builder's employees who were involved in the building project, gave evidence.

Ms Lynch's claim

- 11 In her application Ms Lynch set out her grounds on which she sought damages totalling \$11,874.30. At the hearing Ms Lynch relied on those grounds as well as a number of additional grounds. As there was substantial overlap in Ms Lynch's claims, I have separated the claims into two parts. First, her claims about the builder's conduct when the contract was on foot. Second, her claims about the builder's conduct after the contract had ended.
- 12 Ms Lynch claimed that during the contract:
 - (a) The builder increased the contract price by more than 15% allowing the owners to terminate the contract;
 - (b) The builder unilaterally increased the contract price without following the variation procedure in the s37 of the DBC Act and was not entitled to any amount for work performed under the variation;
 - (c) The builder did not obtain the necessary planning or building permits, on time, or at all;
 - (d) The builder underquoted the contract price by increasing the site costs from \$18,000 to \$55,590;
 - (e) The increase in site costs was reasonably foreseeable and the contract was for a fixed sum;
 - (f) The builder did not obtain the necessary foundation data for the site before entering into the contract and failed to take into account the geotechnical site classification report prepared by Saunders Structural Works, consulting engineers dated 21 January 2014 ("the **Saunders site report**");
 - (g) The contract did not comply with the DBC Act;
 - (h) The builder did not provide Ms Lynch with copies of any reports until February 2015;
 - (i) The builder did not provide a professional service;
 - (j) The owners had to pay interest on loans taken out for the purchase of the land but the builder did not advise the owners about the delay in starting the building works.

- 13 Ms Lynch claimed that after she terminated the contract the builder failed to:
- (a) refund the whole of the deposit;
 - (b) refund monies which had been refunded to it by its suppliers;
 - (c) release reports which caused the owners to have the soil tests redone.
- 14 The owners have engaged another builder to build their home. In her written submissions Ms Lynch sought to rely on her new builder's costings to support her claim that here, the builder had underquoted the contract price. I find that the new builder's costings did not form part of Ms Lynch's evidence and are not relevant to this dispute. Consequently, I have not taken them into account in my determination.

Has Ms Lynch terminated the contract in accordance with its terms?

- 15 The parties agree that the contract has been terminated but they disagree as to how it happened. The question is whether the owners have complied with the express terms of the contract in terminating the contract.
- 16 On 9 February 2015 Ms Lynch sent an email to Mr Fuentes, the builder's Operations Manager, stating relevantly:

“After much consideration we wish to cancel our build with Long Island Homes.
This job has been handled poorly from inception and the list below is an error which we are not willing to wear (one that was not communicated until I followed up but known of since November 2014.
Please refund \$19,622.90 (being the deposit for this job) within seven business days.”

- 17 On 13 February 2015, having not received a refund of the deposit, Ms Lynch sent the builder a Notice of Intention to Terminate the contract signed by the owners (the “**Notice of Termination**”).
- 18 The following facts are not in dispute. The Notice of Termination was a template notice produced by Consumer Affairs Victoria and related to a Consumer Affairs building contract and not to the contract in dispute. The clause numbers in the Notice of Termination did not match the clause numbers in the contract, however the grounds of termination remain relevant to the determination of this dispute.
- 19 The Notice of Termination set out the following reasons for the owners' termination as at 13 February 2015:
- (a) Failure by the builder to perform or progress the work: no application filed with City of Geelong;
 - (b) No request by the builders to the owners for variation of the slab;
 - (c) No final variation without carpet to the front room;
 - (d) No contact made by builder with the owners between November 2014, after the engineering drawings were done, and February 2015;
 - (e) No building permit had been granted;
 - (f) The contract price increased by 15% or more: (\$63,917).

20 With the exception of the ground for termination that the builder failed to provide a variation for works in the front room, set out in paragraph (c) above, Ms Lynch gave evidence about these grounds at the hearing. I have dealt with these grounds in my reasons below.

Contractual right to terminate

21 The contract gives an owner a right to terminate on certain events. The contract sets out a procedure that must be followed. Clause 43 deals with an owner's right to end the contract where the builder has substantially breached the contract.

22 Clause 43 relevantly provides:

“43.2 If the Builder is in substantial breach of this Contract the Owner may give the Builder a written notice to remedy the breach:

- Specifying the substantial breach;
- Requiring the substantial breach to be remedied within 10 days after the notice is received by the Builder;
- Stating that if the substantial breach is not remedied as required, the Owner intends to end this Contract.

43.3 If the Builder does not remedy the substantial breach stated in the notice to remedy the breach within 10 days of receiving that notice, the Owner may end this Contract by giving a further written notice to that effect.”

23 The contract required the owners to give the builder written notice of the substantial breach and 10 days in which to remedy that breach. If the builder failed to remedy the substantial breach within 10 days then the owners had the right to terminate the contract by sending the builder a further written notice. Here, the Notice of Termination did not give the builder any period to remedy the breach.

24 I find that the owners did not comply with clause 43.2 and 43.3 to end the contract for breach of contract by the builder. I have also found in my reasons that Ms Lynch did not follow any of the express procedures in the contract which allowed the owners to terminate the contract for other reasons. I find that in sending the Notice of Termination, the owners did not terminate the contract by the exercise of an express contractual power set out in the contract. I therefore find that the Notice of Termination is not a valid notice of termination.

Termination at common law

25 Although the owners have not complied with the express procedure set out in contract to terminate the contract, the contract allowed the owners to terminate the contract at common law. The contract states what the owners are entitled to do in any event.

26 Clause 43 relevantly provides:

“43.0 If the builder breaches (including repudiates) this Contract, nothing in this Clause prejudices the right of the Owner to recover damages or exercise any other right or remedy.”

- 27 Clause 43 does not limit the owners’ right to terminate the contract at common law through the acceptance of the builder’s repudiation of the contract.
- 28 Where a party to a contract evinces an intention no longer to be bound by the contract or an intention to fulfil the contract only in a manner substantially inconsistent with his obligations and in no other way, that party repudiates the contract.¹ Repudiation does not depend on the subjective intention of the repudiator, but rather, on the effect of that person’s conduct as seen by a reasonable person.²
- 29 The issue here is whether the builder’s conduct amounted to a repudiation. That is, whether the builder’s unilateral increase of the contract price by more than \$46,000, amounted to repudiation by the builder. A further issue is whether Ms Lynch’s email of 9 February 2015, or the Notice of Termination, was as an acceptance of the builder’s repudiation at common law.³

Has the builder repudiated the contract?

- 30 The contract is dated 22 October 2014. The total contract price, excluding variations, is \$392,458 [Schedule 3- Method 2]. There were no prime cost and provisional sum items allowed for in the contract. The owners were required to give the builder written notice of the essential information within 30 days of the date of the contract. This included evidence of the owners’ title to the land and their ability to pay the purchase price [clause 13].
- 31 The contract provided for the building works to start within 21 days after the builder received all essential information from the owners, the necessary building permits and planning approvals and payment of the deposit [clause 10]. The contract provided for the builder to increase the contract price by following the procedure set out in clause 23.
- 32 The following facts are not in dispute. Prior to signing the contract Ms Lynch paid the builder \$2,500 towards the deposit and gave it the owners’ title to the land and the Saunders site report. Ms Lynch needed to sign the contract by about 20 October 2014 to obtain a discount of \$1,300 on stamp duty otherwise payable on the purchase of the land. On 28 October 2014, after signing the contract, Ms Lynch paid the remainder of the deposit of \$17,122.90.
- 33 On 5 February 2015 Mr Fuentes advised Ms Lynch by telephone of an increase in the price of the contract. By email dated 6 February 2015 Mr Fuentes advised Ms Lynch that the overall charge for site works had increased by \$46,252.

¹ *Progressive Mailing House Pty Ltd v Tabali* (1985) 157 CLR 17 at 33,40.

² *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138CLR 423 at 42; see also *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* [1989] 166 CLR 623 at 658 per Deane and Dawson JJ

³ *Bysouth v Shire of Blackburn* (1928) VLR 562, *Lang & Morrison-Knudson v Aegon* (1997) 86 BLR 70

- 34 I have heard the evidence and have examined the documents in evidence. I find that the builder did not follow the express procedure for variations set out in clause 23 of the contract and s37 of the DBC Act when increasing the contract price. I have set out my reasons in paragraphs 39 to 68 below.
- 35 I find that the builder in unilaterally increasing the contract price evinced an intention not to be bound by the fixed price contract of \$392,458. I find that the builder has repudiated the contract. I find that Ms Lynch's email of 9 February 2015 and/or the Notice of Intention to Terminate dated 13 February 2015, amounted to the acceptance by the owners, of the builder's repudiation of the contract.
- 36 The parties spent a great deal of time giving evidence about the numerous claims made by Ms Lynch. I have therefore addressed the other claims made by Ms Lynch which I have listed in paragraphs 12 and 13 above.

Did the contract price increase by 15%?

- 37 Clause 12.3 of the contract provides for the owners to end the contract in certain circumstances, if the contract price increases by 15% or more.
- 38 Ms Lynch claimed that, by email dated 6 February 2015, the builder increased the contract price by \$63,917 or 16% allowing her to send the Notice of Termination ending the contract. However, during the hearing Ms Lynch agreed that the overall increase in the contract price was \$46,252. Ms Lynch agreed that this did not amount to an increase of 15%. Rather the increase was 14%.
- 39 I find that the owners were not entitled to invoke clause 12.3 to bring the contract to an end as the contract price did not increase by 15%.

Did the builder unilaterally increase the contract price?

- 40 Clause 23 of the contract and s 37 of the DBC Act provide a process for the builder to vary the contract. Ms Lynch claimed that the builder did not follow either of the express procedures for varying the contract. She claimed that the builder, by email dated 6 February 2015, unilaterally increased the contract price, allowing the owners to end the contract.
- 41 Ms Lynch said that on 29 January 2015 she emailed the builder to get its work schedule. On 5 February 2015 she said she spoke to one of the builder's staff Kim Wilson, the builder's site manager, who told her there were some additional costs to be paid by the owners. She received an email from Kim Wilson on 5 February 2015, copied to Mr Fuentes, the builder's Operations Manager. Kim Wilson's email was in the following terms:

"Hi Monica

Further to telephone conversation, I have spoken with my Operations Manager and he has advised that he will be calling you today to discuss some additional costs that have come through in terms of site costs.

I can tell you that we have applied for your building permit and are working through a couple of clarifications/ additional bits of information the surveyor needs.

Norberto will be calling you today.

Norberto, please call Monica on .."

- 42 Ms Lynch gave evidence that on 5 February 2015 she had a telephone discussion with Mr Fuentes about the additional costs the builder claimed. On 6 February 2015 Mr Fuentes sent Ms Lynch an email about the costings. Mr Fuentes' email was in the following terms:

"High Monica,

Apologies for delays in sending the email, when I was double checking our file I noticed that the 6 star energy costs had not been forwarded to you.

Please find breakdown of Siteworks including 6 Star Energy Requirements as discussed yesterday.

Once you have reviewed the costings, please call me on 0409072736 to discuss further.

SITE COSTS:

Provide Site Cut and Fill as per Site Plan, including importation of additional Fill to Front of Property

\$9,730

Provide AGI Drains and Silt Pits as per Site Plan: \$2,150

Provide Grated Drain to Front of Garage as per Site Plan: \$675

Provide Site Difficulty, Manual Handling and Crane costs due to fall of Land exceeding 3 metres over Building Platform: \$6,390

Provide Brick Retaining Walls per Site Plan: \$5,110

Provide additional Scaffolding costs due to stepped Slabs: \$3,660

FOOTINGS:

Provide "P" Class Waffle Slab in lieu of standard "M" Class, upgrade to strip footings, upgrade of Reinforcement SL82 Top Mesh in lieu of SL72, 3-12TM Trench Mesh Reinforcement in lieu of 3-11TM, as per Final Engineering & additional concrete pumps: \$8,499

Provide 28 No.450mm Diameter Concrete Bored Piers due to Neighbouring Trees as per Final Engineering: \$5,710

Provide Double Brick Retaining wall up to 1.8 metres including grout fill cavity, N12 Vertical Bars at 250mm centres, N12 Horizontal Bars at 300mm centres, Waterproofing, AGI Drains and Backfill to Stepped Slab as per Final Engineering: \$9,360

Provide Deepened Rebate to Dwelling as per Final Engineering: \$3,320

ASSET PROTECTION:

Provide Asset protection By-laws compliance. This is required to comply with the Local Council's Asset Protection By- Laws and their Building and Works Code of Practice.

Such Requirements include: Timber Crossover Protection & Silt Protection Barriers: \$986

6 STAR REQUIRMENTS:

Upgrade ceiling insulation from R2.5 to R6.0 as required by 6 Star Energy Report: \$987

Provide double glazed windows and glass doors as required by 6 Star Energy Report: \$7,675

RE-ESTABLISHMENT SURVEY:

Re- establish site boundaries due to missing pegs: TBC- To be determined onsite

CREDIT ORIGINAL ALLOWANCES:

Credit Original Site works Allowance: \$18,000

\$55,590 OVERALL SITECOSTS

\$8,662 OVERALL 6 STAR ENERGY RATING COMPLIANCE

\$18,000 OVERALL SITEWORKS ALLOWANCE

\$46,252

OVERALL EXTRA OVER CHARGE FOR SITECOSTS, AND 6 STAR ENERGY RATING COMPLIANCE”.

- 43 Mr Fuentes' email did not mention a variation to the contract price, nor did it request Ms Lynch's consent to the increase in costs. Ms Lynch gave evidence that she telephoned Mr Fuentes to discuss the increase in costs. She said that on the same day she received the FMG Engineering site classification and footing recommendation report dated 7 November 2014 (the "**FMG site report**").
- 44 It is accepted that prior to signing the contract Ms Lynch gave the builder the Saunders site report which classified the site as "M". The contract price was based on an "M" class site. After the contract was signed the builder engaged FMG to prepare a site report. FMG sent the builder the FMG site report dated 7 November 2014 which classified the site as "P" on account of the trees. I set out the relevant parts of the Saunders site report and the FMG site report.

The Saunders site report dated 21 January 2014

- 45 Section 3.1 set out the site description:

“The site is located in a new residential area. At the time of sampling the site had a steep fall. An immature tree was observed in the adjacent road reserve, as indicated in the attached site sketch.”

- 46 Section 4.2 classified the site as “M” in accordance with AS 2870-2011. The following note appeared under the site classification:

“**Owner note:** An immature tree was noted in the road reserve at the front of the property. This tree may, in the future create abnormal moisture conditions as defined in AS 2870-2011, Clause 1.3.3. Abnormal moisture conditions may result in no “acceptable probabilities of serviceability of the building during its design life”, as defined in AS 2870-2011, Clause 1.3.3. **If these distresses are not acceptable to the owner or other relevant parties then the provision of a root barrier may be considered in the future.**”

- 47 Section 5.1.2 stated:

"A waffle footing system suitable for an "M" site classification. On fill side, where the depth of rolled compacted fill exceeds 300mm, the waffle footing system shall be supported on piers founded into stiff natural CLAY as noted in the borelogs."

- 48 Section 6.0 set out the specific site recommendations relating to the site works and potential difficulties. It relevantly provided:

Section 6.1.2

“**Steep slopes.** On steep sites where filling is to be placed on a slope of 1 vertical to 8 horizontal or steeper, a series of parallel, benched terraces shall be excavated into the natural surface contours over the whole of the area to be filled. This will provide stability against downhill slip of the filling after placement.”

Section 6.1.3

“Excavation Difficulties. Rock was encountered at shallow to moderate depth (450mm to 1700mm). Excavation for trenches, piers or a cut platform with light machinery may be difficult.”

- 49 The Saunders surface soil bore log stated that the site was classified as “M”. It noted that rock had been encountered at shallow depth. It further noted the immature tree on the adjacent road reserve.

The FMG site report - 7 November 2014

- 50 The FMG site report classified the site as “P” in accordance with AS 2870-2011 to account for trees. However it stated that the site could be classified as "M" if the proposed house was sited outside the effect of the tree roots. Section 3.0 of the report relevantly stated:

“Trees

- Abnormal moisture conditions caused by the presence of a tree/s which may affect footing performance. Refer to section 4.0 for further details.
- The maximum γ_t (Potential surface movement due to tree induced suction change (mm) value calculated at this site is 21mm.

Note: If the proposed house is sited outside the effect of tree roots (mature height of tree to be considered), site can be classified as "M".

- 51 Section 4.0 dealt with tree effects on soil moisture conditions. It relevantly provided:

"As the site had been classified "P" due to the presence of trees, our footing recommendation is based on the current heights of trees and future mature heights, as shown on the attached site plan.

There are also some trees whose roots (at this time) are not likely to be causing abnormal moisture conditions in the foundation beneath any likely building footprint. However, over time, the zone of influence of the tree roots may encroach upon the building footprint and cause soil movement. These trees have been considered in the footing recommendations.

With respect to tree roots possibly creating, or contributing to, abnormal site moisture conditions, we provide the following advice.

- a) Abnormal soil moisture conditions as a result of the intrusion of tree roots beneath the dwelling footprint..... may develop at some time.
- b) Should the anticipated mature height (h) of the species when inserted into the empirical relationships shown below, indicate that the radial zone of the tree root influence measured horizontally from the tree base (distance =d) encroach upon the building footprint then adequate precautions to protect the footing from the effect of abnormal soil moisture conditions caused by tree root activity was considered.

d=0.75h (class M sites) [illustration not included here]
d= 1.0h (class H sites)
d= 1.5h (class E sites)

MB: "d" shall be increased by a multiplying factor of 1.5 for a row or group of trees.

It must be noted that due to matters such as complex tree root geometry, variable moisture extraction (depending upon tree species) and the difficulty in predicting future growth and watering patterns, a PRECISE rational design for the effects of trees is outside current Engineering knowledge. Engineers are not experts in tree growth and cannot be expected to know the anticipated growth and mature height of trees.

While a design using current knowledge of tree effects has been carried out it must be accepted that there is a higher probability of damage occurring due to "abnormal " soil moisture than would be anticipated in this case for a site subjected to only "normal moisture conditions", as defined in AS2870-2011 Section 3."

52 Section 5.0 set out FMG's footing recommendation:

"The footing sizes used, while based upon the recommendations of AS2870 for a site classification of "M" is based upon the influence of tree roots is in accordance with section 4 with the use of piers."

53 The FMG "PRELIMINARY FOOTING INFORMATION" noted the information to be preliminary only and subject to change. It also noted that piers were required due to trees and fill.

54 Ms Lynch gave evidence that FMG incorrectly classified the site as "P" because it wrongly identified the species of particular trees on and around the site. She said that she spoke to the Council who identified the relevant trees as not being the same species of trees as those identified and on which FMG based its findings.

55 Ms Lynch relied on her email to Mr Fuentes of 25 February 2015 in which she identified the relevant trees: the tree at the front of the site as being a lightwood (acacia implexa) and the trees in the neighbouring park being Black SheOak (allocasuarina littoralis). She said that the distance between the trees and the house exceeded the distance requiring tree protection as set out in the FMG site report. She said the FMG site report also stated that if her home was sited outside the effect of tree roots, the site could be classified as "M".

56 Ms Lynch relied on the FMG preliminary footing information and plans and drawings which were in evidence. The FMG document register stated that the documents had been issued by FMG on 19 November 2014. Each of the FMG notes, plans and drawings were stated to be issued on 21 November 2014, for a building permit. The FMG general notes (SO1) were stamped

"ISSUED FOR CONSTRUCTION - for construction subject to approval by the relevant building surveyor or statutory authority"

57 The FMG footing notes (page SO3) stated the site classification to be "P" in accordance with AS 2870 of 2011 and site investigations by FMG.

- 58 Ms Lynch gave evidence that on receipt of the FMG site report in November 2014, the builder did not advise her of the report or its contents, including the fact that the site was classified as "P" because of trees. She said that both the builder and FMG revised further plans and drawings based on a "P" classified site and changed works. She said that FMG produced plans and drawings based on items which varied the contract without obtaining her consent or requesting a variation. She said she first became aware of the change in the building works and the increase in price in February 2015.
- 59 Mr McDonald gave evidence that the owners signed the contract and agreed to certain items and allowances in the contract relating to site costs. He said that item 20.01 of the contract made an allowance for site costs of \$18,000 with fixed site costs to be determined by engineering and soil reports.
- 60 Mr McDonald said that that an engineer's report was required before the builder could start the building works. He said item 20.19 of the contract allowed for additional site condition expenses to be confirmed following receipt of a soil test, feature survey and engineer's footing design. He said that the owners also agreed to pay the costs of the bored piers (item 20.12), the retaining wall (item 20.14) and surface drains (item 20.15) which were not included in the contract price. He said that when the builder received the FMG site report, the builder had to carry out further work and incur further expenses which increased the contract price.
- 61 He said Mr Fuentes' email dated 6 February 2015 set out the additional site costs payable by the owners. He said that Mr Fuentes' email amounted to the builder's variation to the contract. I do not accept Mr McDonald's contention.
- 62 Mr McDonald did not explain why another engineering report was necessary when Ms Lynch had given the builder the Saunders site report some time prior to the contract being signed. Nor did he explain why the FMG site report did not directly refer to, or comment on, the Saunders site report when FMG classified the site as "P" to account for the trees. Further, Mr McDonald gave no evidence about having any discussions with FMG about the change in site classification to "P" to account for the trees.
- 63 The plans and drawings in evidence showed that FMG drafted plans and drawings for issuing a building permit on 21 November 2014 and the builder drafted revised plans and drawings on 9 December 2014, on the basis of the site classification being "P". Further, no evidence was given as to why Mr Fuentes' email stated that the costs for a re-establishment survey, because of missing survey pegs, was to be determined on site, when item 20.16 of the contract costed the item at \$880.
- 64 FMG in its site report, did not hold itself out as being experts in trees. However, no evidence was given of any discussions between the builder and FMG over the change to the "P" classified site because of tress and the need for the additional works set out in Mr Fuentes' email of 6 February 2015. Also, no evidence was given of the builder or FMG further investigating the issue of trees in the light of the Saunders site report.

65 I find that the builder, by email dated 6 February 2015, unilaterally increased the site costs without following the variation procedure set out in the contract or s37 of the DBC Act.

The additional six star energy costs

66 The contract provided for preconstruction items which included:

“11.01: Single glazed windows; and

“18.04: 6 star (minimum) thermal energy assessment and report to comply with government regulations. Any insulation, double glazing, window sarking, or design upgrades required to achieve 6 stars will be at the Owners’ expense”.

“6 star Guarantee excludes ...double glazing upgrades (Low ”E” glass). These items are an extra cost to client.”

67 The increased costs set out in Mr Fuentes' email of 6 February 2015 included \$987 to upgrade the ceiling insulation and \$7,675 for double glazed windows. Ms Lynch gave evidence that she gave the builder a set of design drawings before the contract was signed from which the builders prepared their drawings. No signed drawings were in evidence. The builder's general notes and revised drawings dated 9 December 2014 were in evidence. The builder's general notes referred to insulation and Windows. Under the heading "Insulation" it stated: "refer to energy rating report". Under the heading "Windows" it stated: "All glazing shall conform to AS1288-2006".

68 While Mr McDonald agreed that the contract provided for single glazing he said that item 18.04 of the contract allowed the builder to charge the owners for double glazing, if required by the six star energy report. The energy rating report was not in evidence. Mr McDonald did not give evidence about there being a change in Government regulations after the contract was signed, which required a change from single glazing to double glazing.

69 Mr McDonald said that Mr Fuentes’ email of 6 February 2015 set out the increased costs for the six star energy compliance and that this email amounted to a variation to the contract. I do not accept Mr McDonald's contention that Mr Fuentes’ email amounted to a variation. I find that by Mr Fuentes' email of 6 February 2015, the builder unilaterally increased the contract price.

Was the builder late in applying for or obtaining planning approval or the building permit?

70 Ms Lynch claimed that the builder failed to obtain the necessary planning approvals and building permit within the required time set out in the contract, or at all, allowing the owners to end the contract.

71 Clause 19 relevantly provides:

“19.1 Subject to receipt of the planning approval and if the Owner has not already got the necessary building permits, the Builder must apply for them within 14 days after receiving evidence of the Owner’s title to the Land and ability to pay under clause 13.

“19.3 If the necessary planning approval and/or building permits are not obtained within the time specified in items 4 or 5 of Schedule 1, then if:

- Neither party is at fault, either party may bring this Contract to an end by giving written notice to the other;
- The Builder is at fault, the Owner may bring this Contract to an end by giving the Builder written notice,

provided that the party who wishes to end this Contract under the conditions of this Clause must do so within 14 days of the expiration of the period set out in Items 4 or 5 of Schedule 1.

19.4 If the Contract is ended under this Clause and the Builder is not at fault, the Builder is entitled to a reasonable price for the work performed, including the costs incurred and an amount for the Builder's profit and overheads being the percentage shown in Item 6 of Schedule 1 applied to the cost of that work. The price:

- May include an amount for the preparation of Plans and Specifications, the Engineer's Design and Soil Test Report - unless these have been allowed for in a separate contract;”

72 Clause 19.1 provides that where the owners have not obtained the building permits, the builder must apply for them within 14 days of receiving evidence of the owners' title and their ability to pay the contract price.

73 Ms Lynch said that in September 2014 she gave the builder the owners' title to the land. That is, prior to signing the contract. She said she first notified the builder of the owners' capacity to pay the contract price on 6 November 2014, when she received notification from the bank. She said she notified the builder again on 28 November 2014 having been asked to do so by the builder on the previous day. Mr McDonald disputed Ms Lynch's evidence. He said Ms Lynch notified the builder of the owners' capacity to pay the contract price by email on 1 December 2014 and not 6 November 2014.

74 Having heard the oral evidence and having reviewed the chain of emails sent by Ms Lynch to the builder, I accept Ms Lynch's evidence that she notified the builder of the owners' capacity to pay the purchase price, on 6 November 2014.

75 The date that the builder applied for the building permit was not in evidence. Kim Wilson's email of 5 February 2015 stated that the builder had already applied for a building permit by that date. The FMG revised notes, plans and drawings in evidence are stated to have been issued on 21 November 2014, for the purpose of a building permit.

76 Mr McDonald gave evidence that he did not know the actual date on which the builder applied for the building permit but said that it was applied for prior to the Notice of Termination. He relied on the invoice from Neocheck Building Surveyors dated 2 December 2014 which described its work as including "building permit fee".

77 Mr McDonald said that the builder sought building approval as soon as possible after the parties signed the contract. He said that the builder had to obtain all of

the engineering information before it could obtain a building permit. He said that once the builder received the information from FMG, it started the process of applying for the building permit.

- 78 Ms Lynch gave evidence that when she sent the Notice of Termination on 13 February 2015 the builder had not applied for the building permit. She said around that time she spoke to a person at Neocheck, building surveyors, who told her that they were waiting on further information from the builder for the building permit.
- 79 Clause 19 of the contract required the builder to apply for a building permit by 20 November 2014. That is, within 14 days of the date on which it received the owners' notification of capacity to pay.
- 80 Having heard the evidence and reviewed the documents in evidence, I find that the builder applied for the building permit on or around 21 November 2014. I find that the failure of the builder to file the application for the building permit, 1 day after the date required by the contract, does not amount to a substantial breach of the contract.
- 81 Clause 19.3 provides the parties with the right to terminate the contract if the necessary planning or building permits have not been obtained within the requisite time set out in Items 4 or Item 5 of Schedule 1. The letters "N/A" appeared in Item 4.
- 82 Item 5 of Schedule 1 requires the parties to identify the person responsible for obtaining and paying for the building permit, on behalf of the owner. It also requires the number of days allowed for obtaining the building permit to be stated. Here, Item 5 has not been completed. It does not identify the person responsible for obtaining the building permit, nor the number of days by which the building permit must be obtained. It only states "ASAP".
- 83 I find that the contract did not identify the date by which the builder had to obtain the building permit. I therefore find that Ms Lynch cannot invoke clause 19.3 to terminate the contract.

Was the increase in costs reasonably foreseeable?

- 84 It was accepted that on 22 October 2014, the builder sent Ms Lynch the contract for \$392,458. Ms Lynch claimed that the contract was for a fixed price and that the costs set out in Mr Fuentes' email of 6 February 2015, were reasonably foreseeable at the contract date.
- 85 Mr McDonald gave evidence that the contract price did not allow for site costs listed as items 20.11 to 20.15, items 20.17 to 20.19 and item 20.21. The excluded items comprised, amongst other things, bored piers, removal of rock, retaining walls and surface drains, where costings were to be confirmed. He said bored piers were to be confirmed, if required, after the engineer had analysed the soil report and completed the structural design (item 20.12). He said if required, they were to be at the owners' cost.

- 86 The additional site costs set out in Mr Fuentes' email of 6 February 2015, included providing a site cut and fill, AGI drains, a grated drain and a brick retaining wall "as per site plan". They also included extra costs for site difficulty and additional scaffolding due to stepped slabs.
- 87 The increased costs for footings included the provision of a "P" class rather than a standard "M" class waffle slab and upgrade of reinforcement as "per final engineering" and additional concrete pumps. They also included the provision of 28 no 450mm diameter concrete bored piers due to neighbouring trees as "per final engineering". The increased footing costs also included a double brick retaining wall up to 1.8m and a deepened rebate as "per final engineering".
- 88 Mr McDonald said that the increased site costings were not foreseeable from the foundations data available when the parties entered into the contract. Mr McDonald did not give evidence as to why the builder could not ascertain, at the date of the contract, the additional site costs set out Mr Fuentes' email of 6 February 2015.
- 89 I do not accept Mr McDonald's evidence that the builder could not have obtained the additional costings set out in Mr Fuentes' email prior to signing the contract. Nor do I accept his evidence that the information in the FMG site report was not foreseeable. It is accepted that at the time the parties signed the contract Ms Lynch had given the builder the Saunders site report. If the builder did not wish to rely on the Saunders site report it is unclear why it could not have obtained the relevant information from FMG prior to signing the contract so as to provide accurate and fixed costings to the owners.
- 90 I find that the additional works and the increased costs set out in Mr Fuentes' email of 6 February 2016 were foreseeable at the date of the contract.

Did the builder obtain the necessary foundation data?

- 91 In her submissions, Ms Lynch claimed that the builder did not obtain the necessary foundation data prior to signing the contract. Ms Lynch's claim is not in line with her claim that the costs set out in Mr Fuentes' email of 6 February 2015 were foreseeable. I find that Ms Lynch has not made out this claim.

Were the plans and specifications in the contract incomplete?

- 92 Ms Lynch claimed that the plans and specifications in the contract did not comply with s31(1)(d) of the DBC Act because they did not include enough information to enable a building permit to be obtained.
- 93 She said that the builder's drawings were incorrect and incomplete. The builder's revised plans and drawings are in evidence and dated 9 December 2014. They are not signed by the owners. Ms Lynch gave evidence that the owners had not signed any of the plans or drawings, including the revised plans.
- 94 She said she spoke to Neocheck, the building surveyor in February 2015. They advised her that they were waiting on more information from the builder in order

to obtain the building permit. This is confirmed by Kim Wilson's email of 5 February 2015 to Ms Lynch.

- 95 Having heard the evidence and reviewed the relevant documents, including Kim Wilson's email of 5 February 2015, I find that the contract did not include plans and specifications with enough information to enable the obtaining of a building permit. I find that the contract does not comply with s 31(1)(d) of the DBC Act.

Did the contract state the contract price?

- 96 Ms Lynch claimed that the contract did not set out the contract price as required by s31(1)(j) of the DBC Act. The parties filed detailed submissions about whether the contract price appeared on page 6 of the contract in item 2 of schedule 1 headed "contract price". I find that page 12 of the contract specified the contract price as "Total contract price (excluding variations) \$392,458 (Schedule 3- Method 2).

Was there a warning next to the contract price that the contract price was subject to change?

- 97 Ms Lynch claimed that the contract did not include a warning next to the contract price that the contract price might change as required by s33(2) of the DBC Act. I find a warning did not appear next to the contract price as required by the DBC Act. I find that the contract does not comply with s33(2) of the DBC Act.

Did the builder fail to provide Ms Lynch with copies of reports?

- 98 Ms Lynch claimed that the builder did not give her copies of the FMG site report and the FMG survey report until 6 February 2015. Mr McDonald did not dispute Ms Lynch's evidence. However, Ms Lynch did not point to any clause in the contract that required the builder to give the owners copies of any reports, including the FMG site and survey reports. As I understand it, the relevance of this issue is that Ms Lynch was not informed of the content of these reports until February 2015.

- 99 I am not satisfied that the builder has breached the contract by failing to give the owners copies of the FMG reports until February 2015.

Did builder provide a professional service?

- 100 Ms Lynch claimed that the builder did not provide the owners with a professional service. Ms Lynch's claim is unclear. She said that she was unhappy with the builder's conduct including the lack of communication both before and after the owners signed the contract.

- 101 She said that the builder did not return her calls promptly, did not do all the work it had agreed to do, or follow up on work that it agreed to do. She said that she had to contact the builder constantly. She said that communication with the builder was poor because staff left the builder or went on leave without her being

notified. She said that she had informed the builder of the need for the contract to be signed prior to 20 October 2014 so that the owners could get a stamp duty discount. She said that on about 20 October 2014 she told the builder that she did not want to go ahead with the contract due to the builder's lack of action. She said following her discussions with the builder, they then sent her the quote and contract for signing and she decided to go ahead with the contract.

- 102 The contract sets out the obligations and responsibilities of the builder and the express terms with which it must comply. The contract does not include an express term or reference to professional service. The words professional service are not defined in the contract. I am not satisfied that Ms Lynch has any basis for making this claim. I find that Ms Lynch has not made out this claim.

Is the builder liable for the interest paid by the owners on loans for the purchase of the land?

- 103 Ms Lynch initially claimed that the builder was liable to pay interest on the loans that the owners took out to purchase the land on which they intended to build their home and interest on the deposit paid to the builder. She said that her claim arose from the builder not advising the owners about the delay in starting the building works.

- 104 In certain very limited circumstances, a claimant may be entitled to claim damages for interest on monies borrowed to pay for the cost of rebuilding or for the cost of borrowing money to replace money paid or withheld⁴. However, here the owners purchased land on which they have gone on to build their home with a new builder, irrespective of ending the contract with the builder. Here, Ms Lynch did not have evidence to support her claims which she subsequently withdrew.

Is the builder required to refund the remaining deposit of \$3,970?

- 105 I have found that the builder has repudiated the contract and the owners have accepted the repudiation and ended the contract. Here, the issue is whether the owners have benefitted from any of the builder's work.

- 106 Ms Lynch gave evidence that the owners were unable to use any of the builder's drawings or documents or other documents including the FMG site report and FMG survey. They had to arrange for them to be done again. Mr McDonald said that the builder had withheld monies for its expenses which it had reasonably incurred.

- 107 Having heard the evidence I am satisfied that the owners did not benefit from the work that the builder carried out under the contract. I find that the builder must refund the remaining deposit of \$3,970.20.

⁴ *Hungerfords v Walker* (1989) 171 CLR 125.

Must the builder refund any refunds it has received?

108 Ms Lynch claimed she was entitled to a refund from the builder if the builder received a refund from its suppliers for work not performed at the time she terminated the contract. Ms Lynch withdrew her claim on hearing Mr McDonald's evidence that the builder had not received any refund.

Was the builder required to give the owners the FMG reports?

109 Ms Lynch gave evidence that after she terminated the contract she asked the builder for originals of the FMG site report and other FMG reports for use by her current builder who built her home. Ms Lynch gave evidence that the builder emailed a copy of the FMG site report to her on 6 February 2015. She said the owners had to obtain, and pay for, further soil and survey reports for use by the owners' new builder.

110 Mr McDonald agreed that Ms Lynch had paid for the FMG reports. He agreed the builder had not given the original documents to her because of copyright issues. He said that there was no obligation on the builder under the contract to give Ms Lynch the documents and I agree with his evidence. However, he agreed that Ms Lynch should not have to pay for reports that she did not receive nor use in building her home. I find that the builder was under no obligation to give the various reports to the owners.

THE BUILDER'S CLAIMS

Did the owners delay notifying the builder of their ability to pay?

111 In his final written submissions dated 25 November 2015, Mr McDonald claimed that the owners failed to provide proof of the owners' financial capacity within 30 days of signing the contract as required by the contract. He claimed that the owners were in breach of the contract when they terminated the contract in February 2015.

112 I have found that on 6 November 2015 Ms Lynch notified the builder of the owners' ability to pay the contract price. I therefore find that the owners notified the builder of their ability to pay the contract price within 30 days of the contract date, 22 October 2014. I therefore dismiss the builder's claim.

Are the owners are liable to pay \$98,000 to the builder on termination?

113 Mr McDonald raised a new claim in his submissions filed on 25 November 2015. He claimed that if the owners terminated the contract under clause 19.3, because a building permit was not obtained within the time specified in the contract and the builder was not at fault, then clause 19.4 allowed the builder to claim \$98,000 from the owners.

114 I find that Mr McDonald has not made out this claim for the following reasons. First, I have found that the owners did not terminate the contract under clause 19.3. Second, I find that even if the owners had validly terminated the contract under clause 19.3, the builder has no basis for claiming \$98,000. This is because Mr McDonald's calculation was incorrectly based on a percentage of the contract price rather than on the work performed by the builder during the contract.

Is Ms Lynch entitled to a refund of her deposit and damages?

115 At the start of the hearing Ms Lynch claimed damages of \$11,874.30 comprising the following:

(a)	The owners' deposit withheld by the builder	\$3,970.20
(b)	Interest on the owners' deposit of \$15,652.70	\$310
(c)	Interest paid on land purchase	\$5,650
(d)	Bank asset assessment fee	\$118.50
(e)	Stamp duty discount if building application filed before 15 February	\$1,300
(f)	VCAT filing fee	\$525.60

116 During the hearing Ms Lynch acknowledged that the filing fee of \$525.60 was not to be included in the damages claim but was a fee for which she would claim reimbursement from the builder should she succeed with her application. During the hearing Ms Lynch conceded that she did not have the evidence to support her claim for interest set out in paragraphs 89(b) and (c).

117 Ms Lynch gave evidence that the owners paid a bank fee of \$118.50 which was part an asset assessment fee. I find that this fee was payable by the owners irrespective of the termination of the contract as they needed the asset assessment to obtain a bank loan to construct a home on the site. I therefore find that the builder is not liable to pay Ms Lynch \$118.50 as this fee was payable regardless of which builder carried out the building works on the site.

118 Mr McDonald gave evidence that the owners were still entitled to a stamp duty discount of \$1,300 because the builder had applied for the building permit prior to 15 February 2015. Ms Lynch did not dispute Mr McDonald's evidence. I accept Mr McDonald's evidence. I find that as the owners did not lose their entitlement to a stamp duty discount of \$1,300 there is no basis for this claim.

Is the builder entitled to any part of the deposit?

119 Mr McDonald gave evidence that the builder was entitled to be paid for work that it had carried out and for expenses that it incurred and paid for whilst performing its work when the contract was on foot. He claimed that the builder was entitled to withhold \$3,970.

120 I have found that the builder repudiated the contract and that the owners validly terminated the contract on accepting the repudiation. As a consequence, the owners are entitled to a refund of the deposit. However s 53(1) of the DBC Act gives the Tribunal the power to make any order it considers fair to resolve a domestic building dispute. The issue is whether, regardless of the builder's repudiation, the owners have gained some benefit from the work carried out by the builder or for work paid for by the builder on the owners' behalf.

121 Initially, Mr McDonald said that the owners should pay the costs of the FMG invoices of \$352, \$497.20 and \$1,925. However he agreed that the owners had not received any benefit from them and had paid for new reports. Having heard

the evidence I find that the owners did not benefit from FMG's work as they had to pay for the work to be redone.

- 122 Mr McDonald gave evidence that the builder paid Neocheck, the building surveyor, for its invoice dated 2 December 2014 of \$1,638.75 and that the owners should pay for this work. The description in the invoice is for "building permit fee, council lodgement fee and stated government levy based on the estimated cost of the works being \$392,458. The description appears to be for disbursements. I am not satisfied on the evidence that the owners have gained any benefit from this work.
- 123 I find that the owners have not received a benefit from the work carried out by the builder, FMG or Neocheck. I find that the owners are entitled to a refund of the remainder of the deposit of \$3,970.20.

Conclusion

- 124 I therefore find that, as the owners accepted the builder's repudiation of the contract and validly terminated the contract at common law, and the owners did not benefit from the work carried out by the builder or paid for by the builder, Ms Lynch is entitled to the remainder of the deposit of \$3,970.20 withheld by the builder.
- 125 I will make orders that the builder must pay Ms Lynch \$3,970.20. I will also make orders that the builder must reimburse Ms Lynch the filing fee of \$525.60 and the hearing fees of \$399.80.

MEMBER F.A. MARKS

15 March 2016