VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D791/2007

CATCHWORDS

Domestic Building List; Major domestic building contract; Builder abandoning contract; Whether builder entitled to abandon contract based on perception that owners not ready and willing to perform in light of inadequacies of amounts remaining undrawn under loan facility; Abandonment constituted repudiation; Owners entitled to recover costs of rectification of defects and completion; Allowance made for sums apparently paid to builder but subject of *'round robin'* transaction and materials ordered by owners on builder's account for extraneous work.

FIRST APPLICANT	Silvia Beatriz Mackay
SECOND APPLICANT	Craig James Mackay
RESPONDENT	Christopher Knight
WHERE HELD	Melbourne
BEFORE	M.F. Macnamara, Deputy President
HEARING TYPE	Hearing
DATE OF HEARING	11-14 May 2009
DATE OF ORDER	26 May 2009
CITATION	Mackay v Knight (Domestic Building) [2009] VCAT 911

ORDER

1 The respondent must pay the applicant damages in the sum of $201,269.00.

2 Costs reserved.

M.F. Macnamara
Deputy President

APPEARANCES:

For Applicants	Mr Kirby of Counsel, instructed by Moray & Agnew Solicitors
For Respondent	In person

REASONS

BACKGROUND

1 Mr & Mrs Mackay both suffer significant hearing impairment as do some of their children. In 2005 they lived in a house in Pearcedale.

2 The Mackays owned a vacant property at 40 Finsbury Road, Devon Meadows. They entered a contract with Mr Knight, the respondent in this proceeding who carries on business under the name C.M. Knight Builders, for the construction of a brick veneer residence on their land at Devon Meadows for a fixed price of $297,000.00

3 The contract provided for a deposit of $14,850.00 representing 5% of the contract price with a further 10% or $29,700.00 payable at the base stage; a further 15% at the frame stage $44,550.00; $103,950.00 or 35% payable at the lock-up stage. The final stages were fixing stage $74,250.00 and completion stage 10%, $29,700.00. The contract is dated 4 August 2005 and was on a standard form produced by Buildsafe Independent Housing Group Pty Ltd which apparently was Mr Knight's insurance broker. The contract provided for a construction period allowing for holidays and other anticipated delays at 185 days. Table 6 to the contract set out certain works excluded from the contract on the basis that they would be done by the Mackays. Those exclusions were as follows:

> All decking on plans to rear and sides to be by owner.
>
> All site cleaning by owner.
>
> Power/water to building by owner.

4 The special conditions added in manuscript were as follows:

> Owner can change to lock-up stage if needed – price $158,000.
>
> Owner to pay full cost of …….. $800.00 to Forsite Design.
>
> Or any loans as needed to start work.

5 The Mackays obtained a loan in the sum of $297,000.00, the contract price, from a lender known as *'Homeside Lending'*. This loan was obtained through a brokerage known as *'Mortgage Choice'*.

6 Mr Knight obtained a certificate of insurance for the home warranty insurance required by the *Building Act* from Australian Home Warranty. This certificate valued the work to be done at $295,000.00; showed Mr Mackay as the owner and insured and showed Mr Knight as builder. The domestic building work covered by the policy was described as follows:

> Construction of a brick dwelling on slab floor with steel roof and plastered walls to lock-up stage only – as per application dated 01/10/2005.

7 Work began on about 23 December 2005. According to the Mackays' calculation of the days, this should have led to the works being completed by 27 June 2006. It will be recalled that the Mackays were to undertake certain preliminary works. Apparently Mr Mackay funded the carrying out of these works by resort to his credit card. The only immediate source of money to pay off that balance was the Homeside Lending facility which it will be recalled had a total face value of $297,000.00, the contract sum. On the face of it therefore the whole of the Homeside facility should have been devoted to meeting the payments owed to the builder under the contract. In fact some $13,351.00 of a tax invoice rendered by the builder for $14,835.00 was reimbursed to the Mackays in a *'round robin'* transaction. The difference between the original invoice sum and the refund represented the Goods and Services Tax which was presumebly retained and remitted by Mr Knight and not refunded.

8 This cheque to the Mackays from Mr Knight was dated 12 January 2006. A further cheque in the sum of $18,000.00 was also remitted to the Mackays as part of a similar *'round robin'* transaction.

9 Mr Knight then rendered a bill for *'lock-up stage 35% of contract price'* in the sum of $105,000.00 inclusive of $9,545.45 in Goods and Services Tax. This was endorsed for payment by Homeside by being signed by the Mackays and this payment was made to Mr Knight's bank account. On the same day Mr Knight rendered another invoice, No. 95 for a total inclusive of GST of $8,410.00. This invoice consisted of:

> Works at 40 Finsbury Road Devon Meadows to replace standard range bricks to Boral block range with labour as needed $7,150 (inclusive of Goods and Services Tax $650) and to supply tinselled windows to bedrooms as needed and quoted in dark grey 5mm $1,260 inclusive of Goods and Services Tax of $114.55.

10 These items referred to changes which the Mackays requested. The original contract apparently contemplated standard house bricks but the owners requested *'Boral block'* concrete bricks which are approximately twice the size. They also requested tinted windows. This invoice was met by Homeside once again against subscription of the signatures of the Mackays to the foot of the invoice.

11 In fact the works were never completed. According to Mr Mackay, Mr Knight *'abandoned the works on or about 4 May 2006'*. The Mackays instructed Gavin J. Black, Lawyers & Consultants to act. They obtained a report on the partly constructed house from Mr Alasdair Macleod of BSS Design Group. Mr Macleod concluded:

> The results of this report indicate that this building is technically approaching lock-up stage. We note however that the general standard of the work is considered to be average at best. In relation to the concrete blockwork externally the control joints do not properly align to the sides of windows, the damp proof course has been installed higher than that which is ideal and the damp course itself

> does not carry through to the face of the wall being well set back in many situations. In addition to this purpend variations in walls exceed an 8mm variation in many locations.
>
> In consideration of all of these issues there is a significant case for removal of the external blockwork and reconstruction. Possibly some retention of garage blockwork could be contemplated however remedial works will be necessary in this regard if this was adopted – rising damp problems, etc. Possibly a rendering of these walls could be considered as an option both externally and internally.
>
> Apart from the brickwork issue the other major issue is one of site drainage and all of the other matters noted in our report do require attention in the process of project completion.

12 Mr Black wrote a letter of demand to Mr Knight on behalf of the Mackays dated 18 July 2006. The letter of demand drew attention to the non-completion of the house, complained of hardship inflicted on the Mackays and identified some 19 alleged defects in the building. The letter threatened termination of the contract failing rectification and completion. There was apparently no response. In April 2007 a new law firm acting for the Mackays, namely Moray & Agnew wrote to the building inspector, Mr Chambers of Casey Building Services. Mr Chambers replied in a letter dated 27 April 2007 noting that inspections had been carried out at the pre-slab and steel reinforcement stages on 9 and 18 December 2005 but no further inspections had been carried out.

THE PRESENT PROCEEDING

13 The present proceeding was commenced on behalf of the Mackays on 29 November 2007. They sought a declaration that the building contract was at an end, they sought restitution, costs of rectification *'damages for inconvenience and nuisance'*, interest costs and further or other relief.

14 The matter went to hearing before Senior Member Walker on 14 March 2008. It proceeded on an undefended basis and Mr Walker ordered Mr Knight to pay the sum of $242,229.00 which apparently included an award of damages for inconvenience to each applicant in the sum of $10,000.00 each. Mr Walker also ordered that Mr Knight pay the Mackays' costs of the proceeding *'on an indemnity basis'*.

15 An application under Section 120 of the *Victorian Civil and Administrative Tribunal Act* 1998 heard by Senior Member Lothian was dismissed. The learned Senior Member found that Mr Knight had no reasonable excuse for failing to attend the hearing before Senior Member Walker. An application for leave to appeal from Mrs Lothian's decision was dismissed by a Master. On appeal to Williams J, the appeal (leave presumably having been granted) against Mrs Lothian's determination under Section 120 of the *Victorian Civil and Administrative Tribunal Act* was dismissed; nevertheless, Her Honour granted an enlargement of time to bring an application for judicial review under Order 56 of the *Supreme Court Rules*

and quashed the original Tribunal determination. She remitted the matter to the Tribunal for further hearing and the matter has now come on before me.

16 When the matter was called on, on Monday 11 May (a hearing date confirmed at a compulsory conference held on 15 April last) Mr Knight was represented by Mr Fennessy of Counsel. Mr Fennessy sought an adjournment for four months to enable his client to raise money by sale of assets to fund legal representation. I refused that adjournment for reasons which I then gave. By this time it was lunchtime on the 11th. I stood the hearing down to an on-site view at Devon Meadows the following morning (12 May) with evidence commencing 13 May. The evidence occupied the whole of 13 May and the morning of 14 May.

APPLICANTS' CASE

17 The applicants' case is simple. They say that Mr Knight walked off the site on 6 May thereby repudiating the building contract. They claim damages for the cost of rectifying defects and the cost of completion.

RESPONDENT'S CONTENTIONS

18 Mr Knight who represented himself at the substantive hearing following the refusal of his adjournment application submitted that once substantial moneys were drawn down from the Homeside Lending loan facility for purposes other than the construction of the house in accordance with the building contract it was clear that the Mackays would be unable to meet their obligations under the contract, hence he, Mr Knight, sought to modify the arrangements so that he could do sufficient work to enable a certificate of occupancy for the house to be obtained. He said that this would require matters to be stripped to the bone and a kitchen costed at approximately $3,500.00 would be all that could be afforded. As it was the Mackays selected a kitchen costed at $25,500.00. Mr Knight said there then ensued an *'unsavoury'* conversation which ended with him and the Mackays parting on bad terms. Mr Knight's discovery brought forth a document on CM Knight letterhead as follows:

> **Notice of completion of works 31.02.2006**
>
> Notice of completion building works No. 40 Findbery Rd
> Lockup stage only (as per contract)
> all works complete.
> Please note owners to carry out all works and warrintys (sic) from lockup, all electrical, all plumbing including drains, all plastering, all fixing, tiling, kitchen and vanitys (sic) as needed, complete painting and complete floor coverings, any site drainage as required.
> as of 31.1.2006
>
> OWNERS INITIALS …… BUILDERS INITIALS ……..

19 Mr Knight said that he was keen to have this document signed to enable him to cancel his warranty insurance because he wanted to commence another job. Presumably his financial arrangements with his insurer only

enabled him to have a limited number of jobs in progress at any one time. The document has on it what appears to be a signature of Mr Craig Mackay next to the words *'owners initials'*. Mr Mackay denied signing it. Mr Knight admitted that the apparent signature was not Mr Mackay's. This is clear enough if for no reason other than that Mr Mackay's surname is rendered as *'McKay'* whereas the correct spelling of his name is *'Mackay'*.

20 Mr Knight says the total payments which were made to him were $242,936.27. The applicants agree with this figure. Again there were round robin payments in the sum of $31,351.50 which in the circumstances cannot be regarded as having been paid for the benefit of Mr Knight. Once again, the Mackays agree with this figure. Next Mr Knight says he should be allowed credit for a short payment of $9,708.73 which was lacking from the payment of the deposit under the building contract because this amount had been withheld from the first loan draw down to pay the commission of the Mackays' broker, Mortgage Choice. He says he should also be given credit for $8,410.00 variations relative to bricks and windows; $26,700.00 materials which he said he allowed the Mackays to debit to his building supply account but which were used to erect and furnish a shed at the rear of No. 40 where the Mackays continue to reside. Further, he says he should be given a credit for some $6,226.00 paid to plumber Mr Mark Lay for the *'rough in'* work which he did on the premises and which Mr Knight says he paid for. These figures according to Mr Knight yield a *'total reimbursement (cash and in time) in the sum of $82,936.23'*. Accordingly he says only $160,540.04 should be regarded as the balance paid under the contract. Mr Knight continued:

> The building contract contains the possibility to complete the project to lock-up for $158,000 (without plumbing, electrical, site clearance, decking). There is a minor difference between the balance paid under the building contract ($162,540.04) and the $158,000 agreed to for a completion to lock-up only and this would be accounted for by some of the missing invoices and the septic tank [Mr Knight says he supplied but did not install the septic tank].

21 In effect Mr Knight contends that the option to terminate at lock-up stage has been implemented; he has performed to the extent that he was obliged to do and has received the moneys to which he was entitled, hence on this basis no moneys would be payable.

22 The estimates put by the owners to the costs of completion are according to Mr Knight *'outrageous'*. Mr Knight complained that he has spent over $100,000.00 in legal fees and lost work *'for the time I have put into attendance to all these court matters'*. He said he was defamed in an item on Channel 7's *'Today Tonight'* program and was the victim of arson on Christmas Eve 2008 which was:

> Within a week of the result of the Supreme Court hearing being in my favour. The investigation by my insurance company is ongoing and this timing of events is circumstantially suspicious.

23 He said that he had suffered *'distress, suffering, inconvenience and nuisance'*.

CONCLUSIONS

24 Mr Kirby, Counsel for the Mackays submitted that Mr Knight never intended to complete this house. He referred to evidence by both building consultant Mr Ray Martin and rectifying builder, Mr Gordon Christian that the provisions of Section 40 of the *Domestic Building Contracts Act* 1995 which provide for 65% of the contract price to be payable at or before lock-up stage *'front load'* the profitability of a domestic building contract such that the profit is to be made by the builder who undertakes the work to lock-up. This interpretation of events gains some credence from the form in which Mr Knight obtained his warranty insurance which even although quoting a figure of $295,000.00 which is almost the full contract price, states that the works are to be taken to lock-up only.

25 Clearly there was a difficulty created by funds from the Homeside Lending facility being used for purposes other than paying the obligations owed to Mr Knight under the building contract. Mr Mackay in cross-examination conceded as much. The document appearing from Mr Knight's discovery containing the apparently bogus signature of Mr Mackay indicates however that Mr Knight was seeking to obtain an exercise of the *'lock-up'* option which was granted to the owners and not to the builder under the contract. On his own account of the fate of this document, Mr Mackay declined to sign it and therefore declined to exercise the option to call the contract off at the lock-up stage. It may be that the parties were in negotiation as to some alternative arrangement which would relieve the builder of the obligation to complete the house in accordance with the contract by for instance, reaching occupancy certificate stage by some other means with some of the works carried out by the owner, some items dispensed with etc. Again, however it is clear that following the *'unsavoury'* conversation which led to the break between the parties, no agreement to that effect had been made. The result then was that the original contract stood. Mr Knight clearly evinced an intention not to be bound by that contract. He walked off the site and did not respond to the solicitor's letter of demand. Mr Knight repudiated the contract, the owners accepted that repudiation either by force of the solicitor's letter of demand or by the commencement of the present proceeding.

26 Mr Knight is *prima facie* liable for the amounts sought by the owners.

27 What then of the *'credits'* or *'deduction'* which he says should be made from his liability? It is difficult to regard the short payment on the deposit as being appropriately to be treated as some sort of credit. After all, if the short payment had not occurred, Mr Knight would have had $252,000.00 by way of payments rather than the $242,936.27 that he in fact received. The $9,708.73 has in effect already been removed from the game. It can create no further credit in Mr Knight's favour.

28 Nor should any allowance be given for the so called variation relative to bricks and windows. First, this was not a variation agreement it was simply a tax invoice which was paid. The experts who viewed the work were critical of the brickwork which was carried out. I have already quoted what Mr Macleod of BSS said. Mr Christian who is himself a bricklayer said the brickwork was a disgrace. Mr Ray Martin another of the applicant's building consultants was similarly critical. In answer to all this Mr Knight said that the difficulties were caused by a late decision on the part of the owners to change from having ordinary house size bricks to the large Boral blocks which are in effect twice as large. This he said *'threw out'* the setting out work that had previously been done. Given that the additional charge levied by the builder was presumably intended to cover for correctly laying out the site for the blocks to defend the quality of the works by saying in effect that no proper modification of the setting out was done would render an observer unsympathetic to any further credit being given to the builder for this work. It was not suggested for instance that this house was of some kind of shape that could not with proper workmanship be constructed with the large blocks. It was simply a matter of corner cutting on the part of the builder. According to Mr Knight he *'made an executive decision'*, presumably not to go back and redo the setting out properly.

29 The formalities required by Sections 38 or 39 of the *Domestic Building Contracts Act* 1995 governing variations respectively at the instance of the builder or the owner had not been complied with. In those circumstances according to those sections the costs of complying with such variation are recovered only in exceptional circumstances and if it would not be unfair to allow the builder to recover the relevant amounts. In the circumstances described particularly having regard to the fact that the work has not been properly done and having regard to the fact that the amounts have already been paid, I believe it would be unfair to give the builder some sort of credit relative to this variation; or to put it in the same way as the sections do, it would be unfair to give him some further credit on his account beyond his already having received the moneys which is of course the effect of what Mr Knight is now contending for.

30 Next, I deal with the sum of $6,226.00 said to be *'owing to plumber (Mark Lay)'* in the builder's written presentation. The word *'owing'* is problematic. According to Mr Knight's oral statements to the Tribunal, Mr Lay has in fact been paid so the choice of the word *'owing'* is surprising. Mr Knight produced extracts from his bank statement which showed a different and lesser amount as having been paid, namely $5,810.88. The difference between the two figures according to Mr Knight was that the payment was ex-GST. Why it would have been appropriate to deduct Goods and Services Tax was not explained. In any event $6,226.00 is not 110% of the payment which is recorded as having been made. I am therefore doubtful $6,226.00 has actually been paid. For the sake of this determination however I assume that it has been. Mr Kirby on behalf of the

owners submitted that if this be the fact it nevertheless gives the builder no entitlement to a credit or reduction in liability to the owners. The work said to have been undertaken by Mr Lay was the plumbing *'rough in'*. This said Mr Kirby was simply within the scope of the works which the builder had contracted to carry out for the owners, hence no special credit should be given for this since it was not additional work. This submission seems generally to be compelling. I was troubled however by the thought that the *'roughin'* would normally be regarded as part of the fixing rather than the lock-up stage. The lock-up stage was the last stage for which the builder rendered an invoice. In the end however it does not matter if the rough in represents a step beyond the lock-up stage. In broad terms lock-up stage had not been attained. The requirement for lock-up stage is laid down in Section 40 of the *Domestic Building Contracts Act*. It requires that *'a home's external wall cladding … is fixed'*. There is no door, temporary or permanent on the garage which is located under the house roofline nor is there a stud wall between the garage and the house. It is possible simply to walk straight into the house. The house is not at lock-up stage. *Bobo's Fashion Pty Ltd v MJF Property Developments Pty Ltd* [2004] VCAT 1090 [14] per Senior Member Young. Given that on so fundamental a point the building has not reached lock-up point this balances out any possible advances beyond lock-up constituted by the provision of a plumbing rough in. I should record that I absolutely reject Mr Knight's contention that the requirement for the fixing of external cladding as a criterion for the attainment of lock-up stage could be regarded as satisfied because there was plaster sheet on site. On this view a brick house could be at lock-up stage with no external walls at all as long as all the bricks had been delivered to the site.

31 This brings me finally to the figure of $26,700.00 which is claimed by Mr Knight as a credit in his favour on the basis that it represents the amount of materials which were *'booked'* to his account by the Mackays not for the purposes of building the house but rather to build a shed at the rear of the property at No. 40 where they now reside. Mr Mackay agreed that by February 2006 the house remained incomplete. He had sold his property at Pearcedale where his family had previously resided and rental property in Cranbourne West proved an unsatisfactory location for one of his children suffering a hearing disability and requiring special transport to school. A caravan belonging to the family was not a satisfactory place to live; hence the Mackays used part of the funds drawn down from Homeside to construct the shed where they now reside. They also used the facility of Mr Knight's account with trade suppliers to obtain materials. In his statement Mr Mackay admitted liability for a sum of $12,703.91 but otherwise either denied liability for the balance of the $26,000.00 or said he was unable to identify the relevant items and therefore felt he should not be held liable for them. Mr Knight did not produce individual documentation relative to many of the items. He was impeded by the fact that many of his records are

retained by his former solicitor under a solicitor's lien. Mr Knight elected to refrain from giving sworn evidence.

32 At the end of the hearing Mr Kirby on behalf of the Mackays was minded to admit liability for amounts relative to plasterboard in the sum of $16,500.00 as referred to in Invoice No. 136 issued by Mr Knight.

33 In the state of inadequate proof and the lack of sworn evidence from Mr Knight I propose to accept the admission made by Mr Kirby on behalf of his clients and not accept the availability of a credit relative to these matters beyond the $16,500.00.

34 As best I can understand Mr Knight's reasons for walking off the site was because he believed that since a large portion of the Homeside Lending facility had been drawn off and used for purposes other than funding the payments under the building contract, the Mackays were not ready and willing to perform their side of the bargain. He walked off the site where there was no existing default such as an unpaid progress claim. Do these circumstances deprive a contracting party in the situation of the Mackays from a right to recover damages?

35 At the conclusion of the unsuccessful compulsory conference before Senior Member Levine, the learned senior member noted that Mr Knight:

> Relies on Exhibit 24 (and Schedule A thereto) to his affidavit sworn 10 June 2008 as his points of defence.

36 That draft defence at Clause 9(b):

> The [building] contract was terminated, by mutual agreement between [Mr Knight] and [Mr Mackay], in or about late April 2006. This mutual agreement was particularised as being oral and made on-site.

37 In light of the findings which I have made on Mr Knight's own account of the *'unsavoury conversation'* which is presumably the meeting on site referred to in the particulars to Clause 9(b) of his draft defence, this defence must be rejected - though in truth it was not really contended for by Mr Knight at the hearing. Whilst he did not frame his defence in legal terms it amounted to a contention that the Mackays were unable to perform their part of the bargain by meeting the progressive payments which would become due should he bring the structure through to completion; hence he said he was discharged from the obligation to complete.

38 According to Professor Carter in his work *Carter on Contract* states:

> A repudiation of obligation may be proved by reference to inability in two cases:
>
> (1) By reference to the words or conduct of the promisor, that is, declared inability;
>
> (2) By reference to the promisor's actual position, that is, factual or inferred inability.
>
> *Carter on Contract* [35-180] 88,245 [Service 18]

39 The effect of a promisor's inability to perform if established to the requisite degree appears to be to create an anticipatory breach which the promisee may accept, treat as a repudiation and discharge himself from performance without the occurrence of the actual breach which the promisor's inability renders inevitable. Later in his treatment of this species of anticipatory breach Professor Carter states the following:

> General Principles:
>
> 1 A promisor's declaration of an inability to perform is a clear indication of an absence of readiness or willingness to perform.
>
> 2 An act disabling a promisor from performing the contract is a clear indication of an absence of readiness or willingness to perform.
>
> *Carter, op cit* [35-210]

And later again at paragraph [35-220] Professor Carter states:

> 1 Proof by a promisee that the promisor was wholly and finally disabled from performing the contract is a sufficient justification of the performance of the contract by the promisee if the inability existed at the time of termination.
>
> 2 Where during the course of the performance of a commercial contract, a promisee reasonably draws the inference that the promisor is wholly and finally disabled from performing the contract, the promisee may terminate the performance of the contract.

40 Even although these doctrines were not invoked by the pleading the manner in which Mr Knight put his contentions indicated that he was seeking to rely upon them given that Mr Knight was acting without the assistance of legal practitioners I believe he should be entitled to rely upon these doctrines even without amendment to the draft points of defence referred to earlier. The formulation requiring a finding that the promisor be finally disabled from performance to enable the promisee to rely upon this doctrine comes from the judgment of Devlin J as he then was in *Universal Cargo Carriers Corp v Citati* [1957] 2 Qb 401. His Lordship's formulation was approved by the High Court of Australia in *Sunbird Plaza Pty Ltd v Maloney* (1988) 166 CLR 245, 262, 264 per Mason CJ with whom Deane, Dawson and Toohey JJ concurred. Applying these principles in *Winterton Constructions Pty Ltd v Hambros Australia Limited* (1992) 39 FCR 97, 111 Hill J of the Federal Court of Australia said:

> If a promisee, claiming to have terminated a contract must prove that the promisor was wholly and finally disabled through insolvency from performing, that will be somewhat difficult to prove. The present case is an example …

41 His Honour said that in the case before him a property developer in default with its existing financier might have been able to refinance the transaction:

> One really does not know. In other words, the question rests in supposition rather than in proof.
> (1992) 39 FCR 97, 111

42 His Honour's reference to the phrase *'in supposition rather than in proof'* refers to the formulation by Devlin J in *Citati* where His Lordship said that the necessary disability of performance must be established in proof and not mere supposition.

43 How do these principles operate in the present case? Mr Knight supposed that having drawn off part of their Homeside Lending facility the Mackays would be unable to pay the full price contracted for the completion of the house. He did not refer to any profession of inability to pay the full price on the part of the Mackays. Indeed the *'unsavoury discussion'* seems to have involved Mr Knight's asserting that the Mackays were unable to pay the full contract price and Mr Mackay's refusing to accept that position. It is clear that the Mackays did not have and do not have abundant financial resources. It does not follow however that they would in the circumstances be unable to arrange some further loan either on a commercial basis or from friends or family to make good the deficiency in their existing line of credit. The position taken by Mr Knight to adopt the remarks of Devlin and Hill JJ lay in supposition rather than proof. There was no anticipatory breach or repudiation based on inability to perform which Mr Knight was entitled to accept.

QUANTUM OF DAMAGES

44 Mr Raymond Martin, Building Consultant, inspected the premises at the request of solicitors acting for the Mackays on 26 April 2007. He found some 10 defects which are as follows:

1. Provide additional studs (on the flat) to the garage side of the garage/bedroom 4 wall to provide support to the laminated beam above and to conceal the slab overhang.
2. Remove excessive overhang to edge beam of slab to retreat and meals area.
3. Provide flashings omitted over the external doors in conjunction with works required at items 7 & 8.
4. Inject or gravity feed damp proofing chemical into lower course of brickwork beneath the level of the existing cavity flashing.
5. Demolish existing pad footings to verandah posts and replace on completion of item 6 below. Inspection of footings to be carried out by the building surveyor prior to concrete being poured.
6. Align verandah posts with particular emphasis to those on each side of the front door. The height of the posts vary and need to be made uniform.
7. Adjust and pack all external doors and secure to the adjacent framework. Fit door locks as necessary.

8. Adjust and align all external windows and pack and secure to adjoining framework. Adjust lining boards, infills and beadings and complete same above all openings. Adjust and secure wind moulds (where they are too narrow to cover the cavity they should be replaced with wider material).

9. Rake out mortar wherever cracking and voids are apparent to a depth of 25mm and re-point as necessary. Relay loose and missing bricks to eaves and sills. Point up around structural beams to verandah and garage. On completion all brickwork should be acid washed to remove excess mortar, mould and water stains.

10. Make control joints continuous and fill with a flexible sealant.

45 Mr Knight felt that some of these alleged defects were unfair criticisms, others he admitted. He disagreed for instance that the verandah posts needed to be realigned. He said that some unpacked areas of framework probably had packing in them which had fallen out before Mr Martin's inspection and so on. Ultimately however he made an open offer to rectify those defects. I believe that offer constitutes an admission that those defects in fact exist. He made similar comments in the course of a view carried out at the outset of the proceeding to the extent that Mr Knight did challenge Mr Martin in cross-examination. I found Mr Martin's responses to those challenges convincing hence I regard these defects as established.

46 Mr Gordon Christian a registered builder and specialist bricklayer said that in his opinion the brickwork was a disgrace. He gave a quotation as at 27 February 2008 of $38,900.00 to rectify the defect identified by Mr Martin. At the same time Mr Christian provided an estimate of the cost to complete the works at $228,184.00. In light of the amounts already paid under the building contract this estimate seems surprising to say the least. Mr Christian said however that as an alternate builder taking over a project to bring it to completion there was a transfer of risk and that transfer of risk had to be reflected in the costing to complete. Further, he said that the scheme of Section 40 of the *Domestic Building Contracts Act* allowing some 65% of the contract subsidy drawn up to lock-up stage, front loader, the profitability of the contract so that the profit was to be found in the first 65% and the remaining 35% was insufficient to recover a builder's costs and provide him with a reasonable profit margin. Where a single builder carried the works through to the end this allocation caused no problem but where a second builder took over from lock-up stage onward he needed to be compensated with an additional loading to enable him to obtain a proper return on completing the building from lock-up stage onward. Finally, Mr Christian said in his opinion the $297,000.00 price in the original contract was insufficient from the outset. Mr Christian said that building costs had risen some 10% since he gave his original quotation, hence his revised quote to rectify and complete was $293,185.00.

47 Mr Martin was of opinion I think that this quotation was a relatively full one. He accepted that the scheme of Section 40 allowing the drawing of 65% of the contract price to lock-up stage *'front loaded'* and a contract profit, he did not disagree that costs had gone up 10% since Mr Christian gave his original quotation. Mr Knight did not cross-examine Mr Christian.

48 I accept Mr Christian's assessment and regard it as the proper basis to assess the damages which the Mackays are entitled to recover as covering the cost of rectification and completion of their house.

49 It is common ground that Mr Knight received payments inclusive of Goods and Services Tax of $242.936.27 and that he refunded some $31,351.50. The various other credits or deductions which he claimed should for the reasons I have already given be disallowed with the exception of some $16,500.00 relative to materials charged on his account for the erection of the shed. This leaves the net amount which he received at $195,084.00 which is of course substantially beyond the lock-up contract price which he had agreed to in the contract. The Mackays should be allowed the cost to complete their house - $295,185.00 as assessed by Mr Christian including 10% uplift, less the difference between the amount paid under the contract and the contract price $297,000.00 - $195,084.00 = $101,916.00. This leaves a net amount of damages to be awarded for remedying defects and completing the structure in the sum of $191,269.00.

50 The Mackays also made a claim for general damages for physical inconvenience, anxiety and distress. Mr Walker it will be recalled at the undefended hearing awarded some $20,000.00 to the Mackay's on that score. Mr Kirby on behalf of the Mackays justified this claim on the basis of a decision of the Victorian Court of Appeal in *Boncristiano v Lohmann* [1998] 4 VR 82, 94 where Winneke P said:

> It now appears to be accepted, both in England and Australia, that awards of general damages of the type to which I have referred can be made to building owners who have suffered physical inconvenience, anxiety and distress as a result of the builders' breach of contract, but only for the physical inconveniences and mental distress directly related to those inconveniences which have been caused by the breach of contract.

51 The findings which I have made indicate that Mr Knight repudiated his building contract and the Mackays have been left for some years now with an incomplete structure suffering from defects, they have been left in legal uncertainty and to live in a shed. Mr Knight correctly observed that the *'shed'* is not a rude unlined structure as its designation might suggest. It might as easily be described as a commodious sleep-out or a large granny flat. It is fully lined and plastered. It includes an air-conditioning unit and connection to septic tank. Mr Mackay said that his wife was suffering from anxiety and depression.

52 I accept therefore that in accordance with the principle stated by Winneke P in *Boncristiano's* case that the necessary physical inconvenience, anxiety and distress for the applicants has been proven to exist and that this derived at least in part from Mr Knight's breach of contract. It may well be that there are other endogenous factors and other life experience factors which influence Mrs Mackay's anxiety and depression. It would be wrong therefore on the present state of the evidence to attribute such illness entirely to the breach by Mr Knight of the building contract. In *Boncristiano's* case Winneke P did not accept dicta from English decisions that awards of damages under this head should be restrained or modest. He did say however that in his view:

> Damages awarded under this head will rarely be large, because of the very nature of the loss being compensated …
> [1998] 4 VR 82, 95

53 In my view based on the evidence and the considerations already mentioned, and guided by Winneke P's statement that this class of damages should rarely be large, an appropriate award to each of the applicants for their physical inconvenience, anxiety and distress is the sum of $5,000.00. This yields a total damages award of $201,269.00.

COSTS

54 I have heard no submissions on the question of costs and so I will reserve that question.

MFM:RB