VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D566/2009

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic Building – defective works – builder voluntarily undertaking re-design – responsible for defective re-design – responsible for use of inappropriate materials – major changes not documented – credit to owners for substantial savings to builder – nature of right to credit – *Domestic Building Contracts Act* 1995 s.37 – whether builder entitled to be paid for variations where procedure in contract not followed – rectification of defects paid by third parties – whether owners have suffered loss - assessment of damages

APPLICANTS	Anthony Donald Morphett, Janice Elizabeth Morphett
FIRST RESPONDENT	Skabaw Pty Ltd (ACN 006 056 524) t/as Detailed Homes
SECOND RESPONDENT:	KCE Consulting Engineers Pty Ltd (ACN 103 920 341) (Application withdrawn against the second respondent 14/7/11)
WHERE HELD	Melbourne
BEFORE	Senior Member Walker
HEARING TYPE	Hearing
DATE OF HEARING	14-22 and 24 November 2011 and 25 January 2012
DATE OF ORDER	29 March 2012
CITATION	Morphett v Skabaw Pty Ltd & Anor (Domestic Building) [2012] VCAT 35

ORDER

1. Order the Respondent to pay the Applicants $507,858.68.
2. The counterclaim is dismissed.
3. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicants	Mr R.A. Fink of Counsel
For the First Respondent	Mr B. Reid of Counsel

REASONS

Background

1 The second applicant, Mrs Morphett, is the owner of land in Arthur's Seat, Victoria ("the Land"). The respondent ("the Builder") is and was at all material times carrying on business as a builder. Its director, Mr Barbagallo is and was at all materials a registered builder.

2 In April 2010 the applicants ("the Owners") entered into an agreement ("the Contract") with the Builder to construct a large house ("the House") on the Land for a price of $1,498,000.00.

3 The Contract consists of a written building contract in the form of the Housing Industry Association's New Homes Contract with plans prepared by a designer attached but no specifications. Instead of specifications, a quotation prepared by the Builder is attached to the other documents and is said to form part of the Contract.

Construction

4 Shortly after work commenced, Mr Barbagallo informed the Owners that the suspended slab floor of the House could not be constructed as shown in the plans and that it would need to be redesigned. The floor was ultimately constructed of yellow tongue flooring supported on a steel frame that was manufactured by another company associated with Mr Barbagallo. This flooring system was used not only internally but also for the large first floor balcony outside the House.

5 Neither the change to the flooring design nor any of the other many changes that were made in the scope of works was the subject of any redesign by the architect, amendment of the planning permit or written variation in accordance with the terms of the Contract. The numerous variations are listed in paragraphs 117 and 118 of Mr Morphett's witness statement of 28 March 2011. None were documented, except that engineering drawings were prepared for the support of the structure of the upper floor.

6 The construction time specified in the Contract was greatly exceeded and for this and other reasons a dispute arose between the parties following which the Builder suspended work, the Contract was terminated and the Builder left the site.

This application

7 These proceedings were then commenced by the Owners seeking damages from the Builder for delay and defective works totalling $705,067 plus the repayment of approximately $15,000 said to have been overpaid.

8 The Builder counterclaimed for damages, alleging that the Owners had terminated the Contract unlawfully, and sought the sum of $306,312.56 by way of a quantum meruit.

9 The matter initially came before the Tribunal for hearing in May 2011 but was then adjourned on the application of the Builder after its original solicitors had ceased to act.

The hearing

10 The matter came before me for hearing afresh on 14 November 2011 with 10 days allocated. Mr Fink of Counsel appeared on behalf of the Owners and Mr Reid of Counsel appeared on behalf of the Builder.

11 On behalf of the Owners, I heard evidence from:

- Mr Morphett;
- Mr Brovedani, an engineer;
- Mr Thomas, the architectural draftsmen who designed the House;
- Mr Croucher, a building expert;
- Mr Atchison, a building expert and also an engineer;
- Mr Shah, a quantity surveyor;
- Mr Kosik, the design engineer;
- Mr Scarpino, the renderer; and
- Mr Maroszek, a rectifying Builder, who gave evidence in regard to the construction of the yellow tongue deck.

Witness statements were also filed for a number of tradesmen who worked on the House but they were not called for cross-examination and their statements were admitted by consent.

12. For the Builder I heard evidence from:

- Mr Barbagallo;
- Mr Foley, a quantity surveyor; and
- Dr Eilenberg, a building expert.

13. I have some reservations about Mr Barbagallo's evidence. He insisted, despite overwhelming contrary evidence, that his use of yellow tongue flooring for the external deck was appropriate. He failed to follow proper procedures under the Contract concerning claims for payment and

variations. He persuaded Mr Morphett to adopt different and cheaper construction methods from those required by the plans and then did not make proper adjustments to the price. He did not document these changes or have the permit amended to incorporate them, nor did he suggest to the Owners that they should do so. All of this indicates a lack of professionalism that one would not have expected from a builder of his experience.

14. I did not form any adverse view of the evidence of any of the other witnesses. I think that each of them endeavoured to give truthful evidence to the best of his recollection.

15. A day was lost during the hearing due to the unavailability of Mr Foley and there was insufficient time left on the final day allocated, being 24 November, for submissions. The matter was then adjourned for submissions to 25 January 2012. Submissions by both Counsel took the full day and I informed the parties that I would provide a written decision.

The Contract

16. The scope of works is described on page 4 of the Contract as "two storey residence to lock up". Following these words, the Contract states:

> "The specifications include ….. pages that were prepared and supplied by Detailed Homes as per quotation. There are 14 sheets of plans and they were all prepared and supplied by Thomas Anderson. There are ….. sheets in the engineer/s design and it/they was/were, prepared by ….. for the owner" (sic.).

17. As will be apparent from this description, there were no formal specifications. The quotation referred to, dated 13 October 2006, is the more recent of two quotations. It states that the work is to include a list of additional items which would normally be regarded as being beyond the lock up stage. It appears to me that the scope of works was therefore to be the works set out in the quotation and that position was not disputed.

18. On page 2 of the quotation there are a number of exclusions from the Contract and a prime cost sum is specified for the removal of trees in the site cut. The quotation then proceeds as follows:

> "Based on previous projects of this size/type, please find below the following estimates of costs to assist you in the completion of Stage 2 of your project. These amounts are <u>not</u> included in the quotation price above".

There follows a list of items with a price range next to each.

19. The term "Stage 2" is not defined in this quotation but is dealt with in an attachment to the Contract in the following terms:

> <u>Stage 2</u>
>
> Internal Fit out Specifications have not been prepared for this project. The terms of the Contract as per quotation dated 13 October 2006

should Stage 2 be required to be completed by Detailed Homes the following would apply:-

Option 1

If internal fit out specifications have been prepared during the course of building to lock up we would be happy to provide a quotation to completion.

Option 2

- When Builders/Contractors/suppliers are used to execute works owner will be invoiced materials/labour cost plus 15%.
- When Owners/Contractors/suppliers are preferred to execute works owner will be invoiced materials/labour cost plus 17%.
- When Owners paid Contractors/suppliers direct, owner will be invoiced Builder's margin of 12% for cost, supervision, etc."

20. The Contract provides that the "Owners" within the meaning of the Contract are the Owners but it is signed by Mr Morphett alone on behalf of both Owners.

21. The significance of whether a particular item of work is within Stage 1 (whether as per the Contract or as per a variation) or Stage 2 was said by Mr Reid to be that, if it is within Stage 2, the Builder's role is not that of builder but of supervisor only.

22. Mr Reid referred to my decision in the case of *Mrocki v Mountview Prestige Homes Pty Ltd* [2009] VCAT 2649. In that case the Contract was for the respondent to supervise the construction of two houses for an agreed fee. The suppliers of materials and the sub-Contractors were paid directly by the applicants. I held that, since the role of the respondent was expressly to supervise the applicants' tradesmen and suppliers, his responsibility for any defects would only extend insofar as they arose out of his failure to supervise with reasonable care.

23. This case is fundamentally different from *Mrocki*. It is clear from the Builder's quotation that, in regard to Stage 2 works, the Owners are to pay the Builder for the work and materials, not just a fee for supervision. For all but the last alternative of Option 2, the amount is to be fixed by reference to cost plus a margin, but it is the Builder that is to supply the work and materials. It is not simply providing a supervision service.

24. For the last alternative of Option 2, the Owners will be paying the tradesman directly, but the opening words of the paragraph are: "should Stage 2 be required to be completed by Detailed Homes the following would apply:" Stage 2 therefore relates to work that is to be completed by the Builder, not just supervised by it. It should also be noted that Stage 2 works are only to be done if the Owners require them to be done.

25. There were major structural changes made to the original Contract drawings. The Builder did not apply for any amendment to the permit. Mr

Barbagallo says that that was not his responsibility. He said that he spoke to the building surveyor about the changes and the work was inspected. According to the evidence of Mr Thomas the permit ought to have been amended. Quite apart from his evidence, that would appear to be a requirement of the *Building Act* 1983. Whether or not it was for the Builder to have the permit amended is not to the point. The Builder should not have proceeded to carry out work if no permit had been issued for that work.

Retention

26. An attachment to the Contract provides that the Builder will submit progress payment claims to be certified by the architect "for 80% of works carried out to date" for that month and that the balance of the Contract price would be paid on completion of lock up stage. I accept Mr Fink's submission that this means, inevitably, that there will be a 20% retention. I cannot see any other interpretation to put on this clause. Nevertheless, as the work progressed, that was not done and the accounts rendered by the Builder were paid in full.

The design of the deck

27. Mr Reid pointed out, correctly, that the design process continued after the Contract was entered into. He referred me to the case of *Minchillo v Ford Motor Co of Australia Ltd* [1995] 2 VR 594 as authority for the proposition, undoubtedly correct, that a builder whose job is only to carry out the construction is not responsible for the defective design of someone else. Clearly the Builder is not responsible for any defective design by others but Mr Fink argues that in this case the Builder has undertaken a design role itself.

28. Mr Barbagallo told Mr Morphett that in his opinion the Builder could not construct the hollow core Contract floor as it was designed. Mr Morphett asked Mr Barbagallo to find an answer to the problem. Mr Barbagallo denied that the Builder was responsible for any of the design of the project. It is certainly true that the original plans incorporating the hollow core Contract floor were drawn by Mr Thomas and the engineering drawings were done by the Owner's engineer.

29. In his closing submissions, Mr Reid said that the final decision on the changes to the deck and the cathedral ceiling were made by Mr Morphett. I accept that the Owners knew about the changes and agreed to them and that without that agreement the changes would not have proceeded. However it was Mr Barbagallo who suggested them, Mr Barbagallo who designed them and Mr Barbagallo who the chose the materials.

The flooring system

30. According to the evidence of Mr Atchison there is an inconsistency between the architectural drawings and the engineering drawings with respect to the hollow core slab for the upper floor. The architectural

drawings show the concrete planks going east-west and to be at a different height for the external balcony. The engineering drawings show no drop down for the external balcony and show the planks going north-south. Under cross-examination Mr Barbagallo said that he did not detect any inconsistency and that he regarded the drawings as being merely indicative.

31. Mr Atchison said that if he were building the House he would have stuck to the concrete design. He said that one could change the orientation of the planks in the hollow core and adjust the beam supporting the junction of the larger hollow core planks and the smaller ones forming the external deck. He said that any projection below the slab could have been concealed by a suspended ceiling.

32. If the House could not have been built as it had been designed as Mr Barbagallo asserted, he could have simply required the Owners to get it redesigned. If the Owners had then referred the matter back to their designer and to their engineer and if the Builder had subsequently built according to revised plans that they prepared, the Builder would not have been responsible if the design turned out to be defective. That is not what happened.

33. Although Mr Barbagallo says that he consulted with the Owners it is quite clear from the evidence that the choice of yellow tongue particleboard as a material and also the design of the steel support and the structure placed above it was his. The engineering below that was drawn by the Owners' engineer but I do not find that that contributed to any problems. The issues for me relate to the upper part, being the light weight steel work and the timber platform, referred to in evidence as "the sandwich", and that was the creation of the Builder.

34. Although the Builder and Mr Barbagallo had no contractual duty to design the deck they nonetheless undertook that role and performed it. The fact that Mr Morphett asked him to fix the problem that Mr Barbagallo said existed makes no difference.

35. The Builder was contractually bound to build the House according to the Contract documents. If it had done that then, insofar as any defect arose from the design of others, it would not have been responsible. However, since it chose to recommend to the Owners and then pursue a different method of construction according to judgments made by Mr Barbagallo then it is responsible for any defect in the result. Mr Barbagallo prepared no proper plans for this deck. The Builder simply constructed it like that to his direction.

Choice of materials for the deck

36. The deck was constructed in December 2007. Being made from timber the external portions of it had to be waterproofed. Mr Barbagallo purchased a material called "Rhinocoat" in May 2008. That material failed and so he procured another material from a company called Cocoon Coatings Pty Ltd.

The choice of each of these waterproofing materials was that of Mr Barbagallo and there was no specification or design by the architect. The failure appears to have been more to do with the manner of construction than any fault in either of the materials referred to.

37. In his evidence Mr Barbagallo defended his choice of yellow tongue particleboard as the decking material. He said that yellow tongue is suitable for external use. He said that it is water resistant and so did not require a waterproof membrane. That is very much at odds with the evidence of the experts and also the *Guide to Standards and Tolerances* in force at the time which states:

> "13.05 Waterproof Decks and Balconies Substrate
>
> Waterproof Decks and Balconies are defective if they are constructed with substrate of non external quality water resistant materials such as particle board referred to in AS 1860 – Installation of Particle Board Flooring, or other materials that are not warranted as suitable by the manufacturer for that purpose, whether or not they fail" (emphasis added).

38. I accept Mr Reid's submission that the *Guide to Standards and Tolerances* is only a guide and is not prescriptive but the experts were unanimous in saying that the material should not have been used in that situation. Even the Builder's own expert Dr Eilenberg agreed that he would not recommend the use of this material for an external deck because it is for internal use only.

39. Mr Reid referred me to the Tribunal's decision in *Schulz v Duncombe* [2011] VCAT 1165 where the tribunal found that the use of yellow tongue externally in conjunction with some other materials in a particular construction in that case was not a defect. That was a finding of fact that was made in that case upon the evidence that was led in that case. The expert evidence in this case is unanimous that this material should not have been used on this deck.

40. I therefore find that the construction of the external deck using particle board flooring was a defect for which the Builder is responsible.

41. Apart from the material used there is also the manner of construction. The Builder constructed the deck without any fall to allow the drainage of water. In fact, in at least part of the deck there was a negative fall towards the House and photographs show water ponding in those areas. The experts identified that as a defect and again, it is a defect for which the Builder is responsible.

42. According to the evidence of Mr Brovedani the deck was damaged by moisture generally, but particularly on the western side. That is supported by photographs that were tendered

43. It is clear from the evidence the deck had to be replaced and that the work carried out by the Owners in this regard was necessary. It is equally clear

that the need to replace the deck was a consequence of the Builder's defective construction and the use of inappropriate materials.

The redesign of the roof

44. According to the architect's design the roof was to have a cathedral ceiling. Mr Barbagallo recommended to the Owners that this be changed to a flat ceiling. Again, no amendments were made to the plans or permit and the structural steel appears to have been designed and supplied by Mr Barbagallo's steel company.

45. According to the evidence of Mr Atchison the trusses were spaced unnecessarily closely together, resulting in excessive steelwork being used. Not being a tiled roof it did not require that amount of structural support. The significance of this is that in assessing a reasonable price for the construction of the flat ceiling I should allow what it should reasonably have cost and not allow for the cost of materials that were used unnecessarily.

The gates

46. There is a dispute as to whether the gates to the property were included. They are not specified in the quotation as being either included or excluded although there is a reference to the construction of the driveway.

47. The plans show "remote entry gates with security intercom" to be constructed part of the way down the driveway with "Hillview quarry" stone columns with Merbau horizontal infill panels (WD02).

48. According to the evidence of Mr Thomas the construction of the front gate posts, the installation of the gates (including power) was included but not the motors.

49. The Builder's sub-Contractor, Mr Maurier, said in his witness statement that he was engaged by the Builder in about November or December 2007 to carry out the stonework on the House itself and then later to construct the entrance pillars for the front gates to the property. He said that the footings for the proposed entrance pillars were in place and that there was a pile of rocks and bricks on site close to the footings. He said that Mr Barbagallo told him that he would telephone him as soon as he was ready for him to proceed with the construction of the gate pillars but that this never occurred. He later constructed the pillars on the instructions of Mr Morphett.

50. The driveway was, by agreement, removed from the scope of works and the Owners were credited with the sum of $46,840.00. A later invoice (Exhibit "L") dated 5 May 2009 claims the sum of $64,100.00 which it says is the balance of the Contract price. This sum is said in the invoice to be made up of an amount of $17,260, described as "completion of Contract" and $46,840 being the reversal of the credit for the driveway. When questioned about this in cross examination Mr Barbagallo said that the reason for the reversal was that there had not been a formal variation to remove the

driveway from the scope of works. He did not suggest that he had in fact constructed the driveway. According to the evidence very little work was done by the Builder on the driveway before it was taken over by the Owners who then completed it themselves.

51. Mr Barbagallo does not appear to have drawn a distinction between the scope of works under the Contract and what he hoped to do under Stage 2. The fact that he indicated to Mr Maurier that he would be building the gate pillars should be seen in this context. Having regard to the wording of the Contract documents, I am not satisfied that the gate pillars were within the scope of works.

Alleged stage two works

52. The Builder claims that works to a value in excess of $40,000 were done under "Stage 2" of the Contract. There is no evidence of any specific requirement, as contemplated by the quotation, by the Owners for the Builder to undertake any Stage 2 works. There was no quotation requested or given pursuant to Option 1 of Stage 2. Mr Barbagallo simply pressed on with work and categorized some of it as "Stage 2".

53. The suggestion now is that work was done under Option 2 for which the Builder is entitled to be paid. It is not suggested that the parties ever referred to Stage 2 or Option 2. The argument seems to be that, because the items in question were not within the scope of the Contract they must be regarded as Stage 2 works carried out under Option 2 of Stage 2. That does not necessarily follow. They might be variations adding to the scope of works.

54. Mr Fink submitted that, if these items of work are not to be regarded as variations of the existing Contract, then a further, formal building contract ought to have been entered into because the amount involved was in excess of $5,000. I think that submission is correct. (*Domestic Building Contracts Act* 1995 ("the Act") s.31(2)). Works done by the Builder outside the original scope of works are usually treated as variations rather than as work done under an entirely separate contract.

55. In regard to variations Mr Fink relied upon s.37(3) and s. 38(6)(b) of the Act. These are in the following terms:

> **37 Variation of plans or specifications—by Builder**
>
> (3) A Builder is not entitled to recover any money in respect of a variation unless—
>
> (a) the Builder—
>
> (i) has complied with this section; and
>
> (ii) can establish that the variation is made necessary by circumstances that could not have been reasonably foreseen by the Builder at the time the Contract was entered into; or

(b) the Tribunal is satisfied—

(i) that there are exceptional circumstances or that the Builder would suffer a significant or exceptional hardship by the operation of paragraph (a); and

(ii) that it would not be unfair to the building owner for the Builder to recover the money

38 Variation of plans or specifications—by building owner

(6) A Builder is not entitled to recover any money in respect of a variation asked for by a building owner unless—

(b) the Tribunal is satisfied—

(i) that there are exceptional circumstances or that the Builder would suffer a significant or exceptional hardship by the operation of paragraph (a); and

(ii) that it would not be unfair to the building owner for the Builder to recover the money.

56. Mr Fink submitted that it would be unfair to order the Owners to pay for these variations because, by the "swings and roundabouts" agreement the parties agreed that there were to be no variations. In the alternative, he relied upon the tribunal's decision in *Pratley Constructions v Racine* (2004) VCAT 2035, where Senior Member Young said at paragraph 7.21 on page 22 of the decision:

> " I consider that it is fair that where the builder discussed the need for a variation with the owners and gave an estimate of cost that the owners pay that estimate of cost. Where there is no discussion and agreement or there is no estimate of cost then it is not fair for the owners to pay."

That is a finding that was made in that case. However what is fair or not fair in this case requires a consideration of the factors in this case.

57. In the present case, the Builder departed from the Contract design in many respects with the knowledge and consent of the Owners. The Owners seek credits for the savings that the Builder achieved. If these are to be allowed it would be unfair that the Builder should not recover a reasonable sum for the works done which involved extra cost.

58. Mr Barbagallo said that he thought that Stage 2 works were those that he had listed in his quotation and given a range of figures for. He said they were not variations.

Stage 2 or variation?

59. Whether a particular item is properly regarded as a Stage 2 work or a variation must be considered on an item by item basis. The parties never discussed at the time these things were done whether they were to be

regarded as one or the other. However they set out in the Contract what the Builder might do under Stage 2. In that context, if one of those items of work is done with the knowledge and consent or at the request of the Owners it should be regarded as Stage 2 works. The alleged Stage 2 works are as follows:

a External stairs, garage door and painting

The first two of these are listed in the quotation as proposed Stage 2 works and so I find that they are Stage 2. As for the painting, Mr Morphett said that he asked Mr Barbagallo to "project manage" the painting and that this was done as a variation, not Stage 2. It was to be done on a margin and the Owners were paying the painter. It does not fit into either category. Rather, it was a separate project management agreement, not a variation.

b Change showroom garage window

That is a change to something that is within the scope of works and so it is a variation.

c Cedar linings to eaves in lieu of cement sheet

Similarly this is a change to something within the scope of works and so is a variation.

d Plaster, pelmets, ceiling and cornice to cellar

Plasterwork was within the original scope of works. Since this appears to be additional plasterwork, I think it is more properly a variation.

e Stainless steel post installation

This is not mentioned in the list of Stage 2 works and so is a variation.

g Patch plaster lights and switches

This is a claim with respect to plastering which forms part of the original scope of works and so is a variation.

g Mezzanine floor heater

Heating and cooling is in the list of Stage 2 works and so that should be treated as Stage 2 works.

60. In paragraph 129 of Mr Barbagallo's witness statement of 20 September 2011 there is a list of further items said to be Stage 2 works. Since all of these have been fully paid for it is unnecessary to consider whether they are properly treated as variations or Stage 2 works.

The alleged "swings and roundabouts agreement"

61. The major changes to which the Owners agreed were:

(a) substituting a lightweight construction floor supported by steel frames.

(b) the deletion of limestone cladding and substitution of block work.

(c) the deletion of the fireplace.

(d) change of the cathedral ceiling to a flat ceiling.

62. On 5 February 2009, the Builder wrote to the Owners in the following terms:

> "Just a quick note to recap our last meeting at my office on 27/1/09, in order that all concerned parties have a clear understanding of our agreement reached in relation to the changes that have been undertaken at the above address.
>
> Specifically the following:
>
> 1. Project initially quoted as Boral Rock Face Blocks then Detailed Homes was prepared to use WA Limestone in lieu of Boral Blocks (no cost adjustment) and finally now a textured rendered building.
> 2. The changes to the suspended hollow concrete floor and now steel frame suspended floor construction.
> 3. Changes to cathedral ceiling and now a coffered ceiling in lieu of.
>
> The above items are now considered resolved, with no costs adjustment required by either party."

63. As its wording would suggest, this letter does not purport to set out the whole of the agreement that is said to have been reached. I am satisfied that it was discussed between Mr Morphett and Mr Barbagallo that some of these changes would cost the Builder money and in others there would be a substantial saving to the Builder. It was decided that the Owners would not receive any credits and the Builder would not be paid for future minor changes. However, it does not appear from the evidence that what amounted to a minor change was ever agreed upon.

64. In a further letter dated 24 March 2009, Mr Barbagallo set out a list of 32 items that he claimed had been done, that were "…over and above the Contract [and] have not been charged for…", but said that, given the current "circumstances", he reserved the right to invoice. The circumstances he was referring to was a dispute that had arisen with the Owners in regard to the quality of the painting and his invoicing for numerous items that he claimed were "Stage 2" works.

65. Notwithstanding this "swings and roundabouts" agreement, the Builder invoiced the Owners for various changes and the Owners paid those invoices.

66. On 25 March 2009 the Owners' solicitors sent the Builder a list of 70 defects and requested a meeting. The Builder declined a meeting, saying that it would continue work when it was paid.

67. Mr Thomas recalled having a meeting with Mr Barbagallo on 1 April (Mr Barbagallo said it was on 3 April) on site where it was agreed that, if the Builder fixed a list of items Mr Thomas had prepared, then the Owners would forego claims with respect to the limestone, hollow core or cathedral

ceiling. Mr Barbagallo acknowledged in his witness statement that there were items on the list that were not attended to. By letter dated 9 April 2009, which was posted to the Owners on 15 April, the Builder suspended work until "all accounts are paid in full".

68. Mr Fink submitted that I should infer from the rendering of these invoices and the payment of them by the Owners that the parties had agreed that the "swings and roundabouts" agreement would then no longer apply. Alternatively he said that there is an implied term of the "swings and roundabouts" agreement that it would cease to apply if the Builder should decide to charge for these variations. I do not think that I can imply such a term. If there is an agreement it binds the parties for so long as it subsists. If the Builder is not entitled, under the terms of the agreement, to charge for the variations, then it cannot "decide" to do so.

69. It is arguable that, by claiming money contrary to the swings and roundabouts agreement and receiving payment the Builder is acting inconsistently with the agreement and is saying that the agreement will no longer apply. That is either a repudiation of the agreement or an offer to terminate it. The Owners do not allege that the payments of these claims were made under a mistake. By making payment the Owners must be considered to have accepted that the agreement will no longer apply.

70. However, the more fundamental problem with this "swings and roundabouts" agreement is that there is no clear evidence as to what it was intended to cover. The three major changes described in the Builder's letter of 5 February are clear enough and if that stood on its own it would be an agreement. However it is common ground that that was to be only part of the agreement. The Owners were not to be charged for some other changes but precisely what those changes were to be was never agreed upon. According to the weight of the expert evidence, the savings to the Builder from the changes described in the letter were very substantial indeed. It would not only be unconscionable but also contrary to the intention of the parties that the Builder should be able to enjoy the benefit of the three changes in the letter without the Owners receiving the benefit they were to receive in exchange and yet what that benefit was to be was never ascertained. Indeed, the Builder invoiced for the changes and the Owners paid the invoices.

71. Mr Morphett said in his witness statement that he never expected to receive credits for the cost savings to the Builder but also never expected to be billed for extras, yet he was billed for them. By the issue of the invoices for things that Mr Barbagallo claimed were "Stage 2" it is apparent that he is not intending that the Builder will be bound by the swings and roundabouts agreement or that he has a different view of it from Mr Morphett. Most of the items concerned do not appear to me to have been Stage 2.

72. In a letter of 3 March 2009, which appears to have been faxed on 3 April, Mr Barbagallo offered credits for some items which he claimed to have

discussed with Mr Morphett but in a following letter Mr Morphett disputed his allegation that these matters had been agreed. I think Mr Morphett is a more reliable witness.

73. I am quite unable to make any objective finding as to what this alleged agreement was so I am unable to give effect to it. The parties are bound by the building contract they have executed and by any other agreement that I can find established. I find that the alleged "swings and roundabouts" agreement was never an agreement because it does not appear that there was ever any consensus ad idem or objectively ascertainable agreement between the parties as to what it was to apply to.

Liquidated damages - $13,821.45

74. Under the terms of the Contract the work was to be completed within 365 days from the day on which building works commenced on the site (Schedule 1, Item 1, Clause 10). Work commenced in March 2007 but the Building permit was not issued until 28 April 2007. Work was still incomplete when the Builder left the site in April 2009. Mr Croucher's first inspection was in May 2009 and that revealed many of the defects discussed below. Rectification work then ensued and in November 2010, the Owners moved in.

75. The construction period allowed for in the Contract was 365 days. If that is taken from the date of issue of the Building Permit when the Builder was already on site, the work should have been finished by 27 April 2008.

76. In a letter dated 22 April 2009 the Owners solicitors alleged that the Builder had released occupation of the site "some months ago". Mr Reid submitted that from this I should find that the Owners took possession of the site in February 2009. However it is clear that the Builder was still on site at that time.

77. The Builder claims that there was a delay of eight months in the critical path of construction – five months in relation to the deck and flooring and three months in relation to the cathedral ceiling. However there was no formal variation of the work, no notice of suspension served nor an actual suspension or other cause for delay alleged, as set out in Clause 34 of the Contract, nor was any written notice served by the Builder upon the Owners pursuant to that clause.

78. Mr Reid relied upon the case of *620 Collins Street v. Abigroup Contractors Pty Ltd* [2006] VSC 491 as authority for the proposition that an extension of time can be granted, notwithstanding that the Builder is not entitled to or claimed an extension of time. That case turned on a particular clause in the building contract to that effect. The contract in this case is in very different terms. In the absence of waiver or estoppel or an agreement to set time at large or extend time the Builder is bound to complete within the time fixed by the contract and is liable for liquidated damages if it fails to do so.

79. According to his evidence, Mr Barbagallo spent five months in finding a solution to the problem that he perceived with the hollow core slab but, apart from evidence as to various parties he contacted, it is quite unclear what he did during this period and there is no expert evidence that it ought to have taken as long as that. The same can be said of the delay alleged in relation to the suspended ceiling. Mr Barbagallo said that it was agreed with the Owners that time was to be set at large. Mr Morphett denies that allegation and I am not satisfied on the balance of probabilities that there was any such agreement.

80. The purpose of a building Contract is to provide certainty to the parties. If Mr Barbagallo believed that the House could not have been constructed according to the hollow core slab design, what the Builder ought to have done is request instructions and suspend work until instructions were received. Time would not then have run during the period of suspension. When instructions were received, if they involved a variation to the scope of works then a notice would have been given by the Builder pursuant to Clause 23.2 warning the Owners of the Builder's estimate of the delay involved. The Owners would then have been in a position to decide whether they wanted to accept Mr Barbagallo's suggestion or seek other alternatives. If they chose to adopt the suggestion that would have been their choice, and they would have made it with knowledge of the likely consequences in regard to time. An extension of time could then have been sought by the Builder under Clause 34. None of these necessary steps were taken and so the Builder is not entitled to any extension of time.

81. By Clause 40 of the Contract and Item 9 of Schedule 1 the Builder is liable for liquidated damages at $250 per week in the event of late completion. I will allow damages from 27 April 2008 until termination on 19 May 2009, at $250 per week, which is $13,821.45.

Possession of the building site

82. The building site was very large and it was agreed between the parties that Mr Morphett could occupy part of the site for the purpose of working on his cars. This was in a shed built on the land for the purpose. Mr Barbagallo gave Mr Morphett a key to the front gate of the site to enable him to go in and out.

83. The Builder claims that the Owners took possession of the site but, given that Mr Morphett was allowed access to the land under the agreement referred to, I cannot infer from his mere presence on the land a taking of possession on the part of the Owners.

84. The consequences of the Owner taking possession of the land before paying the final claim without the Builder's written consent are dealt with in clause 38.1 of the Contract but I am not satisfied of any such possession was taken.

Suspension of work

85. In April 2009 the Builder suspended work and left the site. Mr Barbagallo said that the Owners had failed to pay moneys owed and that they were too fussy.

86. The failure to pay related to the final payment but the Owners said that lock up was not achieved by the Builder because:

- The front door was missing;
- The bedroom door locks were missing;
- The door and glass seals were missing; and
- The tilt door motors for the garage door were not secured.

87. In a letter from its solicitors dated 12 May 2009, the Builder acknowledged that the front and laundry doors were missing but said that this was by agreement in order that the Owner might have the benefit of the Builder's insurance. This is not admitted and in any case, a house without a front door is not at lock up stage. I am not satisfied that there as any agreement that payment would be made regardless of the fact that the doors were missing. Further, the evidence is that without the motor on the garage door anyone could lift the door and walk into the House.

88. In any case, the problems with the work were more fundamental than a mere failure to reach lock up. In particular, the front deck was seriously defective and the Builder was not intending to rectify it.

The default notice

89. By a letter from their solicitors dated 3 April 2009, the Owners gave the Builder a month to complete the works and bring them to a proper standard.

90. By a further letter dated 6 May 2009 the Owner's solicitors sent to the Builder a document purporting to be a Notice of Substantial Dispute under Clause 43. Correspondence thereupon ensued between the solicitors for the parties but nothing further was done by the Builder to rectify any breaches and, by a further notice dated 19 May 2009 they purported to determine the Contract.

91. Mr Fink submitted that if any of the grounds set out in the Notice of Substantial Dispute were sustained the notice was valid. He relied upon the decision in *Matthews* v *Brodie* (unreported - decided 2 April 1980 by McGarvie J). In that case his Honour said (on p.6):

> "I consider that the owners by specifying the one ground are not precluded from relying on another as entitling them to give an effective notice of determination. The considerations which led the common law to adopt the principle that an innocent party who purported to discharge a Contract in reliance on a specified breach by the defaulting party may later rely on another breach which then existed as justifying the discharge……..lead me to the conclusion that the owners here may

> rely on the builder failing to proceed with the works in a competent manner to justify their purported determination of the Contract although the notice specified another ground. I have not been referred to any case where the principle was applied to the determination of the Contract under an express clause as distinct from the common law discharge of a Contract upon breach."

92. As the last sentence makes clear, what his Honour says reflects the common law position. However, if a party serving a notice is doing so under a provision of a contract then, quite obviously, the requirements of that provision must be satisfied if the notice is to have the effect that the provision contemplates.

93. In *Matthews*, the termination clause only required that the builder be at fault at the time of the service of the notice. There was no need to specify the particular default nor provide any opportunity to the builder to remedy the default so as to prevent termination. The regime set out in Clause 34 of the present form of contract is entirely different. In order to be effective under that clause the notice is required to set out the defaults relied upon and the builder then has ten days in which to remedy the default and avoid termination.

94. Clause 43 of the contract provides (where relevant):

> 43.1 The builder is in substantial breach of this contract if the builder:
>
> - suspends the carrying out of the building works otherwise in accordance with Clause 35
>
> …
>
> - is otherwise in substantial breach of this contract.
>
> 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; and
> - stating that if the substantial breach is not remedied as required, the owner intends to end this contract.
>
> 43.3 The builder does not remedy the substantial breach stated in the notes to remedy the breach within 10 days of receiving the notice, the owner may end this contract by giving a further written notice to that effect.
>
> 43.4 The owner is not entitled to end this contract under this clause when the owner is in substantial breach of this contract."

95. The notice identifies the contract and the parties and specifies the following alleged instances of substantial breach:

> *1. That you failed to complete the building works within a period of 365 days.*

2. *That you have failed to carry out the works in a proper and workmanlike manner under the plans and specifications set out in the contract.*

3. *You have made a significant number of variations to the building works without first obtaining a signed variation in accordance with condition 23 of the contract.*

4. *That you have requested payment and accepted payment of various progress claims notwithstanding the provisions of attachment 1, page 13 have not been completed.*

5. *That notwithstanding a request by the owner dated 3 April 2009 that you complete all of the works required in the contract within one month of 3 April 2009 you have failed to do that.*

6. *That the following works remain to be completed –*

   - *the construction of Merbau decking in a proper and workmanlike manner including polishing;*
   - *the installation of a gas supply line underneath the driveway;*
   - *the construction and installation of front gate pillars, front gates, electrical connections to the front gate and electric motors to make the gates automatic and closing;*
   - *the construction of a driveway in black bitumen with brick edging laid into end with an area allowance of 895^{2m};*
   - *the electrical fit off;*
   - *the plumbing fit off;*
   - *the sanding and polishing to a semi gloss finish of the timber floors;*
   - *the rectification of each and every one of the defects listed in a list of defects set out in a letter from the owners' solicitors dated 1 April 2009;*

7. *That you have asserted by letter dated 28 April 2009 that the works are completed save for the electrical fit off, the plumbing fit off and the semi gloss finish to the timber floors but have failed to provide a notice of completion, final claim in accordance with condition 36 of the contract."*

96. The notice goes on to provide that, pursuant to Clause 43, the Builder is required to rectify each and every one of the substantial breaches and in particular, complete all works required to be done by it under the contract within 10 days after receipt of the notice. The notice then states that if the substantial breaches are not remedied within 10 days after the notice is received the Owners intend to end the Contract.

97. Mr Reid submitted that the notice was invalid because of "inaccuracies" and because the Builder was unable to understand it. In particular, he pointed out, correctly, that there was no letter from the Owners' solicitors dated 1 April. There was a letter dated 3 April. He pointed out that the Owners took out construction insurance on the same date as the notice and that I should infer from that fact that it was drafted so that the specified breaches were incapable of remedy in order that the Owners might take over the work. He said that this "ulterior motive" vitiated the notice. I do not accept that submission. Whatever the motives of the Owners, the Builder needed only to satisfy the notice insofar as it specified actual breaches. To that extent it was up to the Builder whether or not to comply with the notice.

98. Clause 43.1 entitled the Owners to serve a notice provided the Builder was in substantial breach of the Contract. I think that so long as at least one of the breaches specified within the notice was a substantial breach within the meaning of the contract then a notice given under Clause 43 was valid and if the Builder did not remedy the breach within 10 days the Owners were then entitled to terminate the Contract.

99. The Builder had not followed the plans, had not followed the procedure for variations, had done grossly defective work and not rectified it. The time for construction was well past and the Builder asserted that the work had been substantially completed even though it was grossly defective. I find that all of these things added up to a substantial breach of the Contract.

100. In the present case there was no attempt by the Builder to rectify the substantial breaches or any of them. In response to the notice, on 12 May 2009 its solicitors wrote back joining issue with many of the allegations made and demanding payment of an amount of $122,353.55 allegedly owed. The letter claimed that, pursuant to Clause 38.1 of the Contract the Owners had taken possession of the site and were therefore deemed to have accepted the work.

101. The Owners would not be entitled to serve a notice under Clause 43 if it they themselves were in substantial breach of the Contract (Clause 43.4). A failure to pay a progress payment as required by Clause 30 of the contract is a substantial breach (Clause 42.1).

102. By Clause 30.0, the Owners were required to pay a progress payment within 7 days after the stage had been completed and they had received a written claim of progress payments. The procedure for making claims was not followed by the Builder but, in any case, the final payment was not due. The evidence was that the Owners paid promptly where payment was due.

103. In conclusion, although I am satisfied that the Builder was in substantial breach, I am not satisfied that the Owners were in substantial breach at the time they served the notice. I think the notice served by the Owners was clear enough in its terms. It satisfied the requirements of the Clause. It specified numerous faults in the work, at least some of which are clearly

established. It called upon the Builder to rectify the defaults, albeit within a very short time period, but that is the period the Clause specified. Since the first notice was valid and the Builder made no attempt to rectify the defaults the Owners were entitled to determine the Contract.

Quantum

104. The amounts claimed by way of damages by the Owners for defective and incomplete work are the monies that they spent in rectifying and finishing the work. Evidence was provided by way of invoices and, in some cases, the evidence of the people concerned.

105. The principal witness in this regard was Mr Maroszek. In August 2009 Mr Morphett gave Mr Maroszek a copy of Mr Croucher's report and invited him to quote on the completion and rectification work required. He declined to quote on the work and instead agreed to act as the building supervisor and work at an hourly rate.

106. Mr Maroszek gave evidence and was cross examined. He is a registered building practitioner and has carried on business as a builder on his own account since 2005. He charged for his own work and supervised the other tradesmen, all on a "do and charge" basis.

107. The amounts incurred were as follows:

Stephen Maroszek	$133,853.83
John Girarratana, concretor,	$71,100.00
Jimana Timber – materials	$1,993.37
Cost of building entrance gate pillars, fabricating steelwork and installing gates	$26,937.63
Cost of finishing the timber floors	$9,000.00
Repainting of walls	$35,037.50
Plastering and plumbing	$4,584.40
Tile decking repairs	$28,634.35
Rendering	$25,800.00
Corking and sealing	$3,706.12
Plumbing fit off	$10,749.00
Rubbish removal	$5,091.00
Scaffolding hire	$11,385.00
Septic repairs	$9,167.30
Front entry door	$5,207.00
Electrical work	$10,059.61

108. I accept that these represent monies paid by or on behalf of the Owners towards rectification and completion of the House but the evidence is insufficiently detailed in regard to any of these payments for me to determine the extent of which the Builder is responsible for the expense.

109. The assessment of the extent to which any monies expended by an owner in rectifying and completing defective or incomplete building work is necessary and reasonable is a matter of expert judgement requiring expert evidence.

110. Many of the rectification costs were paid not by the Owners but by companies and entities associated with them, including a family trust and a company apparently associated with Mr Morphett's business. Mr Reid pointed out, correctly, that there is no evidence that the Owners have to repay these various amounts to the entities concerned. He submitted that, in these circumstances, the Owners had not proven that they had suffered any loss.

111. Mr Reid relied upon the comments of Windeyer J in *Coulls v Bagot's Executors & Trustee Company Ltd* [1966-67] 119 CLR at p.501-2. However what his Honour was considering in that case was the situation of a Contract entered into by A with B in which B was to pay C. If B failed to pay, then A could sue B but unless he suffered some other loss recoverable according to the ordinary rules for the assessment of damages for breach of Contract, he could recover only nominal damages. He would not have suffered any loss from the mere fact that the payment were not made. He could sue for the money if he did so as trustee for C, in which case he would then hold the money as trustee for C.

112. That is not the situation here. The Contract was entered into by the Owners for their own benefit and they would suffer the consequence of any breach.

113. Reliance was also placed upon *Commonwealth of Australia v Cornwell* [2007] HCA 16 (at para 16) and *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 (at p.527) to the effect that, in a claim in negligence for economic loss there has to be some actual damage. Prospective loss is not enough. That proposition has no application here.

114. I was also referred to *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] AC 518. In that case Company A entered into a building Contract with a builder to construct a building upon land owned by its associated company, Company B. There was a deed entered into between the builder and Company B rendering the builder directly liable to Company B for any defects. The work was defective and Company A sued for damages. The House of Lords held by a majority that, given that the deed provided the owner, Company B, with a direct remedy against the builder and since Company A had itself suffered no loss, it could recover only nominal damages. Again, that is not the situation here. Mr Reid submits that, insofar as the Owners did not directly pay for the rectification themselves, they have not suffered any loss. I do not accept that submission. The land is

owned by Mrs Morphett and the Builder contracted with both Owners to build the House. It is they who suffered the loss.

115. Where there is a breach of Contract, the innocent party is entitled to damages arising from that breach. In general, the measure of damages is what it would cost to put the innocent party into the position he would have been in if the Contract had been complied with (*Tabcorp Holdings Ltd v, Bowen Investments* [2009] HCA 8).

116. I put to Mr Reid the hypothetical case of what would happen if my daughter engaged a painter to paint her house and he did the work defectively. If she sued the painter and in the meantime I had paid to have her house repainted, would that mean that she had suffered no loss and so could recover only nominal damages from the painter? Of course, it would not.

117. A distinction must be drawn between the loss the innocent party suffers as a result of the breach and how he copes with it. He might put up with the defective work and spend the damages that he recovers on something else. He might demolish the house and start again. That has nothing to do with the Respondent, whose responsibility is confined to paying damages according to the legal measure.

118. Although the invoices and other records of what the Owners have paid is relevant evidence I have regard to the evidence of the experts as to what it should have reasonably cost to complete the work and, insofar as it was defective, to bring it into compliance with the Contract.

119. Mr Reid criticized the inclusion of a builder's margin and a contingency allowance in the expert assessment in each case. He said that the Owners avoided these by becoming owner-builders. This submission ignores the fact that the Owners were entitled under the Contract to have the work done by the Builder. If they complete as owner-builders then part of their loss is having to do that themselves instead of having the Builder do it for them. The reasonable cost of bringing the work into compliance with the Contract and fully compensating the Owners for the breach includes the cost of a supervising builder because that is part of their loss. As to the contingency figure, it is for the expert witnesses to form the opinion that such a figure should or should not be included because that forms part of their assessment.

The Owners' claims

120. The works carried out by the Builder are not in accordance with the Contract documents in many respects. The Owners verbally agreed to some of the changes or omissions and as to those they claim various credits. As to those they did not agree to, the Builder is in breach of the Contract and is liable for damages equivalent to the cost of bringing the work into compliance.

121. By Clause 24 of the Contract, if the effect of a variation under Clauses 12 or 23 of the Contract is to decrease the amount payable by the Owners

under the Contract, then the amount is subtracted from the next progress payment.

122. None of the variations carried out by the Builder fall within either of those clauses because the required procedure has not been followed by the Builder. However this clause shows that it was the intention of the parties that any saving achieved by varying the scope of works is to be passed on to the Owners.

123. The variations were agreed to but in each case, no price for the work was agreed to. In those circumstances, subject of course to any statutory restrictions imposed upon the Builder's right to recover anything at all, the law implies an obligation on the Owners to pay a reasonable price. Further, since the Builder has not done some of the work required under the Contract but done this varied work instead, there ought to be a fair and reasonable adjustment to the contract price to take account of any extra expense incurred by the Builder as well as any savings achieved by the variation.

124. Where the Builder has not built in accordance with the Contract and, as a consequence, has achieved a saving in labour or materials, that saving should be passed on to the owner, either as damages, where the variation is not consented to by the owner, or as a credit, where it is.

Defects and incomplete work - Expert evidence

125. The expert witnesses as to the defects and incomplete work and the credits claimed were Mr Croucher on behalf of the Owners and Dr Eilenberg on behalf of the Builder. Mr Croucher inspected the property on 14 May 2009, 25 September 2009, 29 June 2010 and 1 February 2011 Dr Eilenberg's inspections were on 25 August 2009, 7 September 2009 and 9 March 2010. 2010.

126. The two Quantity Surveyors were Mr Shah on behalf of the Owners and Mr Foley on behalf of the Builder. Mr Shah visited the site on 13 April 2010. Mr Shah did not have the revised structural drawings when he prepared his report but based his opinion on the other documents and his site visit. Mr Foley did not visit the site but based his opinion on the instructions that he received from Mr Barbagallo.

127. Mr Atchison inspected the site on 7 August. He has also examined the invoices and quotations given to him by the Owners for the completion work. Mr Atchison said that the work referred to in the invoices was done on a "do and charge" basis with a provision for supervision.

128. I heard the evidence of Mr Croucher and Dr Eilenberg concurrently. The other expert witnesses gave their evidence separately.

Credits

129. Some of the work required by the Contract documents was not done and the Owners claim that the consequent saving to the Builder should be credited to them. They are as follows:

(a) Two front stone columns missing - $4,386.00

The plans required two stone columns to support the portico. These were deleted by agreement but no credit was given to the Owners. According to Mr Croucher's initial costing, this resulted in a saving to the Builder of $10,710.00. Dr Eilenberg said that the pads were already placed and that two additional roof trusses were installed and there were additional works to the footing.

Mr Croucher acknowledged that if the pads were already in place that would come out of his calculation. That would leave the cost of the stonework which was $5,300. Allowing his 10% contingency, 20% margin and 10% GST, the allowance becomes $7,696.00. From that would need to be deducted any extra work the Builder did as a result of the change. Dr Eilenberg said that when these are allowed for the figure becomes $2,917 in the Builder's favour but that allows a credit for the pads which have now been removed.

As to the figures, it is difficult to reconcile the different methodologies adopted by Mr Croucher and Dr Eilenberg. Dr Eilenberg's figures do not allow for overheads which he adds in afterwards together with a 10% profit. I will allow his figures for the supply of the trusses and the labour and scaffolding to install them. Adding on the 20% overheads and 10% profit and GST, the amount to come off the stonework figure is $3,310.00. Taking this allowance for extra work by the Builder from the stonework figure of $7,696.00, I will allow a credit to the Owners of $4,386.00.

(b) Plumbing and electrical fit-offs - $27,574.00

Although the Contract was for construction to fit off stage it also specifically included "electrical wiring and fit-off" and "plumbing & septic including water tanks and appliance fit offs, excluding white goods". These were not done and Mr Croucher has allowed a credit of $27,574.00. Dr Eilenberg made no allowance on the basis that these were post lock up items. I find them to have been within the scope of works so I will allow the credit.

(c) Plasterboard instead of Limestone - $14,410.00

Certain specified internal walls were to be limestone. Instead, plasterboard was substituted Mr Croucher has costed the saving to the Builder at $38,067.00. He assessed the cost of supplying and installing the limestone at $28,250.00 and the cost of constructing the plaster walls at $2,034.00. He then added the margins to the difference to produce his assessment. Dr Eilenberg costed the supply and

installation of the limestone at $10,061.75 and the plaster walls at $6,917.94. He also deducted certain other work that he was instructed the Builder had carried out at the request of the Owners. Whether the Builder is entitled to a variation for that other work is a matter to be considered separately. The cost saving was also assessed by Mr Shah at $12,960.00 plus preliminaries and Mr Foley assessed the difference at $11,300.00 which includes his allowance with respect to the external façade.

Mr Atchison compared the assessments of Mr Shah and Mr Foley. He concluded that the area measured by Mr Shah of 110 square meters was approximately correct but he thought that the rate of $140.00 per square metre as assessed by Mr Foley was approximately correct. On that basis he assessed the cost saving to the Builder at $14,410.00. I accept Mr Atchison's assessment.

(d) Fence to front of property - no allowance

A fence is shown and detailed in the working drawings (WD07). Mr Croucher was instructed by the Owners that the front fence was included in the scope of works and assessed the saving to the Builder of not constricting it at $26,875.00. Dr Eilenberg pointed out that it was not part of lock up, nor was it one of the items specified in the Contract documents, which includes the quotation. I think that is right. Whatever may have been the understanding of the Owners, the scope of works is as defined in the Contract documents and the fence is not included.

(e) **Polish floors - further allowance $2,400.00**

The polishing of the floors as included in the scope of works as a specified item in addition to lock up. It was not done. Mr Croucher costed the saving to the Builder at $12,705.00. A credit was given by the Builder of $6,600.00. According to the receipts produced bty the Owners, it cost them $9,000.00 to polish the floors. Since that is less than Mr Croucher's assessment I find it to have been fair and reasonable. I will allow the difference between that the allowance of $6,600.00 already received.

(f) **Side fences - further allowance $4,025.00**

The paling fence was specifically included and was not built. Mr Croucher assessed $8,625.00 as the saving to the Builder, being the raw cost of $5,940.00 plus contingency, margin and GST. Dr Eilenberg did not make an assessment, since a credit of $4,600.00 had already been given by the Builder. I will allow the difference between that and the figure assessed by Mr Croucher.

(g) Coverplates to doors and windows missing - $682.00

This item was agreed and I will allow M Croucher's figure of $682.00

(h) Incomplete decking - $160.00

A section of decking was left incomplete because the stairs hhad not been installed. The figure of $160.00 is not disputed.

(i) Incomplete render - $1,626.00

The render was incomplete and the figure of $1,626.00 was not disputed.

(j) No flashings to rock columns - $740.00.

These were not installed. Instead, the Builder placed untreated cement sheet on top of the columns but it did not entirely cover the tops of the columns. I accept that this is incomplete work and will allow Mr Croucher's figure of $740.00.

(k) No sills to north facing doors and windows - $2,390.00

No sills were provided. There was no detail in the drawings but Mr Croucher said they should have been done. I will allow his figure of $2,390.00.

(l) The driveway.

The driveway was taken out of the scope of works. The Builder had made an initial payment to the sub-contractor of $9,660.00 and allowed a credit of $46,800.00. It then purported to reverse the credit but Mr Barbagallo did not seek to defend that course. Rather, he said that he did it because the Owners' solicitor had challenged the validity of variations that had not been documented. It does not seem to me that there should be any further allowance beyond what the Builder has already allowed.

Items constructed differently from drawings

130. The following items were found to be different from the Contract documents. There were no formal variations prepared and signed pursuant to the Contract in regard to any of these changes, although they all appear to have been discussed between Mr Barbagallo and Mr Morphett. The Builder achieved substantial savings from constructing the house according to the change in each case.

(m) Rendered external walls instead of limestone blocks - $50,175.00

Mr Croucher costed the saving on the basis of $250.00 per square metre for 540 square metres, which was $135,000.00. After deducting the cost of constructing the rendered walls, which he said was $87,460.00, and adding to the difference the contingency, margin and GST, eh arrived at his allowance of at $69,028.00. Dr Eilenberg priced the stone at $$82.00 per square metre for an area of only 412 Square metres. After deducting what he said the constructed walls cost, he arrived at his figure of $25,255.74. In view of the difference between

them about the cost of the limestone, both experts indicated that they would defer to the quantity surveyor on that point.

Mr Shah calculated the saving at $50,085.00 plus preliminaries and Mr Foley assessed it at $11,300.00, based upon a schedule of costs for the limestone given to him by Mr Barbagallo..

Mr Atchison measured the area at 569 square metres , compared with 540 by Mr Croucher, 569 by Mr Shah and 439 by Mr Foley. The rates for limestone per square metre were $250 by Mr Croucher, $220 by Mr Shah, $122 by Dr Eilenberg and $140 by Mr Foley. He said that of these Mr Shah's figure was reasonable and so he assessed the saving to the Builder at $50,175.00. I accept Mr Atchison's assessment.

(n) Lightweight floor and deck instead of slab - $7,299.00

This was the most controversial issue. Mr Croucher assessed that the Builder would have incurred a cost of at $125,600.00 if it had installed the floor as designed. He deducted from that the cost of the lighter weight construction the Builder built, which he costed at $99,972.00. When the contingency, margin and GST are added, he arrives at an allowance of $145,159.00.

Dr Eilenberg assessed that the as-built structure was more expensive by $90,417.00. That seems an extraordinary divergence between two experts.

The quotation, dated 4 August 2006, by Hollowcore for the concrete slab as designed was $156,860 (inclusive of GST). That did not include the support structure and a number of other components detailed in the quotation. Mr Croucher was not provided with that quotation nor the original engineering plans for the support of the hollow core slab. He acknowledged in cross-examination that the figure he provided for the steel was to come off the figure that he had calculated. Dr Eilenberg has calculated the cost of what the Builder has built but the only credit that I can see in his calculation is the quotation figure of $142,601.23.

When Mr Croucher re-worked his figures in the witness box Dr Eilenberg pointed out that the calculations did not take into account a number of matters, including a block work wall and the reinforced floor in the garage. A discussion then ensued involving both experts from which it became apparent that the two systems were so different that the task of comparing costs was very difficult indeed. Mr Croucher suggested that the calculation was more suitably done by the Quantity Surveyors.

Mr Shah costed the credit due at $30,288.00 plus preliminaries. Mr Foley costed the original construction at $173,500.00 and the alternate light weight construction at $256,900.00, resulting in an additional cost to the Builder of $83,400.00. The first figure comes from the

Hollowcore quotation. In the second figure Mr Foley assessed the cost of the particleboard floor at $56,105.00 because he understood from his instructions from Mr Barbagallo that there were two layers of particleboard laid. He also allowed for a double skin masonry wall below to support the floor. He did not attend the site himself.

Mr Atchison pointed out that Mr Shah's report allowed only 600 square metres whereas the correct area is 651 square metres. He said that the amount they used for the hollow core was reasonable but that they had not allowed for the particle board flooring used in the alternative. He said that the allowance in the Foley assessment for two layers of particle board flooring was excessive as was the allowance for floor joists and the load bearing walls. Support could have been provided, he said, by timber framed or stronger steel framed walls. On this basis, he costed the saving to the Builder at $7,299.00. I accept Mr Atchison's assessment.

(o) Flat ceiling instead of cathedral - $22,516.00

Mr Croucher estimated the raw cost of constructing the cathedral ceiling as designed at $54,440.00 and the cost of what the Builder constructed at $4,445.00. When the contingency, margin and GST are added to the difference, he calculated a saving to the Builder of $72,592.00. Dr Eilenberg calculated the raw difference at $15,675.00 which became $24,140.00 when the margins and GST were added.

In the course of the ensuing discussion between the experts it became apparent that, like the first floor change, the financial implications of the roof change are also complex. Although the construction was light weight, there was considerable steel work in the ceiling as built because of the span. Mr Croucher said that the very heavy steel beams in the ceiling as designed would have been much more expensive than the figure allowed for by Dr Eilenberg.

Mr Shah costed the credit due at $24,065.00 plus preliminaries. Mr Foley costed the cathedral ceiling at $33,400.00 and the flat ceiling that was built at $77,000.00, resulting in an additional cost to the Builder of $43,600.00. His costing of the flat ceiling was based on his instructions from Mr Barbagallo as to what was built.

Mr Atchison said that the area of 65 square metres allowed for in tMr Shah's report was approximately correct but that the area of 150 square metres allowed for by Mr Foley was too low. He said that what the Builder had built was excessive in that the trusses were spaced too closely so that there an unnecessary number of them. He said that a simple truss design to replace the steel frame and beam design would have been sufficient. On that basis he assessed the credit to the Owners at $22,516.00. I accept Mr Atchison's assessment.

(p) Cost of metal fireplace inserts - $11,000.00

The fireplaces on both levels were specified to be "Hillview stone". Because of the other changes it was agreed that they could not be built and that fireplace inserts would be used instead. Mr Croucher said that the Builder saved the cost of constructing the fireplaces and flues but that the appropriate method of dealing with it would be to treat it as a substitution and credit the Owners with the money they paid for the metal fire boxes, which was $11,000.00. Dr Eilenberg did not raise any contrary view and I think that Mr Croucher's suggestion is a sensible one. There will be a credit in favour of the Owners of $11,000.00.

Defects

131. Mr Croucher set out in great detail the defects that he found in the work and assessed the rectification cost in each case. Details are as follows:

(q) Plasterwork - $6,461.00

Mr Croucher costed the rectification of the defective plater at $6,461.00. Dr Eilenberg said that the defects should have been attended to before painting. He also said that the plasterer should have been called back to rectify his work. That is no doubt true but he was the Builder's sub-contractor and that wasn't done. According to Mr Morphett's evidence, which I accept, Mr Barbaballo told him that the defects would be attended to by the painter. It was Mr Barbagallo who oversaw the painter. I am satisfied that the defects were present and will allow Mr Croucher's assessment.

(r) Painting - nil allowance

Mr Croucher's allowance for painting defects was $28,459.00. The issue here is whether it was to be done by the Builder or whether the Builder was merely supervising, in which case it would only be liable for defects arising from failure to supervise with reasonable care and skill. Because this was a separate supervision contract I would need evidence that the faults were due to improper supervision and I do not have that evidence.

(s) Bowed wall beside the fireplace - $3,818.00

In assessing what was done to rectify this item Mr Croucher relied upon what he as told by the Owners. However he saw the bow in the wall before it was repaired but could not take measurements because the cabinet makers were working in the area. He assessed the cost of rectification at $3,818.00. The steps costed are unremarkable and so I will allow his figure.

(t) **Replace damaged glass louvres - $1,089.00**

This item was not disputed. I will allow Mr Croucher's assessment of $1,089.00

(u) Installation of floor vents

There was some doubt as to the need for venting , given that the house is constructed on a slab. Dr Eilenberg said none were required and Mr Croucher described it as a moot point and suggested reasons why venting would be desirable. I am not satisfied as to this item.

(v) Rectify defective articulation joints - $5,386.00

This item was not disputed. I will allow Mr Croucher's figure of $5,386.00.

(w) Reconstruct deck - $234,235.23

This was the major issue in the case. Amongst the defects identified were that there was no fall and it was holding water in parts. The centre was springy, having been constructed of structural ply instead of marine ply, and untreated timber was used in the substrate that had rotted. There was a hump in the middle due to the presence of a structural beam. The most fundamental defect was the use of yellow tongue particle board which is unsuitable for external use. The decking had been nailed instead of screwed. It had to be demolished and reconstructed with a fall using appropriate materials.

Mr Reid submitted that the cost of reconstruction should be apportioned because the membrane and tiling of the central part of the deck was undertaken by the Owners. I do not accept that there should be any apportionment because whatever was affixed to the central part of the deck was inevitably wasted because of the fundamentally defective nature of the structure it was affixed to. In any case, I am not satisfied that the work done by the Owners' tradesmen was defective.

Mr Croucher assessed the reasonable cost of re-construction using compressed fibro-cement sheet at $111,864.00. Neither he nor Dr Eilenberg costed what was actually re-constructed.

The reconstruction method used was to demolish the deck and supporting structure and rebuild it using concrete supported upon steel beams. Mr Atchison said that he understood that Mr Croucher's method of rectification was rejected because the light weight joists were running in different directions, making them difficult to pack to achieve a constant fall to the perimeter, that the joist installation was of poor quality and that the Owners had lost faith in the light weight solution. The lack of faith of the Owners is not in itself relevant. The Builder is only responsible for the reasonable cost of rectification. However Mr Atchison said that the method used to rectify the balcony was a reasonable approach providing a long term solution. He concluded in his report:

> "The approach taken by the [Owners] was cost effective as any quotations that could have been obtained from rectifying builders would have been loaded with higher margins due to the unknown nature of the re-build procedure."

Using the invoices and other documents listed in his report he costed the re-construction of the balcony at "approximately $234,235.23". I accept his evidence.

(x) Re-align gutters that are holding water - $1,694.00

Mr Croucher costed this item at $2,061.00. Dr Eilenberg costed it at $1,694.00. It appears to be a minor item and simple to correct. There will be trades already on site. On balance I prefer Dr Eilenberg's figure.

(y) Replacement of damaged roofing sheets

These were damaged and require replacement. Mr Croucher assessed the cost at $1,097.00. However it was not just the Builder's workmen on site in that area. Dr Eilenberg said that they might have been damaged by the workmen engaged directly by the Owners to install the air conditioning. In the absence of evidence as to who caused the damage I cannot make an allowance.

(z) Repairs to damaged thresholds

Similarly, there is insufficient evidence as to who caused the damage to the thresholds and so I cannot make any allowance.

(aa) Replacement of damaged door frame.

This was blown out in a high wind. There is evidence that the windows were not adequately sealed but Dr Eilenberg said that the fact that it blew out might have been due to a miscalculation by the manufacturer who should have been called back to fix it. At the time the window blew out there was a "severe storm" and the house was unfinished. I am not satisfied that it has been established that this storm damage is the fault of the Builder.

(bb) Seal all leaking door and window frames - $800.00

Dr Eilenberg suggested that this is a maintenance item. However windows should not leak shortly after installation. I will allow $800.00 being an average of the two assessments of the experts.

(cc) Rock wall

There is a slab built against the house bridging the top of a rock wall with the wall of the house. The cavity created has been used as a rock garden and the Owners have landscaped the top of the slab with further plantings. Mr Croucher has pointed out that the arrangement is not waterproof and that water runs down the face of the window on the lower level. Dr Eilenberg said that this was not within the Builder's scope of works. I think Dr Eilenberg is right. Although the Builder poured the slab, the subsequent work was beyond lock up and so was the Owners' responsibility.

(dd) Swollen plaster in billiard room

This was caused by a water leak but it is unclear whether the defective workmanship was in the work that the Builder did or whether it was work done directly for the Owners, so I do not find this item proven.

(ee) Sliding doors to basement area - $10,426.00

There is a bow in the bottom sills of two sliding doors in the basement due to a hump in the slab beneath the sills. The Builder claims that the doors were operable when it left the site and suggested that they might have been removed by the rectifying builder. It seems to me that if there is a hump in the slab then that must be the fault of the Builder and so I find this item proven and will allow Mr Croucher's figure of $10,426.00.

(ff) Fill and repaint small cracks throughout

Although the scope of works included the plaster it did not include the fix generally. I do not see that this is part of the Builder's responsibility.

Cost of completion - $89,697.00

132. The Builder left the site without completing the work. Mr Croucher costed the incomplete work as $204,984.00 but that includes many of the matters referred to above. Mr Atchison assessed the reasonable cost to complete at $89,697.00. I accept that assessment.

Mental distress

133. The Owners claim also damages for mental distress arising for the Builder's breaches of the building Contract. Litigation is usually stressful for parties. Where there is a breach of a building Contract there will usually be a deteriorating relationship between the parties, arguments between the parties which are often heated, concerns on the part of the owner about cost over-runs, claims thought to be unjustified, delay and when the work will be finished. It is not usual to award damages for these things. This Tribunal deals with claims for economic loss, not personal injury.

134. If I have jurisdiction to deal with this sort of claim, and I do not decide that I do, I accept Mr Reid's submission that in order to award damages for any psychological injury I would need medical evidence and there is none, apart from a letter from Mr Morphett's doctor that he has high blood pressure..

135. The Tribunal can award damages for loss of amenity in an appropriate case but here there is no evidence that the Owners have suffered or are suffering loss of amenity because of having to put up with living in a defective or aesthetically displeasing house. The house was rectified and completed and they moved in. There was a great deal of delay, but that is quantified and allowed as liquidated damages.

Conclusion

There will be an order that the Respondent pay to the Applicants $507,858.68, calculated as follows:

(a)	Work not done	
	Stone columns	4,386.00
	Fit off	27,574.00
	Interior limestone substitution	14,410.00
	Polish floors	2,400.00
	Side fences	4,025.00
	Coverplates doors/windows	682.00
	Incomplete decking	160.00
	Flashing columns	740.00
	Sills to doors/windows	2,390.00
	External limestone substitution	50,175.00
	Lightweight floor	22,516.00
	Fire inserts	11,000.00
(b)	Defects	
	Plaster	6,416.00
	Bowed wall	3,818.00
	Glass louvres	1,089.00
	Articulation joints	5,386.00
	Reconstruct deck	234,253.23
	Re-align gutters	1,694.00
	Leaking doors and windows	800.00
	Sliding oors	10,426.00
(c)	Cost of completion	89,697.00
(d)	Liquidated damages	13,821.45
Total		$507,858.68

136. Costs will be reserved for further argument

SENIOR MEMBER R. WALKER