

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. D1103/2013

CATCHWORDS

Domestic building – defective work – evidence – liquidated damages – limits amounts recoverable

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|------------------------|------------------------------------------------------------------------------------------------------------|
| APPLICANTS | Mark Macdonald and Susanne Macdonald |
| RESPONDENT | Peter Tins Design & Sales Consultants Pty Ltd (ACN: 006 913 837) |
| WHERE HELD | Melbourne |
| BEFORE | Senior Member R. Walker |
| HEARING TYPE | Hearing |
| DATE OF HEARING | 10-15 November 2014 |
| DATE OF ORDER | 23 December 2014 |
| CITATION | Macdonald v Peter Tins Design and Sales Consultants Pty Ltd (Building and Property) [2014] VCAT 1595 |

ORDER

1. Susanne Macdonald is joined as an Applicant to this proceeding.
2. Order the Respondent to pay to the Applicants \$160,969.94.
3. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

| | |
|--------------------|-----------------------------|
| For the Applicants | Mr A. Beck-Godoy of Counsel |
| For the Respondent | Mr P. Tins in person |

REASONS

Background

- 1 The Applicants (“the Owner”) are the owners of a dwelling House in Carrum (“the House”) which was built for them by the Respondent (“the Builder”).
- 2 The Builder no longer carries on business as a builder. Its director is Mr Tins who was at all materials a registered Builder but is now retired.
- 3 By a building contract dated 23 October 2009 the Builder agreed to build the House for the Owners for a price of \$1,503,176 (“the Contract”).
- 4 The land upon which the House was to be built abuts the beach at Carrum on its western boundary. It is therefore exposed to wind and wind-borne salt water from the sea coming from the west.
- 5 The plans pursuant to which the House was to be constructed were prepared by an Architect, Mr Oroszary (“the Architect”) who was the person who introduced the Builder to the Owners.
- 6 Construction of the House commenced on 1 February 2010. Thereafter there were some delays for which the Builder sought an extension of time but which was refused by the Architect. No action was taken by the Builder in regard to this refusal and building work thereafter appears to have proceeded, although not on a regular basis.
- 7 The Owners took possession of the House on 16 September 2011.

The issues

- 8 The Owners claim damages for defective and incomplete work and also liquidated damages for late completion.
- 9 The Contract provided that the date for practical completion was 17 December 2010. There was an agreed figure of \$120 per calendar day for liquidated damages.
- 10 The original complaints of defects related to water penetration. Even during construction a number of leaks were noticed in various places which the Builder did not succeed in rectifying. After taking possession the Owners made numerous further complaints and despite many attempts by the Builder to fix them the House is still leaking.
- 11 On 20 December 2012 the Owners had the House inspected by a building consultant, Mr Love, who listed 28 items of defective work and assessed the cost of rectifying them at a total of \$237,689.19.
- 12 This proceeding was issued on 9 October 2013 seeking damages of \$223,422.87. By its Points of Defence the Builder denied that it was in breach of contract and claimed to set off against any claim by the Owners an amount of \$30,317.71 retention held by them under the Contract.

The hearing

- 13 The matter came before me for hearing on 10 November 2014 with five days allocated. Mr A. Beck-Godoy of Counsel appeared for the Owners and the Builder was represented by its director, Mr Tins.
- 14 I heard evidence from Mr Macdonald on the first day and then in the afternoon I inspected the House in the presence of the Owners, Mr Tins and the Owners' expert, Mr Love.
- 15 The Builder had filed an expert report by a Mr Mitchell but he was not called. Nevertheless, Mr Tins said that the Builder wished to rely upon Mr Mitchell's report and so I have considered it.
- 16 On the second day, I heard the evidence of Mr Love and Mr Tins and also considered the report of Mr Mitchell in regard to each of the alleged defects. A Scott Schedule had been prepared and a number of the items had been abandoned.
- 17 Mr Tins frankly conceded that there were problems with the work and said that he had been let down by his supervisor. He also blamed the Architect for not granting an extension of time and for other matters. He said that the Builder was no longer carrying on any business and that he himself had now retired. He did not seem to have any great interest in the outcome of the case and I gained the impression that he was an honest witness.
- 18 Evidence concluded early on Wednesday morning and I then heard submissions from Mr Beck-Godoy and Mr Tins. I informed the parties that I would provide a written decision.
- 19 I will deal first with the alleged defects. Some items previously claimed have been withdrawn. I have referred to both costings but since Mr Love's evidence is sworn I must prefer his evidence over the unsworn report of Mr Mitchell in the case of any conflict.

Item 1- Tiling

19. There is an access door to the House through the garage. It opens into a gallery that runs the length of the House. This is tiled with large square tiles. They are all identical in colour but eight of them appear to be considerably darker than the others, giving the floor a patched appearance. I accept the evidence of Mr Love that this is due to the tiler having laid these tiles in a different direction causing the glancing light coming from the west to reflect differently, making them appear darker. The result is cosmetic but quite unsightly and I accept that it is a defect. There are tiles in the upstairs bathrooms which suffer from the same defect. There are sufficient spare tiles to replace the eight non matching tiles on the ground floor but it will be necessary to replace all of the tiles in the upstairs bathrooms to fix the problem there.
20. Mr Tins said that the Owners did not complain about the way the tiles were laid and that the quality of the tiler's work was good. Certainly, the tiles

have otherwise been well laid but it does appear that care was not taken as to the direction in which they were laid. I was shown a spare tile and there is a pattern on the back of the tile which would have allowed the tiler to know which way they were being laid so as to ensure they were all laid in the same way.

21. I am satisfied that this was a defect. Mr Love has costed the rectification work at \$3,570.06. Mr Mitchell has costed it at \$2,712. The difference appears to relate to a slightly lower hourly rate, a much higher rate for a caulker to caulk the edges and tipping fees, which Mr Mitchell has not included. Since Mr Love is able to justify his figures, and Mr Mitchell was not available to be questioned on his figures, I must prefer Mr Love's assessment.

Item 2 - The garage walls

22. The garage walls are brick veneer construction but the northern wall has no weep holes and the external paving has been laid by the Builder at the same level as the internal garage floor. The result is that the cavity in the wall is unable to drain to the outside of the building.
23. Mr Love said that the problem with that was that the sole plate of the wall, which was ordinary pine timber framing, would rot as a result of water being unable to escape. Mr Mitchell said the wall was performing as intended and that no further work was required. Mr Love pointed out some minor deterioration to a join in the skirting which he said was due to water.
24. Mr Tins said that he had not been able to construct the House too high because of the height restrictions. He said that he ran everything past the Architect. He also suggested that since the garage as Category 10 building the wall did not need weepholes. Mr Love said that although it was a Category 10 building it had a cavity wall and the Building Code of Australia ("the BCA") required cavity ventilation and drainage, with weepholes every 1.2 metres.
25. I accept that this is a defect and Mr Love's costing of \$9,715.20 to rectify it.

Item 3 - Walls out of plumb

26. Nine walls inside the House are out of plumb. This was demonstrated to me on site by Mr Love using a spirit level. Mr Mitchell did not dispute the alleged defect but said that the cost to rectify was out of proportion to the benefit to be gained and suggested that since there was no loss of amenity or loss of value there was no further work required. That is not an answer to the claim. The Owners are entitled to have the work done in accordance with the contract documents and the requirements of the BCA and I accept that these walls will need to be rectified. Mr Love's costing of \$7,986 will be allowed. I have no other costing from Mr Mitchell.

Item 4 - Cabinetry out of level

27. Various bench tops, doors and handles were out of level and are poorly aligned. This was pointed out on site and I accept that that is the case. Mr Love costed the rectification at \$1,584. Mr Mitchell's figure is \$1,478. Since they are both estimates I will allow \$1,500. Mr Tins agreed that the cabinetry needed to be levelled.

Item 5 - Wall in the theatre room not straight

28. The wall is not level and the plaster, skirting and tiles are bowed. Rectification is costed by Mr Love at \$6,032.40. Mr Mitchell said that the cost to rectify would far outweigh the consequence of the defect. Again, I do not think that this is a proper approach. The Owners are entitled to the work contracted for and it is appropriate to allow the cost of rectification which Mr Love assessed. The variations in the wall were about 12mm, which is not trifling. They were clearly seen, particularly against the tiles in the floor. According to Mr Love the Australian Standard allows 4mm over 2 metres and the discrepancy here is 3 times that.

Item 6 – Leak in ceiling of theatre room

29. This is directly below a balcony and the Builder has made several attempts to repair the leak. Mr Love suggested that the likely explanation was that the small area of the waterproofing to the balcony had failed, that the tiles would need to be removed and the balcony re-waterproofed and the tiles reinstalled. Mr Tins said that the water could not be coming from the balcony because it is solid concrete. He suggested that it was coming from the doorways on the upper level. He said that the balcony was waterproofed just before the tiling and the water could be coming from the balcony rail. Having seen the evidence of the water penetration I prefer Mr Love's opinion that it is leaking through the balcony. Mr Love costed this work at \$11,886.96. Mr Mitchell assessed it at \$9,028. They are both estimates and I shall allow \$10,500.

Item 7 - Blocked weepholes.

30. According to Mr Love, the majority of the weepholes are, blocked. Many of the blocked weepholes were pointed out to me on site. I accept Mr Love's evidence that they need to be cleared. The difference between the experts on this item is in the cost. Whereas Mr Mitchell has allowed two hours for a tradesman to clean the existing weepholes and six hours for a tradesman to cut new ones, Mr Love has allowed a lump sum of \$3,000. The manner of calculating this sum is not given in his report but he said that there was a substantial risk of damaging the damp proof course in the course of the work and so a large contingency should be allowed against that possibility. Mr Tins said that Mr Love was being much too cautious and that even if \$3,000 were allowed, to replace the damp proof course in a constructed wall would cost more than that.

31. Mr Mitchell's costing states that the drilling of the new weepholes would be with a depth gauge set to the width of the brick thickness, indicating that he has turned his mind to the danger of cutting too deeply.
32. It seems to me that the actual work in clearing out these weepholes and cutting the missing ones is what has been costed by Mr Mitchell and the real issue is whether there should be any, and if so what, contingency figure added to allow for the risk of damaging the damp proof course. If, as Mr Mitchell suggested in his costing, a depth gauge was used it is difficult to see how the damp proof course could be affected by the work. Nevertheless, I think I should allow some contingency and so on this item I will allow \$1,580, being Mr Mitchell's figure plus a contingency of \$1,000 extra.

Item 10 - Exposed steelwork.

33. Mr Love said that all of the steel in the House should have been treated in accordance with the BCA, Page 265, Table 3.4.4.2. According to that table, the internal steel must be coated in two coats of Alkyd primer. He said that the outer leaf of a wall is considered to be an external environment as is the cavity of that wall. He said that accordingly, any steel in the cavity is regarded as external and must be specially treated. He said: "This has not occurred to this dwelling. Steel in the cavity is only paint treated."
34. Mr Timms said that he thought all of the steel should have been hot dipped galvanised but the engineer had instructed him not to do so. He said that if he had done it he would have charged more.
35. Section 05100 of the Specifications requires structural steel to be hot-dipped galvanized for "Finish A" and 100 micron thick coat of inorganic zinc silicate for "Finish B".
36. I can find nowhere in the contract documents tendered that identifies which members are to have one finish and which the other. I am therefore thrown back onto the BCA. Table 3.4.4.2 provides that, where the building is within 100 metres of salt water then the options for protecting internal steel are 2 coats of Alkyd primer or 2 coats of Alkyd gloss. For external steel the options are either inorganic zinc primer plus 2 coats of vinyl gloss finishing coats or hot dipped galvanised with or without painting (depending on the thickness of the galvanising coat).
37. The steelwork that I saw in the roof space, which I understand Mr Love to be suggesting is an external environment, appeared to have been painted red. Mr Love said that they attempted to take samples of the paint on the steel but were unable to ascertain precisely what it is.
38. The photographs attached to Mr Love's report show some evidence of rusting of the steel members within the roof space but these appear to be in areas where there have been leaks.
39. I am not satisfied that it has been demonstrated that these internal steel members have not been painted in accordance with the Code since I do not

know whether the red paint that I can see is Alkyd primer or Alkyd gloss or whether or not 2 coats have been applied. However there are steel members in an external environment that are rusting that would seem not to have been hot dipped galvanised or painted in accordance with the Table.

40. Mr Mitchell allowed a figure of \$2,217 to remove all rust and apply three coats of paint to externally galvanised steel. His costing is simply for three days labour without any allowance for materials. Quite obviously, some materials would be required.
41. On the other hand, Mr Love's costing is 75 hours for each of a painter, a carpenter, a bricklayer, a renderer, and a plasterer. He has allowed \$5,000 for the hire of a scaffold and \$4,900 for materials. With margin and GST the total figure becomes \$49,632. It is apparent from these very round figures for labour that this is very much a ball park estimate rather than a precise assessment although I can understand that the full scope of works might be difficult to assess with any precision.
42. However it cannot be positively stated that the paint that is observed on the steel internally on the inside of the building does not have an Alkyd base and so I cannot allow that part of the claim. As to the external steel, for the reasons given I think Mr Mitchell's figure has omitted the materials. If I allow half of Mr Love's figure of \$4,900 for materials applicable to outside steel then add that to Mr Mitchell's figure then add GST and margin that would arrive at a figure of \$6,111.60. That figure will be allowed.

Item 11 - The pool door closer and screws

43. The pool door closer has become seriously corroded and the mechanism has failed. It has become detached from the door and no longer functions. It is plain that it needs to be replaced. Numerous screws that were to be stainless steel have also corroded and need to be replaced. According to Mr Love the materials used were not suited to this environment and an appropriate product was available at the time of construction.
44. Mr Timms suggested that the door closer was supplied by the window manufacturer and that this was a maintenance issue. He said that the screws were stainless steel. It seems to me that these are defects. The supply of the door closer is within the Builder's cope of work s and the Builder is responsible for it.
45. A number of screws used externally are also corroded. If the screws were indeed stainless steel as Mr Tins suggested they were not sufficient because they have failed after only one year. Mr Love's figure of \$858 will be allowed.

Item 13 - Cracking of render.

46. This is acknowledged to be minor and consistent with a rendered House having settled after construction. Mr Love's figure to rectify the cracking is \$250.80 and Mr Mitchell's figure is \$184.00. Mr Love has allowed an hourly rate of \$75 an hour whereas Mr Mitchell has allowed \$70 an hour.

Mr Love has also allowed for materials and Mr Mitchell has not. I think Mr Love's costing is more comprehensive and I will allow his figure of \$250.80.

Item 14 - Install exhaust fan stoppers.

47. This item is also acknowledged. Mr Mitchell's figure was \$389.40 and Mr Love's figure was \$475.20. I see no reason to prefer one figure over the other so I will allow \$440.

Item 15 - Weather seal to garage passenger door

48. The garage passenger door has not been sealed to the garage. Mr Mitchell assessed rectification at \$277. Mr Love assessed it at \$303.60. Mr Love's figure was defended by an extensive discussion on site and I will accept his figure of \$303.60.

Item 16 - Gallery on ground floor.

49. The ground floor gallery has recessed sliding doors to close it off in two places. Between the face of each side of each door and the framework into which it slides, the gap has not been sealed. Mr Mitchell has costed the removal of the doors and the fitting of a specific seal to both sides of each doorframe at a cost of \$257.60. Mr Love has assessed a much greater scope of works involving obtaining access to the space through the wall of the adjoining room.
50. Having examined the doors it seems to me that the solution that is proposed by Mr Mitchell would be sufficient. It was not suggested that the plans made any specific provision for the sealing up of these gaps. The passage in the BCA referred to by Mr Love appears to me to relate to external walls and these gaps are internal. I shall allow Mr Mitchell's figure of \$257.60.

Item 17 - Heating and cooling registers.

51. These are mounted in bulkheads in the ceiling with the appliance positioned behind the grate. In each case the grate and the appliance are different shapes allowing for air leakage between the two.
52. This is an obvious defect and I accept Mr Love's evidence that the gaps will need to be sealed off. Mr Mitchell's costing for this item is \$554 whereas Mr Love's costing is \$2,178. Looking at the items taken into account in each costing I think that Mr Love's costing is more comprehensive and reflects the extent of the work required. I will allow Mr Love's figure of \$2,178.

Item 18 - Timber flooring to Level 1

53. The floor is out of level. At the inspection it appeared that the problem arose from structural members beneath the floor. According to Mr Love, the *Guide to Standards and Tolerances 2007* allows a maximum tolerance for out of level floors is 4mm over 2 metres.

54. Mr Love assessed the cost of rectification at \$9,504.00. Mr Mitchell agreed with that pricing although it is unclear whether he agreed that the defect was present.
55. Although Mr Tins appeared to acknowledge that the floor was defective he said that it was a very big expense to incur for what he considered to be a small outcome. However the permissible tolerance has been exceeded by 4 or 5 times and so I do not believe that I can say that it is unreasonable for the Owner to insist upon rectification. The amount assessed by Mr Love will be allowed.

Item 19 - Water Leak

56. This item is dealt with as part of Item 28

Item 20 - Condensation under the eaves

57. Mr Love said that there was staining to the external eaves of the garage and the side walkway which he thought was due to condensation. He said that one of the possible causes was the material used to construct the eaves and the paint used to seal them. He assessed the cost of bleaching the mould and repainting the eaves at \$607. Mr Mitchell agreed with the costing.
58. Mr Tins said that the problem was due to the Architect's design and instruction and that it was constructed as designed.
59. The cause appears to be unknown and the problem is said to have been possibly due to choice of materials. There is no evidence that the Builder used incorrect materials. I am not satisfied that defective workmanship has been established. It is equally possible that the problem is due to defective design as Mr Tins alleged.

Item 21 - Front gate footing

60. There is a steel double gate for vehicular access and a single passenger gate for pedestrian access. The gates are very heavy and are supported on concrete footings. Each of the posts of the front gate is on a separate footing. As a consequence, they have moved relative to one another and the passenger gate can no longer be secured.
61. Mr Love said that because of the weight of these gates they should have been on a continuous footing and I accept that evidence. He costed the construction of a new footing at \$2,415.60 and Mr Mitchell agreed with that costing. Mr Tins suggested that it could be done much cheaper but did not state with any particularity what it should cost or justify any other figure. I accept Mr Love's costing and because of the conclusion I have come to in regard to the next item I must, according to his evidence, add \$700 to allow for the fact that the gates are not to be removed.

Item 22 - Front gate.

62. Apart from the front gates referred to in the last item there is also a passenger gate adjacent to the swimming pool. The paint surface on the

pool gate is severely degraded and the paint surface on the front gates show some deterioration. They had all been hot-dipped galvanized before being powder coated at, according to Mt Tins, the direction of the Architect.

63. Mr Love said that the paints and coatings applied did not comply with the BCA requirements for steel this close to salt water. Mr Tins said that the Architect required that the gates be powder coated. The detail provided by the Architect for the front gate in WD-14 requires the posts to be galvanized and Section 02820 of the Specifications requires the gates to be galvanized.
64. The painting specification lacks any detail as to how they should be painted, although there is a statement that the Builder should “Consult with Architect”. In these circumstances the Builder should follow good building practice and I am satisfied from Mr Love’s evidence that it did not do so.
65. As to rectification, Mr Love said they should be removed, sandblasted and then repainted in accordance with the BCA requirements and then re-installed. In his costing he has allowed to remove the gates, take them away, strip them back and re-galvanize them and return them to the site was \$6,171.00. Mr Mitchell has costed for them to be stripped back to the galvanized surface and repainted in accordance with the BCA. I am not satisfied that they need to be re-galvanized. I therefore prefer Mr Mitchell’s costing of \$2,217.00.

Item 23 - Double glazed windows

66. The windows were a provisional sum item for which a figure of \$165,800.00 was allowed in the Contract. The Specifications required all windows to be double glazed. According to Mr Love’s report the south side windows are not double glazed “...as per the requirements of the energy report”.
67. Mr Tins said that he was directed by the Architect to use an expensive supplier that he (Mr Tins) would not have used. He said that, because the Architect wanted more money to spend on the joinery, certain of the windows were changed to singled glazed in order to save money on the cost of the windows, which was considerable. He said that, in order to enable the House to still meet the energy rating, the Architect renamed some of the rooms on the plans so as to enable them to have single glazed windows. He said that, although he ordered the windows they were chosen by the Architect. He said that the windows that he installed were those the Architect had chosen.
68. Mr Tins’ evidence is supported by two emails. The first is from the Architect and dated 1 June 2009. In it the Architect’s employee informs Mr McDonald he and the Architect “...were struggling with window quotes and this was affected by the energy rating report provided..” He said that there was no change in the energy rating report. The second is an email dated 23 September 2009 that he said he received from the Architect headed “Rater Comments”. The last paragraph of this email reads:

“All windows are to be 6/12/6 Clear Low E (Hard Coat #3) double glazed windows, except the windows in the work shop, storage room, the dining room windows facing west, the upper storey window, the master bedroom window, the upper storey bathroom window facing west, the upper storey staircase void window facing west, the upper storey pdr room window facing west, the upper storey pantry room window facing west and the upper storey kitchen window facing west.” (*my emphasis*)

69. Although the evidence is not altogether clear, these seem to be the windows about which complaint is now made.
70. Mr McDonald said that he had not seen this document before. He said that it was all done without his knowledge and consent. He said that no variation was submitted to him about that. The communications between the Owner and his Architect are not the concern of the Builder. By Clause A4.2 the Owner must indemnify the Builder for any liability incurred by it in respect of any default or negligence of the Architect. By Clause A6.2 the Architect is the Owners’ agent for giving instructions to the Builder.
71. Since the windows were a provisional sum item there was no benefit to the Builder in using less expensive windows. The saving was to the Owners.
72. The Architect was supervising the construction and the substitution of windows was obvious. If it had not been authorized then one would expect that a direction would have been given by the Architect to remove them and install the correct windows. There is no evidence of any such direction or any complaint from the Architect that the incorrect windows were installed.
73. In paragraph 33 of his witness statement Mr McDonald stated that he attended a meeting with the Architect, Mr Tins and the window supplier on 14 December 2011, He added that

“It was then discovered that many south side windows were not double glazed, as per the Energy Rating Report and contract, but were in fact single glazed.”
74. He did not say what the Architect, the Builder or the window supplier said at that meeting about that discovery or what explanation he received or even say that he received no explanation. If this meeting occurred, I do not believe I have been given a full and accurate account of it. Since the Builder was not legally represented Mr McDonald was not cross-examined.
75. Mrs McDonald kept an on-going record of matters that were not right and required attention. This is highly detailed and lists 193 items. Some of these involve windows and there is reference to the window supplier returning to do various things as well as input by the Architect in regard to the issues raised. There is no mention in these extensive notes about any of the windows not being double glazed. The first indication of any complaint appears to be Mr Love’s report.
76. This seems to me to be an opportunistic claim based upon the absence of a formal variation. Since I am satisfied that the Builder has installed the

windows it was instructed to install that were chosen by the Architect, I find no breach.

Item 24 - Rusting of shade support

77. There are shading louvres on the northern side of the House which are supported by a steel framework that appears to have been hot-dipped galvanized. It is very large and would obviously have to have been mounted in sections. The sections have been welded together on site and the small areas of the welds have been painted with some form of silver spray. This has failed and the steel is rusting underneath in those locations.
78. Mr Love criticized the construction method used and said that the sections should have been bolted together. Mr Tins said that would have been unsightly and the Architect did not want anything to spoil the appearance.
79. There is no detail as to the construction of this steelwork in the contract documents. Section 05580 of the Specifications contains a number of potentially conflicting instructions. The Builder is instructed to provide smooth finishes with sharp well defined lines, it is to fasten galvanized items with galvanized fasteners and remove weld splatter and touch up with zinc rich paint immediately afterwards.
80. Mr Love has costed the dismantling and removal of the whole of the shading system, removal from site, re-galvanizing and reinstallation at a total cost of \$37,441.00. The work would require a crane and scaffolding.
81. Mr Mitchell has costed to wire brush the affected areas and repaint them to match. His figure is \$1,399.00.
82. Since:
 - (a) the only BCA requirement is to paint in the appropriate paint;
 - (b) the Specifications permitted the Builder to paint these welds; and
 - (c) the support has been galvanized as required;

I think that Mr Love's scope of works is excessive and that the scope that Mr Mitchell has costed would be sufficient. I will therefore allow Mr Mitchell's figure.

Item 26 - Cracked bench top

83. The bench top is cracked and requires replacement. Both experts agreed on a cost of \$1,544 for that work.

Item 27 - Pool door closer

84. This item has already been allowed for in Item 11

Item 28 – Roof leaks

85. There are numerous water leaks that occur during rain. Mr Love has documented twelve positions in the House where they occur which are listed in his report.

86. Mr Love said that several layers of silicone have been applied to various parts of the roof in an apparent attempt to stop the leaking. Although he acknowledged that the sheet roofing material appeared to be in good condition, the flashings were the leak points for the roof. He said that all flashings on the roof needed to be replaced with flashings that are sealed and fall to a drain point. He costed this work at \$51,965.37.
87. Mr Mitchell's figures are difficult to understand. He refers to a figure of \$22,800 which he says is a quote from a plumbing expert to renew all flashings, cappings and gutters, \$2,500 for miscellaneous materials and rubbish removal and \$7,000 for repairs, but he then assesses only \$7,000 as the cost of the repairs plus \$75.00 for rubbish removal. Since I do not understand Mr Mitchell's figures I am left with Mr Love's figure which I accept.

Permit and other costs

88. Mr Love said in a supplementary report that, in addition to the individual costings, a rectifying builder will need to obtain a further building permit, engage a building surveyor and an engineer and also obtain domestic building insurance. He said that an appropriate allowance for those costs would be \$10,000.00. In the absence of any contrary evidence I will allow that sum.

Accommodation

89. Mr Love also said in his supplementary report that rectification of defects would take approximately ten weeks. The Owner claims the cost of alternate accommodation at Quest Apartments during this period which he said would cost \$28,630.00.
90. The scope of works that I have allowed for is less than that assessed by Mr Love. The largest items in that regard are the steelwork and the windows. Nevertheless, floors will need to be replaced and considerable work will need to be undertaken inside the House which would make it impracticable for the Owners, given their particular domestic circumstances, to live there during the period of rectification.
91. It cannot be known with any certainty what the period will be but I am satisfied as to the cost of the accommodation sought by the Owners and that they will have to move out. I will allow \$15,000.00.

Damages for delay

92. The date for practical completion was 17 December 2010. By Clause M8 of the Contract, the Builder was liable to pay liquidated damages of \$120 a day for late completion. The Owner took possession of the House on 16 September 2012. That is a delay of 273 Days. At \$120 per day that would amount to \$32,760.00. It is unclear whether the procedure for claiming liquidated damages under Clause M8 of the Contract was followed but the liability appears to arise independently under Clause M8.3.

93. The Owner claims \$128,280.00, for liquidated damages to 14 March 2014. The Contract provides no basis for calculating liquidated damages to that date. Liquidated damages are payable only until Practical Completion is achieved (Clause M9.3). Once the Owner has taken possession, the works are treated as having reached Practical Completion (Clause M7.1) and so the liability to pay liquidated damages ceases.
94. The Owners were living with their family in another house that they owned over which there was a mortgage. In order to cause minimum disruption to their family and particularly their son, who has special needs, they had intended to sell the existing house and move out in time to move into the House. Mr Macdonald said that Mr Tins was aware of their intentions in this regard.
95. Because of the delay in reaching practical completion the sale of the existing house was also delayed. Mr Macdonald said that he was forced to sell the existing house on an unfavourable market and also incurred interest payments of almost \$42,000.00 under the mortgage over the existing house. The Owners claim these losses as well.
96. The purpose of a liquidated damages clause is to agree in advance what damages will be paid in the case of a breach. So long as it is a genuine pre-estimate by the parties of the loss that is likely to be suffered and not a penalty, a clause of this nature is valid and is to be found in almost every building contract. It has the advantage that the innocent party is relieved of having to prove the actual loss suffered. All that is necessary is to prove the breach, the period and the agreed rate. If the actual loss should turn out to be less then the shortfall cannot be relied upon by the party in breach. He still has to pay at the agreed rate. Conversely, if the actual loss should turn out to be more, the excess is not recoverable.
97. Mr Beck-Godoy submitted that these damages, which are sought in addition to the liquidated damages, were foreseeable by the Builder and arose naturally from the breach. Even if they do, both parties are bound by the agreed rate and no more can be recovered than what was agreed in advance.

Conclusion

98. Defects have been assessed at \$122,028.23 as follows:

| | |
|-----------------------------------|-------------|
| Tiling | \$3,570.06 |
| The garage walls | \$9,715.20 |
| Walls out of plumb | \$7,986.00 |
| Cabinetry out of level | \$1,500.00 |
| Wall in theatre room not straight | \$6,032.40 |
| Leak in ceiling of theatre room | \$10,500.00 |
| Blocked weepholes | \$2,580.00 |
| Exposed steelwork | \$6,111.60 |
| The pool door closer and screws | \$ 858.00 |
| Cracking of render | \$ 250.80 |

| | |
|---------------------------------|---------------------|
| Install exhaust fan stoppers | \$ 440.00 |
| Seal to garage passenger door | \$ 303.60 |
| Gallery on ground floor | \$ 257.60 |
| Heating and cooling registers | \$2,178.00 |
| Timber flooring to Level 1 | \$9,504.00 |
| Front gate footing | \$3,115.60 |
| Front gate | \$2,217.00 |
| Rusting of shade support | \$1,399.00 |
| Cracked bench top | \$1,544.00 |
| Roof leaks | \$51,965.37 |
| Building surveyor, engineer etc | \$10,000.00 |
| Total | <u>\$132,028.23</u> |

99. Taking into account defects and liquidated damages as well as the payments made under the Contract I find that the amount due to the Owner is \$160,969.94, calculated as follows:

| | | |
|--------------------------|---------------------|-----------------------|
| Payments made to Builder | \$1,482,432.82 | |
| Contingency not used | \$ 18,657.00 | |
| Defects | \$ 132,028.23 | |
| Liquidated damages | \$ 32,760.00 | |
| Alternate accommodation | <u>\$ 15,000.00</u> | \$1,680,878.05 |
| Contract price | \$1,503,176.00 | |
| Variations | <u>\$ 16,732.11</u> | <u>\$1,519,908.11</u> |
| Balance | | <u>\$ 160,969.94</u> |

100. There will be an order that the Builder pay to the Owner \$160,969.94. Costs will be reserved.

SENIOR MEMBER R. WALKER