VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP1326/2016

CATCHWORDS

DOMESTIC BUILDING; termination of contract under s 41 of the *Domestic Building Contracts Act 1995*; consideration of discussion of that section in *Shao v A G Advanced Construction Pty Ltd* [2017] VCAT 903; discussion of basis of builder's entitlement under s 41(5); relevance of the contract sum, variations, defects, costs to complete the works, general damages, liquidated damages, and the cap on damages arising from s 41(6); builders claim allowed to the extent of $13,916; owners' counter claim dismissed; issues of interest, costs and reimbursement of fees reserved.

APPLICANT	Neil Fletcher Design Pty Ltd (ACN: 087 852 328)
FIRST RESPONDENT	Ms Enid Fullinfaw
SECOND RESPONDENT	Mr Nigel Fullinfaw
WHERE HELD	Melbourne
BEFORE	C. Edquist, Member
HEARING TYPE	Hearing
DATE OF HEARING	27, 28, 29 and 30 November and 1 December 2017
DATE FOR FILING OF PRIMARY SUBMISSIONS	22 December 2017
DATE FOR FILING OF RESPONSE SUBMISSIONS	24 January 2018
DATE OF ORDER	27 March 2018
CITATION	Neil Fletcher Design Pty Ltd v Fullinfaw (Building and Property) [2018] VCAT 188

ORDERS

1. The first respondent and the second respondent must pay the applicant the sum of $13,916.00.
2. The counterclaim of the first respondent and the second respondent is dismissed.
3. Issues of interest, costs and reimbursement of fees are reserved.
4. The applicant has leave within 60 days to file and serve a written submission regarding interest.

5. All parties have leave within 60 days to apply for orders for costs and reimbursement of fees.

C. Edquist
Member

APPEARANCES:

For Applicant:	Mr N J Philpott, of Counsel
For Respondents:	Mr R G Squirrell, of Counsel

REASONS

INTRODUCTION

1 The first respondent Mrs Enid Fullinfaw owns a property near the sea at Bonbeach in Victoria. She and her husband, the second respondent Mr Nigel Fullinfaw, decided to develop the property by creating two townhouses with the intention of living in one and selling the other.

2 Through a friend, Mr and Mrs Fullinfaw ("**the owners**") came to meet Mr Neil Fletcher, a director of the applicant, Neil Fletcher Design Pty Ltd (ACN 087 852 328). They spent a considerable sum with the company developing plans for their development. When they heard Mr Fletcher had gone into the building business, they agreed to contract with Neil Fletcher Design Pty Ltd (ACN 087 852 328) as the builder ("**the builder**").

3 The parties entered into a major domestic building contract on 22 January 2015 ("**the contract**"). On 23 June 2016 the owners terminated the contract, and after that completed the project themselves.

4 The owners terminated the contract under s 41 of the *Domestic Building Contracts Act 1995* ("the DBC Act"), which allows an owner in certain circumstances, where there has been a blowout in completion time or cost for un-foreseeable reasons, to terminate the contract. Under s 41, the builder is entitled to a reasonable price for the work carried out under the contract up to the date of termination. At the heart of this case is an assessment of the builder's entitlement under s 41.

SECTION 41 OF THE *DOMESTIC BUILDING CONTRACT ACT 1995*

5 Section 41 of the DBC Act relevantly provides:

> (1) A building owner may end a major domestic building contract if—
>
> (a) either—
>
> (i) the contract price rises by 15% or more after the contract was entered into; or
>
> (ii) the contract has not been completed within 1½ times the period it was to have been completed by; and
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> (b) the reason for the increased time or cost was something that could not have been reasonably foreseen by the builder on the date the contract was made.
>
> (2) (Not relevant to this proceeding)
>
> (3) To end the contract, the building owner must give the builder a signed notice stating that the building owner is ending the contract under this section and giving details of why the contract is being ended.
>
> (4) (Not relevant)

(5) If a contract is ended under this section, the builder is entitled to a reasonable price for the work carried out under the contract to the date the contract is ended.

(6) However, a builder may not recover under subsection (5) more than the builder would have been entitled to recover under the contract.

(7) (Not relevant)

6 The owners and the builder agree that the building contract has been validly terminated under s 41 of the DBC Act. This, accordingly, is not a case like *Kubic Pty Ltd (ACN 096 053 753) v Catanese*[1] where there was an issue as to whether s 41 had been enlivened.

7 The parties also agree that the leading authority on the operation of s 41 of the DBC Act is *Shao v A G Advanced Construction Pty Ltd*[2] ("***Shao***"), a decision of the Tribunal delivered by Senior Member Walker. Neither party suggested that the case was wrongly decided. Indeed, the owners expressly state that the decision was correctly decided.[3] The controversy between the parties arises principally because of the differing interpretations of a builder's entitlement upon termination under s 41 of the DBC Act which the parties respectively draw from *Shao*.

8 The impact of the differing legal perspectives in financial terms is significant. The builder claims to be entitled to an order for $175,660 plus interest, and costs. The owners counterclaim for damages not exceeding $100,000 plus interest and costs.

9 It is appropriate to set the scene by quoting the relevant passages from *Shao*. Senior Member Walker stated as follows, at [204 to 214], under the heading "The Builder's entitlement":

> [203] By subsection (5), the Builder is entitled to a reasonable price for the work carried out under the Contract up to the date the Contract was ended. …
>
> [204] The section does not say how a reasonable price is to be ascertained but I think that it must be taken to be a price that is objectively reasonable for the work that the Builder has done.
>
> [205] Subsection (6) provides that the Builder may not recover more than it would have been entitled to recover under the Contract. What that means is unclear because the section assumes that the work is incomplete and so the whole of the contract price will not have been earned by the builder.
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> [206] As a result, the calculation of the maximum recoverable under subsection (6) appears to be a hypothetical exercise. In the present case, because of the subsection, the <u>maximum</u> the Builder would be able to recover under s.41 would be the

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1 [2011] VCAT 862 (10 May 2011).
2 [2017] VCAT 903 (21 June 2017).
3 Owner's submissions dated 24 January 2018, paragraph 3.

Contract price of $970,000.00, plus the agreed variations of $175,409.00, making a total of $1,145,409.00, plus any further variations the Builder might be allowed, less the cost of rectifying defects, which I have assessed [at] $93,153.00, and less the cost of completion because, although there is no claim by the Owner under s.41for incomplete work, the Contract price assumes that the work is complete. Finally, any payments the Builder has received would need to be deducted.

[207] However, that is not necessarily what the Builder is entitled to be paid. That is the ceiling on its entitlement. What the Builder is entitled to is a reasonable price for the work it has done up to the date of termination.

[208] A building contract will generally not have assigned a separate price to the specific items of work for which a builder is entitled to be paid. It will simply have specified a price of the whole of the work.

[209] The Contract in this case provided that payment of the Contract price was to be made in instalments relating to particular stages of construction as those stages were reached. For the reasons already referred to, the Builder's entitlement to claim instalments was limited to the stages set out in s.40 of the Act. This payment regime is intended to regulate how the contract price is to be paid. The instalments set out in the section do not purport to be equivalent to the actual value of the work done at each stage. The relationship between the proportion of the contract price a builder is allowed to claim when a particular stage of construction is reached and the amount of work that is actually done with respect to that stage is approximate only….

[210] I think that subsection (5) requires me to make an assessment of a reasonable price for all of the work the Builder has done, regardless of what stage a particular item of work falls within. Were it otherwise, an owner could terminate a contract under s.41 immediately before a particular stage of construction was completed and so avoid payment for any of the work done by the builder that formed part of that stage. Such an interpretation would be inconsistent with the apparent intention of subsection (5).

[211] [Not relevant]

[212]Termination under s.41 gives rise to no claim in damages. However a reasonable price for an item of work that is found to be defective must necessarily take into account the cost of rectifying any defects in it, with the cost of rectification being deducted from the value that it would otherwise have had. The amount to be deducted in regard to any particular defect should be what it would reasonably cost the Owner to rectify it.

[213] The cost the Owner will incur to complete the work is not relevant. The section contemplates that the work is incomplete

and says that, nonetheless, the Builder is entitled to be paid for the work that it has done.

[214] On that basis, the reasonable value of the work would be $917,802.02, being the value assessed by Mr Wilson ($1,006,073.00) less the cost of rectifying the defects that I have found ($93,153.00). Since the Builder has already been paid more than that it has no further entitlement under the section.

PRINCIPLES GOVERNING THE BUILDER'S ENTITLEMENT TO PAYMENT UNDER SUBSECTION 41(5) OF THE DOMESTIC BUILDING CONTRACTS ACT

Objective assessment

10 The parties clearly accept, and I respectfully adopt, Senior Member Walker's observation in *Shao* at [204] that a reasonable price for the work carried out by the builder up to the date the contract is ended is to be "a price that is objectively reasonable for the work that the Builder has done."

11 However, this does not take us very far, as it leaves open the question of how a reasonable price for the work carried out is to be objectively determined. A number of issues arise in the present case regarding that objective determination. One is the relevance of the contract sum. Other contentious issues include the treatment of variations, the cost of rectifying defects, the cost of completing the works, general damages and liquidated damages, and the relationship between the builder's entitlement under s 41(5) and the cap on the builder's recovery imposed by s 41(6).

Relevance of the contract sum

12 The builder contends that this is the starting point for assessing the reasonable price of the works performed.[4] The owners contest this, asserting that what has to be proved is the reasonable price for the work actually completed, without regard to the contract sum.[5] The owners also contend that the contract sum is only relevant when calculating the cap on the damages that the builder may recover under s 41(6).[6]

13 The builder put into evidence a report prepared by Mr Tony Croucher dated 14 July 2016. Critically, Mr Croucher stated:

> I estimate possibly 95% of work was carried out and that Completion Stage had almost been achieved.[7]

14 The builder submits that Mr Croucher's report was admitted into evidence by consent, and that Mr Croucher was not challenged by the owners either by cross-examination or in any conflicting expert material. The builder contends that Mr Croucher's report is the best evidence available as to the

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4 Builder's submissions dated 22 December 2017, paragraph 21.
5 Owners' submissions dated 22 December 2017, paragraphs 8,9 and 10.
6 Owners' submissions dated 22 December 2017, paragraph 11.
7 Mr Croucher's report dated 1 July 2016, page 5.

status of the works completed.[8] The builder goes on to argue that the reasonable price for 95% of the works under the contract is 95% of the contract price, as adjusted. At the heart of the builder's argument is the following passage:

> Consider the following - if the Builder had completed all work under the Contract, objectively, the reasonable price would be the total price of the Contract. That is what the parties have agreed to be the reasonable price for the works to be performed at the time of entry into the Contract. [9]

15 The owners contest that "the reasonable price is the same as the contract price." They say:

> The proposition is unsupportable for this reason: the price agreed might be a price in excess of or less than the price of the willing but not desperate owner would pay a willing but not desperate builder for the works.[10]

Discussion

16 In my view, it cannot be said that in every case the contract price represents a reasonable price for works. The contract price is certainly the price the owner has agreed to pay the builder for the works, and the price for which the builder has agreed to carry out the works. It is also the sum that the owner is lawfully obligated to pay the builder under the contract for carrying out the works, and it limits the amount that the builder can claim upon completing the works.

17 However, it cannot be assumed that the contract price will always represent the reasonable value of the work. There are a range of reasons why this may not be the case. For instance, in a healthy economy, there may be at a particular point a peak in domestic construction. In such a market, a builder might quote an unreasonably high price on the basis that if he or she does not get the job being quoted for then there will be other projects available. In such a market an owner might be prepared to pay a premium in order to obtain the services of a particular builder. On the other side of the coin, in a depressed market, the builder may quote an unreasonably low price just to win a contract in order to keep their business open.

18 If there is evidence that the contract price was derived by the builder on the basis of an objective assessment of the value of the works, perhaps because a quantity surveyor's measurement was relied on, then that would be a basis to accept the contract price represented a reasonable price for the work. Furthermore, if there was evidence that the owner had obtained several quotations, and they were all similar, then this would be evidence supporting the view that a price drawn from this set of quotations was reasonable. However, in the absence of some evidence of reasonableness,

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8 Builder's submissions dated 22 December 2017, paragraphs 15 and 16.
9 Builder's submissions dated 22 December 2017, paragraph 21.
10 Owner's submissions dated 24 January 20`18, paragraph 23.

there is no basis to assume that any contract price will equate with a reasonable price for the contracted scope of works.

Variations

19 If the scope, quality, level, layout or timing of the works is adjusted by agreement between the owners and the builder, it may be necessary to adjust the contract sum up or down. For this reason, variations carried out are clearly relevant to the assessment of a reasonable price for the works performed by the builder to the time of termination.

20 However, this is not to say that the price agreed by the parties for the performance of a variation necessarily represents the reasonable price for the work involved in the variation. The price agreed is just that - an agreed figure. There may be a range of reasons why the price is different to the reasonable price for the performance of the variation. Suffice it to say that owners very often feel in the domestic arena that if they want a variation, they will have to pay more than a reasonable price in order to get it performed.

21 For the purposes of s 41(5) of the DBC Act, the reasonable price of any variation carried out will have to be ascertained from the evidence, and added to or subtracted from the reasonable price for the original contract works, as the case requires.

Defects

22 There appears to be no disagreement between the parties regarding the treatment of defects. In particular, the builder accepts that any defects in the work performed will reduce the reasonable price of the works. The builder expressly relies on [212] of Senior Member Walker's decision in *Shao*.[11] This being the case, it is clear that the builder accepts Senior Member Walker's view that:

> The amount to be deducted in regard to any particular defect should be what it would reasonably cost the Owner to rectify it.

23 Not surprisingly, the owners accept this is the position.[12] As no party sought to debate that the cost of rectifying defects should be assessed from the vantage point of the owners, it is not necessary for me to consider the matter further in the present case. I accordingly proceed, with respect, on the basis that Senior Member Walker has expressed the position accurately.

Cost to complete the works

24 The builder initially understood it to be the owners' position that the cost to complete the contract work was relevant to the calculation of the builder's entitlement. Specifically, the builder's primary submissions referred to Mr Fullinfaw's evidence of the work performed by him or on his behalf in

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11 Builder's submissions of 22 December 2017, paragraph 29.
12 22 December 2017, paragraph 41.

order to complete the contract works and rectify defects. The builder submitted that Mr Fullinfaw's evidence was an attempt to "reverse engineer the task at hand". The builder continued:

> …the Owners' case is that the Tribunal should have regard to all the work it was required to do in order to determine what works the Builder had done at the time of termination and consequently, the reasonable price of that work. However, this approach is inconsistent with *Shao*…[13]

25 However, the owners concede in their response submissions that the cost to complete is not relevant to determining a reasonable price for the works done, and is relevant only to the determination of the cap on the amount that the builder can recover under s 41(6).[14] Accordingly, the apparent tension between the respective positions of the parties on this point is resolved.

26 Before I move on from this topic, it is appropriate that I address a pleading point raised by the owners in their primary submissions. The owners criticise the builder for departing from its pleaded case regarding the relevance of the cost of completion of the works.

27 The owners highlight that the builder contended in its points of claim that the reasonable price of the work carried out by the builder was to be calculated by subtracting from the contract price plus variations the cost to complete.[15] Reference to the owners' points of claim confirms the owners are right about the nature of the builder's initial pleading.[16]

28 The owners' point is that the builder is bound by the pleadings, and should not be permitted to depart from the pleadings in the absence of an amendment.[17] Presumably they are concerned that the builder began the hearing arguing that the cost to complete the works was not relevant.

29 I do not think the owners' contention does justice to the builder's position. The builder pleaded its case in the way it did because it maintained there was an equivalence between the contract sum and a reasonable price for the contract works. On this basis, it made perfect sense to assert that, where the contract had been terminated prior to completion of the works, a reasonable price for the works completed up to the date of termination was to be calculated by referring to the contract sum as adjusted for variations, and working back to allow for the value of the work to be completed.

30 Thus understood, there is no inconsistency between the builder's initial pleading and its attack on Mr Fullinfaw's evidence concerning the cost to complete the works. This is because it was the owners' position that Fullinfaw's evidence was relevant even though the builder was

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13 Builder's submissions dated 22 December 2017, paragraph19
14 Owners' submissions dated 24 January 2018 at paragraph 27(a).
15 Owners' submissions dated 21 December 2017 at paragraph 7
16 Owners' points of claim dated 26 September 2016, paragraphs 14 and 16
17 Owners' submissions dated 21 December 2017 at paragraph 7

"fundamentally mistaken"[18] in proceeding "on the assumption that the contract price is necessarily the reasonable price of the entire contract works".

31 I consider there has been no denial of natural justice to the owners arising from the manner in which the builder ran its case at the hearing as compared to its pleading.

General damages

32 The owners claimed general damages under three headings in their revised Amended Point of Defence and Counterclaim, namely financial losses due to delay in obtaining an occupancy permit in the nature of interest on an investment loan, management and supervision expenses incurred while the works were being completed, and damages for "physical inconvenience, distress, loss of enjoyment and loss of amenity".

33 The owners appeared early in the hearing to drop all three claims for general damages, but later in the course of the hearing it became clear that they were pressing the claim for general damages for "hardship, inconvenience and suffering". In support of this claim, Mrs Fullinfaw went into the box and tendered her witness statement. Accordingly, it is necessary to determine, as a matter of principle, whether general damages can be recovered under s 41(5).

34 The owners refer to several cases involving the construction of a home in which such a claim has been recognised, namely *Clarke v Shire of Gisborne*,[19] *Bonchristiani v Lohmann*,[20] and *Archibald v Perrett*.[21]

35 The owners anticipate the builder's argument that s 41 (5) does not allow a claim for general damages to be made. They assert:

> The right to general damages is not dependent on termination by the owners for fault on the part of builder. It is sufficient that there be a breach of contract that founds a right to damages, and it is not necessary that the termination be for that breach.

36 I am not persuaded by the owners on this issue, primarily for two reasons. Firstly, the owners did not advance any authority to support the proposition that their right to general damages is not dependent on termination of the contract by reason of the builder's breach. If I am wrong about this, then the right to general damages for hardship, inconvenience and suffering must be confined to damages arising out of acts or omissions of the builder that amount to a breach of contract. On this basis, such a claim for damages might be countenanced if it was based upon the existence of defects or their rectification, because if defects exist there must be a breach of one or more of the statutory warranties as to quality of works. However, a claim based

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18 Owners' submissions dated 21 December 2017, paragraph 9.
19 [1984] VR 971, 995.
20 [1998] 4 VR 82.
21 [2017] VSCA 259.

on the fact that the works were not completed as at the date of termination must fail, as the termination was a "no fault" termination under s 41, and failure to complete the works does not constitute a breach of the contract.

37 Secondly, even if there is authority for the general proposition that, in circumstances not governed by s 41(5), a right to general damages is not dependent on termination by the owners for fault on the part of the builder, a claim for general damages certainly appears to be excluded by that provision.

38 This argument was raised by the builder during the hearing, although it is not repeated in the builder's written submissions filed in December, presumably because the builder thought the claim for damages had been abandoned.[22] It is an argument that certainly appears to have been accepted by Senior Member Walker in *Shao* in which he said of s 41 of the DBC Act, at [202] "Neither party is entitled to damages resulting from termination of the Contract" and at [212] "Termination under s 41 gives rise to no claim in damages".

39 I respectfully agree with Senior Member Walker on this point. From a plain reading of the language of s 41(5) of the DBC Act, I find that the owners are not entitled to claim general damages. Section 41(5) provides a complete formula for the financial adjustments to be made between the parties. The builder is entitled to a reasonable price for the work carried out to the date of termination, and unless some loss or damage incurred, or to be incurred, by the owners is relevant to the assessment of that reasonable price, it must be disregarded. Damages for breach of contract are accordingly irrelevant, unless an entitlement to such damages has crystallised prior to the date of termination of the contract, and in this way has affected the value of the works performed to that date.

40 I accordingly find against the owners in respect of their claim for general damages, whether it is put as originally formulated as a claim for "physical inconvenience, distress, loss of enjoyment and loss of amenity," or for "hardship, inconvenience and suffering".

41 In case I am wrong about finding against the owners on the basis of my interpretation of s 41 and its application to a claim for damages, I discuss below the specific claim for general damages made by the owners in the present case. For the reasons explained there, I do not think the claim is sustained factually either.

Liquidated Damages

42 A claim for liquidated damages is a claim for damages for breach of contract where the damages have been pre-agreed or ascertained. Accordingly, whether such a claim can be made under s 41 is to be determined on the same basis as whether a claim for general damages exists. It follows that the claim for liquidated damages must fail, unless an

[22] Builder's submissions dated 2 December 2017, paragraph 72.

entitlement to such damages had crystallised prior to the date of termination of the contract.

The cap on damages arising under s 41(6)

43 As noted, s 41(6) provides "a builder may not recover under subsection (5) more than the builder would have been entitled to recover under the contract."

44 The owners contend that the amount that can be recovered as a reasonable price for the work performed at the termination is capped by the operation of s 41(6). If the Tribunal accepts the owners' figures, the owners contend, the builder has been paid $168,539 more than the capped amount, and can recover nothing for damages. Even accepting the builder's figures, the builder's claim is capped at $86,143.[23]

The relationship between s 41(5) and s 41(6)

45 The owners submit that both s 41(5) and s 41(6) should each be given full effect. In support of this proposition, they refer to the Supreme Court decision in *Radojevic v JDA Design Group Pty Ltd & anor (No 2)*[24] in which Ginnane J quoted Gummow J when he was sitting in the Federal Court to the effect that where two statutory provisions conflict, the Court "should strive to avoid a capricious or irrational result and seek to give each provision a field of operation."[25]

46 I do not see any necessary conflict between the operation of s 41(5) and s 41(6). It seems to me that they can each be given room to operate if a two-stage process is adopted. First, an assessment must be made on the evidence of 'a reasonable price for the work carried out under the contract to the date the contract is ended'. Second, the sum that the builder will be entitled to recover under the contract must be identified in order to establish whether the cap upon the builder's recovery arising under s 41(6) operates.

APPLICATION OF THESE PRINCIPLES

47 I now turn to the task of applying these general principles to the facts of the present case.

Determining a reasonable price for the works carried out by the builder up to the date of termination of the contract

48 The builder's argument that the contract price should be adopted as a reasonable price for the works was examined in the discussion about general principles, and rejected. It is necessary to look at the evidence presented by the parties relevant to the assessment of a reasonable price for the works.

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23 Owners' submissions dated 21 December 2017, paragraphs 123.
24 [2017] VSC 796.
25 *Minister for Resources and Anor v Dover Fisheries Pty Ltd* [1993] FCA 366; (1993) 43 FCR 565 at 574 (Hill and Cooper JJ agreeing).

49 Mr Fletcher, in his witness statement, gives specific evidence as to the reasonable price for the works, but that evidence is based on the proposition that the reasonable price is to be calculated by subtracting from the contract sum the amount paid to date, and the cost to complete.[26] That evidence accordingly has to be put to one side.

50 However, Mr Fletcher does make statements which are relevant to the determination of a reasonable price for the works. He says that in preparing his quotation for the project, he prepared the bill of quantities based on the working drawings. He says that the bill of quantities and the quotation were prepared in November 2014.[27] The bill of quantities was contained in the Tribunal Book. It was prepared by Proquant. It assessed the value of the works at $770,449.71. Mr Fletcher says in his witness statement that the bill of quantities did not include GST, or any amount for builder's supervision, overhead and other costs.[28] Although Mr Fletcher did not mention this, presumably the bill of quantities did not allow for builder's profit either.

51 The owners in their primary submissions acknowledge the bill of quantities, but assert that the builder did not seek to support it by using "any evidence from a qualified quantity surveyor as to the reasonable price for the works undertaken or required to be undertaken for the building works." They continue their attack as follows:

> There is no evidence as to how the BoQ was arrived at, and whether or not the items and amounts are reasonable for the intended build. The Tribunal therefore has no expert or other evidence available from which it can reasonably infer one way or the other if the BoQ is a reasonable estimate for the cost of the build. The BoQ has no evidential value other than the fact that it is a BoQ apparently available to the builder prior to entering into the building contract.[29]

52 The owners then seek to persuade the Tribunal to adopt a calculation as to the value of the work performed based on a review of the builder's invoices carried out by Mr Fullinfaw. This analysis is set out in a spreadsheet attached to Mr Fullinfaw's witness statement.[30] Mr Fullinfaw states that:

> Of the $1,022,797.89 claimed, I calculate that $722,921.91 properly relates to our project. This does not include any margin for overhead and profit.[31]

53 The owners' position is that the builder adduced "no admissible probative evidence" as to the reasonable price of the works it performed prior to the termination.[32] Furthermore, the owners contend that the builder gave no evidence as to what its profit margin/overhead was for the project.

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26 Mr Fletcher's witness statement, paragraph 34.
27 Mr Fletcher's witness statement, paragraph 11.
28 Mr Fletcher's witness statement, paragraph 12.
29 Owners' submissions dated 22 February 2017, paragraph 22.
30 Mr Fullinfaw's witness statement, exhibit "NFL2"
31 Mr Fullinfaw's witness statement, paragraph 133.
32 Owners' submissions dated 21 December 2017, paragraph 33.

Although the owners concede that as a matter of common sense, the Tribunal would expect that the builder intended to profit from the project, this "does not translate as a matter of fair inference into a determination as to what that profit rate would be."[33]

54 The owners highlight their concession that the builder spent at least $722,921 on the project, and suggest that from this it would be reasonable for the Tribunal to infer that the reasonable price for the work undertaken was at least that sum, subject to an appropriate allowance being made for defective work.

Discussion

55 It is apparent that neither party came to the hearing well prepared to satisfy the Tribunal as to the reasonable price of the work performed by the builder as at the termination of the contract. As noted, the builder sought to persuade the Tribunal to accept that the contract price equated with a reasonable price for the contracted work, and sought to work back from that sum to identify a reasonable price for the work performed by making an adjustment for incomplete work. The builder did not present any direct evidence as to the value of the work actually performed to the date of termination.

56 On the other hand, it was not disputed by the owners that Mr Fletcher engaged a quantity surveyor, Proquant, to prepare a bill of quantities in respect of the contract works, and that this bill of quantities was used in the preparation of the builder's quotation. Rather, the owners' position about the bill of quantities is that the quantity surveyor was not called to give evidence as to how the bill was arrived at, and whether it was reasonable for the intended build.

57 I must determine the proceeding on the evidence available. The evidence is not perfect, but in circumstances where it is clear that the builder's quotation for the project was based on a bill of quantities, it is reasonable to infer that the price for the contracted scope of works costed in that bill of quantities of $770,449.71 (which I round up to $770,450) was a reasonable base price.

Builder's margin

58 The price identified in the bill of quantities did not, according to Mr Fletcher, include any allowance for GST, builder's supervision, overhead and other costs. This statement is supported by a reading of the bill of quantities itself.

59 In order to identify a reasonable price for the works it is necessary to add to the reasonable base price identified in the bill of quantities a margin for overhead and profit. The owners effectively concede that it is appropriate to add a margin for profit, as it is "common sense" that the builder intended to

[33] Owners' submissions dated 22 December 2017, paragraph 37.

profit from the project. However, the owners say that because any determination as to profit will be speculation, no determination should be made.

60 I do not agree that the Tribunal should not make any allowance for overhead and profit merely because no direct evidence has been put by either party as to what that margin should be. The reality is that in the domestic building industry, builders do expect to recover a margin for overhead and profit. To ignore this reality would be to do the builder a grave disservice. If I was to allow no margin for profit and overhead, particularly in circumstances where the owners have conceded that the builder reasonably would be seeking to make a profit on the project, I would not be discharging my obligation to act fairly according to the substantial merits of the case, which arises under s 97 of the *Victorian Civil and Administrative Tribunal Act 1998*.

61 In identifying an appropriate margin for overhead and profit, it is useful to look at the margins proposed by the three experts who gave evidence in this case. The first is Mr Quick, who for the purposes of establishing on behalf of the owners the cost of rectifying roof plumbing defects, applied a margin to each item of 30% to cover preliminaries, overheads, supervision and profit. Mr Mitchell, who was called by the owners in relation to general building defects, applied margin covering preliminary and permit fees of 4%, warranties 1%, overheads 10%, supervision 5% and profit 15%, a total of 35%. Against this, Mr Mackie, on behalf of the builder, proposed a margin of 25%.

62 In the present case, I propose, in the interests of conservatism, to assume a margin for overheads and profit of 25%, which of course is the figure proposed by the builder's expert Mr Mackie.

63 If a margin of 25% is added to the reasonable base price of the works identified in the bill of qualities of $770,450, a contract price of ($770,450 +$192,613=) $963,063 results.

64 When GST is added, a total contract price of $1,059,368.30 is calculated.

Finding as to a reasonable price for the works

65 Given that the original contract price inclusive of GST was $1,030,000, I find that the original contract price did represent a reasonable price for the contracted scope of works.

Mr Fullinfaw's calculation of what the builder had spent

66 I note that this finding is not necessarily inconsistent with Mr Fullinfaw's calculation that the builder had spent only $722,922 on the project as at the date of termination.

67 Before I develop this point, I note that the builder criticised Mr Fullinfaw's evidence regarding the reasonable price of the works completed, on the basis that Mr Fullinfaw, as a pharmaceutical salesman:

> …is not a builder and therefore, any expert or opinion evidence he produced regarding matters relating to building should attract less weight than Mr Fletcher, an experience (sic) builder.

68 I am not satisfied that this criticism is justified, because, as I understand it, what Mr Fullinfaw has undertaken is a clerical task. He has not endeavoured to fill the shoes of an expert witness. He has merely collated a number of invoices discovered by the builder, put them in alphabetical order, and added some of them up.

69 Mr Fullinfaw did not explain in his witness statement, or at the hearing, how he decided which of the invoices he collated related to the project.

70 However, if for the purposes of argument, I was persuaded to accept Mr Fullinfaw's calculation that the builder had spent $722,922 on the project, this would not have forced me to rethink my conclusion that the original contract sum represented a reasonable price for the contracted scope of works.

71 The reason for this is that if Mr Fullinfaw's base figure for the work actually completed by the builder of $722,922 is accepted, then, in order to compare apples with apples, a margin of 25% must be added. It is not necessary to add GST, because Mr Fullinfaw worked with figures which in almost every case already included GST.

72 Margin of 25% on a base figure of $722,922 is $180,730. With a margin of 25% added, Mr Fullinfaw's figure for the work completed by the builder increases to $903,653.

73 In their primary submissions, the owners contend that the effect of Mr Fullinfaw's witness statement is that he spent $132,694 completing the project. This figure includes both the rectification of defects as well as completion, as Mr Fullinfaw did not attempt to separate the two categories of expense.[34]

74 If Mr Fullinfaw's figure of $132,694 for the cost to complete is accepted for the purposes of argument, and is added to Mr Fullinfaw's figure for the work completed by the builder as adjusted for margin ($903,653), a total of $1,036,347 results. This is remarkably similar to the original contract sum of $1,030,000.

Variations

75 If variations are taken into account, they do not substantially alter the picture, as the builder values variations at $8,659.23 inclusive of GST, and says the resulting adjusted contract price is $1,038,659.23.[35] The owners also accept the adjusted contract sum is $1,038,659.[36]

[34] Mr Fullinfaw's witness statement, paragraph 128.
[35] Builder's Points of Claim, pargraph 16.
[36] Owners' submissions dated 21 December 2017, paragraph 123.

Conclusion regarding reasonable price for the contracted work

76 For the reasons set out above, I confirm that in this particular case I find that the original contract sum represented a reasonable price for the contracted scope of work. I find the variations were reasonably valued at $8,659 inclusive of GST, and also find that the agreed adjusted contract sum of $1,038,659 represented a reasonable price for the original scope of work plus the agreed variations.

77 I now turn to the key issue of assessing a reasonable price for the work actually performed by the builder at the date of termination.

78 Because I have found that the adjusted contract sum of $1,038,659 represented a reasonable price for the original scope of work plus the agreed variations, I will be able to determine simply a reasonable price for the work actually completed (including variations) if I can be satisfied as to the percentage of work which was completed at the time the contract was brought to an end.

What percentage of the work was completed at the time the contract was brought to an end?

79 As noted, the builder relies on the expert evidence of Tony Croucher, whose report was tendered. Mr Croucher opined that when he inspected the project on 7 July 2016 "[w]ork to the dwellings [was] in its final stages with very little work outstanding". He estimated that 95% of the work had been carried out, and that completion stage had almost been achieved.

80 The owners attacked Mr Croucher's evidence, stating:

> The failure of the builder to seek a supplemental report from Tony Croucher, and its failure to put into evidence photographs taken by Tony Croucher was not explained by the builder during the hearing.[37]

81 The owners continue:

> The builder did not seek to adduce from Tony Croucher any explanation as to what he meant when he said the works were 95% carried out. There was no attempt made to ascertain whether this was an approximation as to the quantity of work or as to the value of work, or on what basis the 95% approximation was determined.[38]

82 The owners conclude this section of their submissions with the proposition that:

> The failure of the builder to seek to produce this evidence and the absence of any explanation for this failure means the Tribunal can and should infer that the evidence of Tony Croucher with respect to these issues would not have been of assistance to the builder.[39]

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[37] Owners' submissions dated 21 December 2017, paragraph 29
[38] Owners' submissions dated 21 December 2017, paragraph 30
[39] Owners' submissions dated 21 December 2017, paragraph 31.

Jones v Dunkel

83 The invitation to the Tribunal to find that in the absence of further evidence from Tony Croucher, it should draw an inference that any such further evidence would not have been of assistance to the builder, is not expressly based on the principle established by the High Court of Australia decision in *Jones v Dunkel*.[40] However, that must be the principle being relied on.

84 This being the case, it is necessary to address *Jones v Dunkel* briefly. The case concerned an appeal to the High Court of Australia by a widow whose husband had been killed when driving up a winding road through wooden hills south of Sydney. The widow brought proceedings against the owner and the driver of the other truck alleging that the driver had been negligent. There were no eyewitnesses to the collision, which took place in darkness. The defendants sought a direction from the trial judge that the case be dismissed before it went to the jury, but the judge allowed the case to go to the jury. The jury found in favour of the defendants. The issue on appeal was whether the trial judge had misdirected the jury regarding the weight which ought to be attached to the fact that the driver of the other truck, who had survived the accident and had given a statement to police, was not called as a witness. In separate judgements, Kitto J, Menzies J and Windeyer J found that the trial judge had misdirected the jury. As they constituted a majority, the appeal was allowed.

85 The relevant passage in the judgement of Kitto J is:

> [A]ny inference favourable to the plaintiff for which there was ground in the evidence might be more confidently drawn when a person presumably able to put the true complexion on the facts relied on as the ground for the inference has not been called as a witness by the defendant and the evidence provides no sufficient explanation of his absence.[41]

86 Windeyer J expressed the principle in these passages:

> Then, I think, his Honour should, when the juryman asked his question, have given an answer in accord with the general principles as stated in *Wigmore* on Evidence 3rd ed. (1940) vol. 2, s. 285, p. 162 as follows: "The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavourable to the party.[42]
>
> As *Wigmore* points out (*Evidence* 3rd ed. (1940) vol. 2, ss. 289, 290, pp. 171-180), exactly the same principles apply when a party, who is capable of testifying, fails to give evidence as in a case where any

[40] (1959) 101 CLR 298
[41] (1959) 101 CLR 298, at 308.AT 320-321
[42] Ibid at 320-321

> other available witness is not called. Unless a party's failure to give evidence be explained, it may lead rationally to an inference that his evidence would not help his case.[43]

87 In my view, by inviting the Tribunal to draw an adverse inference from the failure of the builder to produce further evidence from Mr Croucher, the owners seem to stretch the *Jones v Dunkel* principle impermissibly. I consider the principle does not apply in the current circumstances, because Mr Croucher did give evidence. He was available for cross examination. The owners declined the opportunity to cross examine him. His evidence may be limited, and the owners are entitled to highlight that. However, they are not entitled to an inference that if he had given any other evidence, that evidence would not have assisted the builder.

Browne v Dunn

88 The builder points out that the owners did not cross-examine Mr Croucher and put to him the submissions they now make. This may well be a breach of rule in *Browne v Dunn*[44], as asserted by the builder, but I do not have to decide the point.

89 The builder contends that if there has been a breach of the rule in *Browne v Dunn,* the consequence of the breach is that the Tribunal should exclude the owners' evidence, and their submissions, regarding the question of the extent to which the works had been completed as at the date of termination. I consider that it is not necessary for me to disregard the owners' evidence and submissions in order to determine the issue. This is because the owners failed to give any direct evidence as to the state of the works as at the date of termination.

The evidence of Mr Fullinfaw

90 The owners rely on the evidence of Mr Fullinfaw, who testified as to the work he arranged to have carried out in order to rectify defects *and* complete the house. That evidence is problematic in several respects. Firstly, Mr Fullinfaw is not an expert witness. Not only does he, as a party to the case, lack independence, but as a pharmaceutical salesman he also lacks the professional training and background to qualify him to give expert evidence in a building case. Furthermore, Mr Fullinfaw did not give evidence as to the state of the works as at the date of termination, but testified as to the cost of completion of the works, which is a different issue.

Mr Salvatore Mamone's report

91 The owners put into evidence a report prepared by Mr Salvatore Mamone, architect. However, Mr Mamone was not called as a witness, and therefore was not available for cross examination. I accordingly approach what Mr Mamone said with a degree of caution. Furthermore, I note that the report

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[43] Ibid at 321
[44] (1893) 6 R 67 (HL)

was dated 27 May 2016, following an inspection on the same day. The date of termination of the contract was 23 June 2016, and so the builder had almost a month to progress the works following Mr Mamone's inspection. In addition, as the owners concede in their final submission, the report does not say whether the items noted are defects or incomplete works.[45] For these reasons, I find that no reliance can be placed on Mr Mamone's evidence regarding defects or incomplete works as at the date of termination of the contract.

92 In the absence of any expert evidence to the contrary, I accept Mr Croucher's evidence that when he inspected the works two weeks after the contract was terminated, they were 95% complete.

Finding as to reasonable price for the work performed up to the date the works were inspected by Mr Croucher

93 As I have previously found that the adjusted contract sum of $1,038,659.23 represented a reasonable price for the original scope of work plus the agreed variations[46], I accordingly find that a reasonable price for the work performed up to the date the works were inspected by Mr Croucher was 95% of $1,038,659.23, namely $986,726.27. I consider there is a degree of artificiality about such a precise figure, and for this reason, I round it up to the nearest $1,000, namely $987,000.

Adjustment for work performed by owners after termination

94 I am mindful that when Mr Croucher inspected the project on 7 July 2016 the owners had begun to work on the project. Mr Fullinfaw in his witness statement says at[126]:

> After ending the contract… I spent approximately six (6) weeks on a daily basis managing and arranging trades to complete the works. I have prepared a chronology of the time spent which is marked "NF1"…

95 Reference to Mr Fullinfaw's chronology NF1 indicates that by the date of Mr Croucher's inspection, works had been performed by the owners on site on a number of days since the termination of the contract on 23 June 2016. Mr Fullinfaw made a number of telephone calls to trades, but no attention needs to be given to them, because the owners have abandoned their claim for compensation for supervision costs during the rectification and completion phase. However, details of the people on site are relevant. They are as follow:

> 25 June 2016-Matthew (Mathew Angwin).
>
> 26 June 2016-a cleaner
>
> 27 June 2016-a cleaner and an electrician, a plumber and a caulking contractor.

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[45] Owners' submissions dated 24 January 2018 paragraph 32
[46] See paragraph 83 above.

28 June 2016- a painter, a floor officer, a thermal air mechanic, a plasterer, an electrician, a plumber and a cleaner.

29 June 2016- a renderer, a Phoenix screen contractor, someone from Adrian Advance Building Strategies, and a cleaner.

30 June 2016- no one.

1 July 2016-a painter.

2 July 2016-a painter.

3 July 2016-a painter.

4 July 2016-no one.

5 July 2016-Matthew, a carpenter and a caulking contractor.

6 July 2016-O'Brien Glass, a Tec Privacy Screen contractor, an intercom contractor, a plumber, a carpenter, a retaining wall contractor and an electrician.

7 July 2016-Neil Fletcher and Tony Croucher-(inspection), RST consulting, a plumber, a caulking contractor and an air-conditioning contractor.

96 On its face, this listing of contractors who attended the site between 23 June and 7 July 2016 is not of great assistance, for a number of reasons. Firstly, no hours of attendance are noted for any individual. Secondly, no indication is given as to what work was done by any particular trade contractor. Thirdly, no value is attached to any work which was performed. However, evidence of some of the work performed is available in the witness statements of Matthew Angwin, Raymond Mendoza and Mark Garvey.

Mr Matthew Angwin

97 Mr Angwin is a carpenter who trades as MFA Construction. He was called as a witness by the owners, and his witness statement dated 22 September 2017 was tendered. In his statement, he deposes that he was engaged by the owners to complete rectification carpentry works and completion works. He sets out a list of completion works that he undertook. This list is extensive. However, he does not indicate when he performed any of that work. It is to be noted that Mr Fullinfaw's chronology indicates that Mr Angwin attended the site only twice between 23 June and 7 July 2016, namely on 25 June 2016 and on 5 July 2016.

98 Mr Angwin rendered an invoice on 17 August 2016 for $7,124.80 for labour and materials, with no GST. No detail is given of the hours worked, nor of the hourly rate. Adopting an hourly rate of $60 an hour without GST, and applying that rate over two days, I allow $960 in respect of Mr Angwin's work up to the date that Mr Croucher attended at the site.

Mr Raymond Mendoza

99 Mr Raymond Mendoza of Jodan Electrics also gave evidence. He was called as a witness by the owners, and his statement dated 22 September 2017 was

tendered. He deposed that he was engaged by the owners to complete electrical works at the two units. Although his evidence is that he first sent an invoice on 17 August 2016 for $9,590 inclusive of GST, a handwritten note on the invoice (which was attached to his witness statement) indicates that he was paid $3,130 on 5 July 2016. This was one of three payments noted as having been made, which together totalled $9,590. I am prepared to accept that $3,130 was paid to Mr Mendoza's company for work carried out between the date of termination of the contract, and 5 July 2016.

Mr James Garvey

100 The third contractor who gave evidence was Mr James Garvey, a plumber who trades as New Vision Plumbing Solutions. His evidence, set out in a tendered witness statement dated 22 September 2017, was that he started work on both units on 6 July 2016. He billed $3,932.50 in a tax invoice rendered on 18 July 2016. As a plumber is referred to Mr Fullinfaw's evidence as having attended on both 6 July and 7 July 2016, I am prepared to accept that Mr Garvey worked on both those days. His evidence was that he charged $75 an hour. Eight hours work at $75 an hour is $600, and accordingly I am prepared to allow $600 in respect of Mr Garvey's work, inclusive of GST, on 6 July 2016. No allowance is made for Mr Garvey's work on the day of Mr Croucher's inspection.

101 The paucity of the evidence adduced by the owners regarding the value of the work they performed between the date of termination and the date of Mr Croucher's report creates some difficulty. I have accepted Mr Croucher's evidence that when he inspected the works on 7 July 2016 the work was 95% complete, but as it is clear that the owners caused substantial work to be carried out after they took possession of the site up to and including 7 July 2016, the works could not have been 95% complete when the builder left the site. It follows that I would be doing the owners a disservice if I was to make no allowance for the work they performed after they took over the site up to the date of Mr Croucher's inspection.

102 Although I am satisfied that Mr Angwin did $960 worth of carpentry work, Mr Mendoza performed work and supplied materials valued at $3,130, and Mr Garvey did $600 worth of plumbing work, a total of $4,690, I do not think this is a sufficient allowance to the owners for the work they had performed up to Mr Croucher's inspection. I say this because I think there is a reasonable basis to infer that the owners were incurring costs at the rate of about $3,500 per day during the period in which they were completing the works.

103 The basis for this inference is that Mr Fullinfaw's evidence was that he spent $127,408.60 finishing works, to "around August 2016".[47] Reference to Mr Fullinfaw's schedule of rectification completion works appended to his witness statement indicates that after 28 August 2016 the only

[47] Mr Fullinfaw's witness statement, paragraph 128.

attendance at site was half a day by "Mark" (Mark Garvey), who attended on 6 October 2016. If 28 August 2016 is accepted as the effective completion date, then from 23 June 2016 the owners had, on my calculation, worked 36 days to finalise the works. As the plumber worked for half a day in October, it is not unreasonable to assume that $127,000 was expended in those 36 days. This equates with a daily rate of expenditure of $3,528.

104 I propose to proceed on the basis that the owners were spending an average of $3,500 a day on each of the 12 days they had contractors on site between 23 June and 7 July 2016.

105 I do not think that in so proceeding, I do the builder any injustice. In this connection, I note that under that original contract the builder committed to performing $1,030,000 worth of work in 270 days.[48] This equates with the performance of $3,815 of work a day.

106 On the basis that the performance of $3,500 worth of work on each of the 12 days contractors attended the site between the ending of the contract and Mr Croucher's inspection, I find that the owners are entitled to $42,000 in respect of completion works they carried out. I have previously found the reasonable price of the performance of 95% of the work to be $987,000[49]. If $42,000 is deducted, the resulting figure is $945,000.

Finding as to the reasonable price of the work performed by the builder to the date of termination

107 Accordingly, I find that the reasonable price of the work performed by the builder to the date of termination is $945,000, before any allowance is made for defects.

DEFECTS

108 This finding as to the reasonable price of the work performed to the date of termination is made on the basis that there are no defects in the work. The builder accepts the proposition derived from *Shao* "that any defects in the works performed will reduce the reasonable price of the works".[50] The owners also accept that the builder is entitled under s 41(5) to recover the reasonable price for the work actually completed less the value of any defective work.[51] Accordingly, in order to assess the builder's entitlement under s 41(5), I need to assess the cost of rectifying defective works.

THE COST OF RECTIFYING DEFECTIVE WORKS

109 Three categories of defective work must be addressed. First, Mr Fullinfaw says that when he took over the project upon termination of the builder, he

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[48] Domestic building contract made between the builder and the owners stated 22 January 2015, Schedule Item 1 (time for completion) and Item 2(contract price)
[49] See paragraph 93 above.
[50] Builder's submissions dated 22 December 2017 paragraph 29.
[51] Owners' submissions dated 21 December 2017, paragraph 10.

rectified defects as well as completing the contract works. These rectification works ("the rectified defects") need to be identified and valued. Then there are defects yet to be rectified. These defects fall into two categories. At the hearing, the parties agreed that future defect rectification works should be dealt with in two broad classes. Firstly, there were roof defects identified in a report prepared by the owners' roof plumbing expert Mr Robert Quick ("the roof plumbing defects"). Then there were defects referred to in a report prepared by the owners building consultant Mr Laurie Mitchell ("the house defects").

110 It is convenient to deal with the roof plumbing defects first, and then to address the house defects.

The roof plumbing defects

111 The builder called as its expert witness Mr Peter Mackie. At the hearing, Mr Quick and Mr Mackie gave evidence concurrently regarding the roof plumbing defects. The builder conceded there were defective roof plumbing works. It became clear that there was little difference between the experts regarding the scope of the required rectification work, but the two experts costed the rectification works differently because they were applying different sets of trade rates.

112 Specifically, Mr Quick had applied in his report a rate of $85 per hour for general trades, $85 per hour for labourers, and $100 per hour for the licenced trades i.e. an electrician and plumber.[52] Mr Mackie on the other hand had used rates derived from Cordell (a building cost guide) of $55 for a carpenter and, and $73 for a plumber.[53] There was also a difference regarding the margin to be applied to cover preliminary, overheads, supervision and profit. Mr Quick applied 30%, whereas Mr Mackie thought 25% was appropriate.

113 Following cross-examination, the experts were given time to confer with a view to agreeing labour rates, and to allow for an agreement reached during the hearing that the rectification works would be performed under a single contract rather than as a series of separate jobs.

114 Following this discussion, Mr Quick agreed to use as the rate for a plumber $90 per hour. He amended his quantification to $84,474. Mr Mackie's amended quantum was $71,909.

115 In the owners' primary written submissions, the Tribunal is urged to accept the evidence of Mr Quick over Mr Mackie because Mr Quick is an experienced plumber and building consultant, whereas Mr Mackie is a general building consultant.[54] I would have been inclined to accept this argument if the existence of roof plumbing defects was an issue. However, as the argument between the parties has been reduced to an issue about

[52] Mr Quick's report dated 5 December 2016, Appendix 2;
[53] Mr Mackie's report dated 28 February 2017, page 64.
[54] Owners submissions dated 21 December 2017, paragraph 48 (a)

rates, I do not think Mr Quick's greater experience in the plumbing arena is of such importance.

116 The owner's fall back argument is that Mr Quick's evidence should be accepted because he relies upon general market rates, whereas Mr Mackie relies upon Cordell. Generally speaking, I would prefer to rely upon actual rates established by direct evidence rather than theoretical rates derived from a building cost guide. Having made that point, I think in the present case Mr Mackie's rate of $73 per hour is to be accepted in preference over Mr Quick's rate of $90 because it is very close to the charge out rate that Mr Fullinfaw's plumber, Mark Garvey, used. Mr Garvey said in evidence that his charge out rate was $75 per hour.[55]

117 The owners in their final written submissions contend that Mr Garvey's rate should be viewed as a rate for a small job, and "[i]t would be a fallacy to extrapolate the rates he applied for a small amount of work to what he would charge for the whole job, assuming he would quote at all."[56]

118 I do not accept this argument. Mr Garvey's evidence was that his hourly rate was $75 per hour for the work he did. He was not cross-examined about what rate he would have charged for a larger job. His rate may well have been more influenced by geography i.e. the location of the job at Seaford, and its convenience for him given that he is based in Mount Eliza, rather than the job's size. There is no proper basis for me to infer that Mr Garvey might have charged more if the job was larger.

119 For these reasons, I accept Mr Mackie's amended quantum in preference to that of Mr Quick, and assess the cost of attending to the roof plumbing defects, at **$71,909.**

Deduction from the cost of rectifying roof plumbing defects because of defective roof fixing works performed by Mr Garvey

120 Mr Garvey attended at the site on several occasions, including on 27 October 2016 when he performed work to ensure that the roof was safe, secure and as watertight as possible. The scope of this work is set out in an invoice dated 27 October 2016 which was appended to Mr Garvey's witness statement. The builder highlights that when Mr Garvey's invoice for roof plumbing works is cross-referenced to Mr Quick's report, it would appear that some of the items identified by Mr Quick as defective were the subject of work by Mr Garvey. These include inadequate fixings, and incorrect skylight soaker flashings.

121 The owners raise two arguments as to why the builder should not be allowed to minimise its liability for roof plumbing defects on the basis that Mr Garvey performed roof plumbing works on items that are still defective.

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[55] The rate of $75 per hour was verified by the tax invoices appended to Mr Garvey's tendered witness statement.

[56] Owner's submissions dated 24 January 2018, paragraphs 38 and 39

122 The first argument is that it was not put to Mr Garvey in cross-examination that some of the works he undertook were not necessary, or that the roof plumbing works were free of defects before he undertook any work. Putting aside the legal question of whether there has been a breach of the rule in *Browne v Dunn*[57], I consider that the builder's argument must fail because the builder has not established either by its own evidence or through cross-examination that Mr Garvey caused damage to the roof that was not there before he started work. From his invoice No 1243 dated 27 October 2016, it appears that Mr Garvey aimed to ensure that the roof was safe, secure and watertight as best as possible. It seems he carried out emergency repairs, rather than undertake a full scale rectification of the roof.

123 The owners also rely on the second rule of mitigation of loss identified by the author of Mayne and McGregor on Damages 12th ed. (1963) at paragraph 144, referred to by the Full Court of the Supreme Court of Victoria's in *Tuncel v Renown Plate Pty Ltd*[58]. The second rule is that:

> …where the plaintiff does take reasonable steps to mitigate the loss to him consequent upon the defendant's wrong he can recover for loss incurred in so doing; this is so even although the resulting damage is in the event greater than it would have been had the mitigating steps not been taken. Put shortly, the plaintiff can recover for loss incurred in reasonable attempts to avoid loss.

124 This principle, if it applies, would appear to be determinative of the matter. However, in circumstances where it is not necessary for me to consider the matter, and where the mitigation argument was not raised by the builder at the hearing, and *Tuncel v Renown Plate Pty Ltd* was not referred to, let alone debated, I will not discuss the issue further.

Summary regarding roof plumbing defects

125 I find the roof plumbing defects are assessed at **$71,909.**

House Defects

126 The owners' expert Mr Laurie Mitchell identified eight general building defects in his report dated 6 July 2017. He costed all the required rectification works at $163,537.50 inclusive of contingencies of 10%, a composite margin covering preliminaries and permits, warranties, overheads, supervision and profit of 35%, and GST of 10%.

127 Mr Mackie's view was that only some of the defects existed, and those could be rectified for $2,440 inclusive of contingency of 5%, margin of 25% and GST. It is necessary to address each alleged defect in turn.

[57] (1893) 6 R 67 (HL)
[58] [1976] VR 501

General observations about the assessment of damages

128 In respect of some defects, the owners emphasise that the Tribunal must apply the principle that an owner is entitled to have their contract fulfilled, as illustrated by the High Court *Bellgrove v Eldridge*[59], *Tabcorp v Bowen*[60] and the Court of Appeal in Western Australia in *Wilshee v Westcourt*[61]. It is convenient to address those cases here.

129 In *Wilshee v Westcourt Ltd*, Martin CJ (with whom Buss JA and Newnes AJA agreed) summarised *Tabcorp v Bowen* , and its relationship to the earlier High Court decision of *Bellgrove v Eldridge*, as follows, from [61]:

> 61 Since the decision of the trial judge, the Australian law applicable to issues of this kind has been elucidated by the decision of the High Court of Australia in ***Tabcorp Holdings Ltd v Bowen Investments Pty Ltd***. That case concerned a claim for damages by a landlord as a result of breach of a covenant in the lease by the tenant carrying out work, which resulted in the substantial remodelling of the foyer of the building leased without the approval of the landlord. The trial judge held that there had been a breach of covenant, but awarded damages in the sum of $34,820, being the difference between the value of the property with the old foyer, and the value of the property with the new foyer constructed by the tenant. On appeal, the Full Court of the Federal Court of Australia had increased the judgment sum to $1.38 million, made up of $580,000 to reflect the cost of restoring the foyer to its original condition, and $800,000 for loss of rent while the restoration work was taking place. The High Court upheld the decision of the Full Court.
>
> 62 In doing so, the High Court emphatically rejected the proposition that a party entering into a contract was at complete liberty to break the contract provided damages adequate to compensate the innocent party were paid - in the ***Tabcorp*** case being damages in the amount of the diminished value of the landlord's reversionary interest. Rather, the High Court reaffirmed the 'ruling principle' [13] that the measure of damage at common law for breach of contract was that stated by Parke B in ***Robinson v Harmon***[62]:
>
> The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.
>
> 63 …
>
> 64 …

[59] [1954] HCA 36; (1954) 90 CLR 613
[60] (2009) 83 ALJR 390; [2009] HCA 8.
[61] [2009] WASCA 87
[62] [1848] EngR 135; (1848) 1 Exch 850, 855; [1848] EngR 135; (1848) 154 ER 363 at 365,

65 The earlier decision of the High Court in ***Bellgrove v Eldridge*** stands firmly against the proposition that diminution in value is the ordinary measure of damages awarded against a builder as a result of departure from a building contract. In that case, a builder who had breached his contract in respect of the composition of the concrete in the foundations of the building and in respect of the mortar used in the erection of its brick walls, asserted that the relevant measure of damage was the difference between the value of the house and land as constructed, and the value which it would have had if the building contract had been performed. That contention was rejected. In the joint judgment of Dixon CJ, Webb and Taylor JJ, it is observed that the ordinary measure of damage is the cost of the building work which is required to achieve conformity with the building contract (617 - 618). If that work requires the demolition and reconstruction of the house, then, subject to one qualification, that is the appropriate measure of damage.

66 The qualification to which the High Court referred in ***Bellgrove*** was that 'not only must the work undertaken be necessary to produce conformity, but that also, it must be a reasonable course to adopt' (618). On the facts of ***Bellgrove's*** case, the High Court was of the view that insistence upon the performance of the remedial work by demolition and reconstruction was entirely reasonable given the nature of the breaches of the building contract.

67 …

68 …

69 In ***Tabcorp***, the High Court also elucidated and explained the qualification of 'unreasonableness' established by the earlier decision ***Bellgrove***. It established that this qualification is only to apply in 'fairly exceptional circumstances ... only ... where the innocent party is "merely using a technical breach to secure an uncovenanted profit"...' (quoting from ***Radford v De Froberville***[63]

The Victorian Ash Timber floor

130 This was easily the most significant item in monetary terms. Mr Mitchell considered that the Victorian Ash timber floor at ground level had to be removed and replaced. This task would require, in addition to the removal and replacement of the existing floor, the sanding and polishing of the new floor. The removal of the timber floor would have necessitated the removal of the oven, the bench tops and skirting boards, and associated electrical and plumbing work, and then consequential repairs to splashbacks and painting. Mr Mitchell's costing for this scope of work was $87,337 including contingency, margin and GST.

[63] [1977] 1 WLR 1262 (Oliver J).

131 Mr Mackie fundamentally disagreed with Mr Mitchell's view that the floor had to be replaced, and said that it could be rectified by the placing of epoxy between the floor and the underlying slab through drill holes. He estimated the cost at $750 inclusive of contingency, margin and GST.

132 It is not in dispute that areas of the floor were "springy and loose", as suggested by Mr Mitchell. However, the mechanism of failure is in issue. Mr Mitchell, apparently without investigating the structure of the floor himself, relied on instructions from the owners that the flooring was to have been fixed by way of secret nailing to timber battens, which in turn were to have been fixed to the concrete slab.[64]

133 Mr Mackie, on the other hand, considered that the problem arose because the timber substrate beneath the flooring had been nailed to the concrete slab, and followed the slab contours. This had allowed the creation of hollow pockets, causing the glue sometimes to break loose, creating a drummy pocket. The problem was common, in Mr Mackie's view and could be simply fixed by the injection of low viscosity epoxy adhesive into the hollow spots.

134 The builder contends that Mr Mitchell's opinion must be rejected because it was based on an incorrect understanding of the floor fixing system used. The builder points out that a photograph contained in Mr Mackie's report demonstrates that the floor was fixed directly to the timber substrate, not to battens.[65]

Finding as to mechanism of failure and appropriate method of rectification

135 I accept the builder's submissions. I find on the photographic evidence that the floor was fixed directly to the timber substrate, and because of this, I find that Mr Mackie's analysis of the underlying problem, and the manner in which it is to be fixed, are to be preferred to Mr Mitchell's analysis.

Assessment of damages

136 The owners' argue that Mr Mackie's methodology will give the owners "a second-best Swiss-cheese fix."

137 I reject this argument. If Mr Mackie's solution is adopted, I find the owners will still receive the Victorian Ash floor that they contracted for, although in a limited number of places its appearance will be affected by grouted and sealed holes through which the epoxy will have been injected. At least two such holes already exist in the kitchen. They are noticeable on close inspection, but they are not particularly unsightly. I consider that the total effect of the rectification process recommended by Mr Mackie will be aesthetically minor. There will be about a dozen holes, spread over a considerable area. Because of the layout of the house, it will not be possible to see all the holes at the one time. To suggest that the floor will resemble a

[64] Mr Mitchell's report dated 6 July 2017, page 5
[65] Mr Mackie's report dated 17 August 2017, page 8.

Swiss cheese is to greatly overstate the matter, in my view. I accordingly confirm that Mr Mackie's manner of rectification is to be preferred over Mr Mitchell's.

138 The owners contend that the Tribunal must reject the Mackie solution and adopt the remedy of removal and replacement, as recommended by Mr Mitchell. In this way they would receive the benefit of the works contracted for in line with the principle articulated by the High Court in *Bellgrove v Eldridge*[66] and *Tabcorp Holdings v Bowen Investments*[67].

139 Because I have found that the owners are still to get the Victorian Ash floor they contracted for, I reject this argument. The floor is currently in a defective condition because it squeaks. The builder was denied the opportunity to rectify the floor because the contract was terminated. Had the floor been rectified in the manner now proposed by the builder, it would still be a Victorian Ash for, albeit with holes in it, in about half a dozen places.

140 If I had not found that the owners would still be getting the floor that they contracted for, then it would have been necessary to consider whether the case fell within the exception to the usual rule for recovery of damages in a building case recognised by *Bellgrove v Eldridge* and qualified by *Tabcorp v Bowen*. The cost of removing and replacing the floor has been assessed by Mr Mitchell at $87,337 and the work would take in Mr Mitchell's assessment, at least 10 weeks. Mr Mackie's solution could clearly be performed for $750 in a short period. I consider that to adopt Mr Mitchell's solution would be so unreasonable that the case falls within the exception. That is to say, the owners would be relying on a technical breach of the contract in order to gain a windfall.

Finding as to cost of rectification

141 Mr Mackie's costings were not attacked, and I accordingly find that the floor could be fixed for Mackie's estimate of $750.

Temporary accommodation

142 The owners contend that if the floor is to be removed and replaced, then they should be allowed the cost of temporary accommodation. The builder does not attack the underlying principle that the owners are entitled to alternative accommodation while the floor is being rectified, but clearly the period of temporary accommodation must be assessed on the basis that the method of rectification will be quite different to that proposed by the owners.

143 I consider that the owners should be compensated for the cost of temporary accommodation while the work is being carried out, so that they are not affected by the inconvenience of the performance of the work, by the

[66] (1954) 90 CLR 613;[1954] HCA 36
[67] [2009] HCA 8

inconvenience of not walking on the floor while the epoxy sets, and so they are not affected by any smell from the epoxy. I allow two nights accommodation for Mr and Mrs Fullinfaw and their son, assessed at $750.

144 In summary, I allow damages of **$1,500** in respect of the rectification of the floor.

Bedroom 2-squeaky floor and robe which is not level.

145 In its submissions, the builder concedes that the floor level in the walk-in robe is not correct. The builder contests Mr Mitchell's observation that the floor was squeaky, but I agree with the owners' submission that the squeak was evident during the inspection.

146 Mr Mitchell's suggested method of rectification was to roll back the carpet, screw fix the floor, level it, and then reinstall the carpet. Mr Mitchell assessed the cost of rectification on the basis that eight hours labour at $110 per hour would be required ($880), plus eight hours labour at $58 ($464), a total of $1,344. He added a margin of 35% ($470) and GST ($181), and calculated the cost to repair at $1,995.

147 Mr Mackie accepted the methodology, but estimated that nine hours work at $88 an hour would be required ($792), together with two hours work at $60 an hour ($120). He allowed for contingency of 5%, margin of 25% and GST. The total cost was $1,315.

148 No justification was put forward by Mr Mitchell for an hourly rate of $110 an hour for what appears to be carpenter's work. This rate is 10% higher than the rate for a plumber or electrician initially contended for by Mr Quick. I find that the rate contended for by Mr Mackie of $88 per hour is to be accepted in preference for Mr Mitchell's rate.

149 However, I think Mr Mitchell's assessment of the hours required is more realistic. He has allowed for a skilled trades person such as a carpenter to attend for eight hours, and for a labourer to attend for the same period. Mr Mackie, on the other hand, has allowed for nine hours work by a skilled trades person, and two hours work by a labourer. This will be a small job, and will be performed as a "one-off", rather than as part of an ongoing building project. Accordingly, the owners must expect to pay for the services of a skilled tradesperson, and a labourer, for a full day each.

150 For this reason, I assess the base cost of the work at $88 per hour for eight hours, or $704, and 8 hours at $58 per hour (Mr Mackie's rate), which is $464. The total is $1,168.

151 Turning to margin, I note that Mr Mitchell proposes a margin of 35% with no allowance for contingency, whereas Mr Mackie proposes a margin of 25% plus a 5% loading for contingency. There is accordingly only 5% between the two experts. As this will be a small job, I prefer Mr Mitchell's assessment to that of Mr Mackie, and I adopt a margin of 35%. This comes to $408.80.

152 The addition of margin brings the total cost of the job to $1,576.80. This figure will be rounded up to **$1,600**, as it is unrealistic, in my view, to attempt to assess the cost with scientific accuracy.

Bedroom 1-squeaky floor

153 This issue is in contention. Mr Mitchell recorded that he had observed an obvious squeak in the floor. Mr Mackie said "It was extremely difficult to make the floor squeak".

154 I observed a squeak on the day of the inspection. I find that there is a defect in the floor.

155 As with the issue in bedroom 1, Mr Mitchell recommended the removal of the carpet, the installation of additional screw fixing to the area affected by squeaking, and the reinstallation of the carpet. His costing was $1,995. As with bedroom 1, the costing involved 8 hours work at $110 per hour, and 8 hours work at $58 per hour, plus margin of 35% plus GST.

156 Mr Mackie did not calculate the cost of rectification, as no works were required in his view. I accept Mr Mitchell's time assessments, but as with bedroom 2, apply rates respectively of $88 and $58. I apply a margin of 35% as contended for by Mr Mitchell. Accordingly, as with bedroom 2, I assess damages in relation to the bedroom 1 defect at **$1,600**.

Ensuite toilet not flushing to clear waste

157 The evidence for the existence of this problem is that the owners assert that waste in the toilet is not cleared on a first full flush. Mr Mitchell acknowledges that he relies on what the owners have told him about the matter. Nonetheless, the builder did not insist on a test being carried out, and I proceed on the basis that a problem of the type complained of by the owners does exist. As a toilet is expected to clear waste on the first full flush, I find that the problem is a defect.

158 Mr Mitchell acknowledged that due to the fact that the house had been completed he was not able to inspect the fall of the sewer pipe concealed in the wall. In identifying a lack of fall as the cause of the problem he relies upon the second hand hearsay evidence of a plumber who was said to have advised the owner that there was insufficient fall to the pipe.

159 Mr Mackie says that he read the engineering drawings to establish that the sewer pipe running from the "P" trap pan height of 100mm off the floor level has a fall which equates with a 1:40 gradient, which meets the relevant standard.

160 The owners attack Mr Mackie's opinion on the basis that it is merely a theory that "it is possible that there is sufficient fall *throughout the entire pipe* to take away the waste" and that the theory "is not matched by the practice". The owners go on to say that it is possible that part of the pipe has adequate fall, but a part does not, which accounts for the problem.

161 I interpose to make the comment that I suspect that this submission of the owners does not accord with the laws of hydrodynamics. I make no finding about the point, but highlight that the Tribunal is being asked to determine the existence of a defect where it has the benefit of only limited expert evidence, and where there is no direct empirical evidence about its existence.

162 The owners assert that the Tribunal must be satisfied that the toilet does not operate as designed.[68] The owners then pose the question: is this a building defect for which the builder is answerable? The owners begin to answer their rhetorical question in this way:[69]

> The builder was also the designer of the house and set up the specifications which included the toilet pan and cistern. The problem with the flushing of the toilet appears to have arisen because of a design problem in that the designed sewer outlet was intended to be via the floor and this could not be adopted because of a steel supporting beam precluding the run of the pipe. The builder adopted a different run. This required the outlet for the toilet to run through the wall rather than the floor. On any view this is the cause of the problem.

163 In an endeavour to demonstrate that the problem is a building defect, the owners refer to two warranties implied into the building contract by s 8 of the DBC Act. One of these warranties is that:

> …all materials to be supplied by the builder for use in the work will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new.

164 There is no complaint that the toilet was not new. Accordingly, the owners must be asserting that there is a breach of the warranty insofar as the materials are not "good and suitable for the purpose for which they are used". I consider this complaint is not made out. The toilet works. The sewer pipe works. The problem is that the sewer pipe appears to lack sufficient fall to clear waste on the first flush. It follows that the problem is one of design, or one of construction, but is not to be found in the materials.

165 The second of the warranties referred to by the owners is that:

> …the work will be carried out in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract.

166 I consider that the builder cannot be criticised for not constructing the toilet to the original design, as that was an impossibility because of the existence of the steel supporting beam. If the designer of the house had been a person other than the builder, instructions could have been sought, and the design amended with the approval of the owners. In the present case, what appears

[68] Owners' submissions dated 21 December 2017, paragraphs 62, 63 and 64.
[69] Owners' submissions dated 21 December 2017, paragraph 65.

to have happened is that the builder changed its own design, and completed the construction in accordance with the amended design. Accordingly, there appears to have been no breach of the warranty that the work will be carried out in accordance with the plans and specifications.

167 However, the other limb of this warranty is that the work will be carried out in a proper and workmanlike manner. As the builder voluntarily assumed the task of rectifying the design of the sewer pipe, this design work became, in my view, part of the builder's work under the contract. Either the amended design was inadequate because it failed to ensure that the sewer pipe had adequate fall, or the design was adequate, but the pipe was constructed other than in accordance with the design.

168 If the pipe has been constructed in a manner other than called for in the amended design, the builder is liable for the defective workmanship, as there has been a breach of the warranty that the work will be carried out in a proper and workmanlike manner.

169 If the design was inadequate, then I consider the builder will be in breach of another express warranty in the contract, which is also implied by s 8(d) of the DBC Act, that:

> … the work will be carried out with reasonable care and skill …

170 In summary, I accept the owners' contentions that the flushing problem constitutes a building defect, and that it is a defect for which the builder is legally responsible by reason of the builder's breach of statutory warranty.

Quantum

171 It remains to assess quantum. The owners rely on Mr Mitchell's assessment that will cost $8,726 to adjust the fall to the sewer pipe. This is a high figure, and arises because Mr Mitchell considered that in order to adjust the sewer pipe, the ensuite effectively will have to be demolished to facilitate the resetting of the sewer pipe, and then be rebuilt.

172 Mr Mackie contended that it was not necessary to adjust the fall of the sewer pipe, and he did not comment on Mr Mitchell's costings.

A larger cistern?

173 At the hearing, the prospect of addressing the problem by installing a cistern with a larger capacity was raised. This proposal prompted the owners to dispute that the builder could fix the flushing problem by installing "a larger, less efficient toilet." They contend that such a toilet would be:

> …different to the toilet suite contracted for and different to the other toilets.
>
> The owners are entitled to what they paid for. They paid for are (sic) house that included three toilets, each identical. They should not have

> to put up with "second best" or a miss matched toilet suite in the hope that this will work.[70]

174 In support of their contention, the owners refer back to the rule in *Bellgrove v Eldridge* that they are entitled to the benefit of their contract.

175 I consider that to award to the owners damages sufficient to allow them to demolish the bathroom, reset the sewer pipe and then reconstruct the bathroom would be allow them to use a technical breach to achieve an "uncovenanted profit" or unwarranted windfall. The case accordingly falls into the exception to the rule *Bellgove v Eldridge* established in that case and qualified in *Tabcorp v Bowen*. In coming to this view I have taken into account the further arguments advanced by the owners in respect of the defect.

The owners' further arguments

176 I do not accept the owner's contention that if a larger cistern were to be installed they would merely have to "hope" that it would work. The reality is that the existing cistern almost works. This is apparent from the owners' own evidence that waste is usually cleared on a second flush.

177 I also do not accept that a larger cistern would be "second-best". Many people would regard it as better than the existing cistern.

178 Certainly, a larger cistern could be regarded as less efficient than the specified model, but this in my view is not a reason for imposing on the builder an award of damages sufficient to cover the cost of demolition and reconstruction of the ensuite. If efficiency, and respect for the environment, are relevant issues - and I accept that they are - then installing a larger cistern rather than demolishing the ensuite and then reconstructing it, is the obvious choice.

179 Obviously, a larger cistern will be different to the toilet suite contracted for, and different to the other toilets in the house. However, the cistern will be hidden in the wall behind tiles, and there will be no aesthetic impact of the change.

180 For these reasons I find the owners' entitlement to damages is limited to that sum which would be required to allow them to install a larger cistern.

Cost of installing a larger cistern

181 Regrettably I did not have the benefit of any assessment by Mr Mackie of the cost of acquiring a larger cistern and then installing it in in place of the existing cistern. Obviously this will involve substantial ancillary work including the removal of some tiles, the removal of the existing cistern, plumbing in the new cistern, reinstating the substrate and waterproofing it, and then re-tiling as necessary. In the absence of any evidence from either party as to the cost of all this work, the owners are entitled to the benefit of

[70] Owners' December submissions, paragraphs 67 and 68

an assessment that will not leave them out of pocket. On this basis I assess conservatively from the point of view of the owners the cost of acquiring a larger toilet cistern and installing it, at $4,000.

Incorrect sliding doors

182 Mr Mitchell in his report observes that the sliding door leading from bedroom 1 to the rear balcony, and the sliding door from the rumpus room to the front balcony, are not in accordance with the contract documents. At the hearing, the dispute centred on the change of the front sliding door. An issue was the fact that the plan called for a four panel door and the builder installed a three panel door.

183 Mr Mackie did not dispute that the front door did not conform with the original contract plans and specifications, but referred to instructions from Mr Fletcher to the effect that the specification had been changed with the agreement of the owners.

184 Mr Fletcher relies on emails sent by the builder to the owners. One of these was sent by his business partner Alison High on 10 June 2015. This read in part:

> As discussed, the layout of the window frames to the front floor of Unit 2, when viewed from the street, will vary slightly from the drawings due to limitations with the window company. See attached drawing for comment.

185 Mr Fletcher's evidence was that at a subsequent meeting between him and the owners on-site, the owners agreed to the change in the doors.

186 Mr Fullinfaw disputed that this occurred.

187 The owners put in evidence a drawing which they said was the drawing referred to in Alison High's email of 10 June 2015. The drawing clearly shows a three stacker sliding door. The owners say that the builder provided this drawing to explain why there had to be insertion of a post between the sliding door and the return window. One of the owners had endorsed the drawing with two notes. The first note was to the effect that the owners agreed with the insertion of the post. The second note recorded that the owners did not agree on the three stacker door.

188 In weighing the issue on the balance of probabilities, I have regard to the following matters:

(a) the need for the change was openly flagged by the builder in the email of 10 June 2015;

(b) the change was made in the unit in which the owners continue to reside, as was obvious at the inspection;

(c) the same change appears to have been made in the adjoining unit (which was sold), as the change is referred to in an email from Alison High dated 17 December 2015;

(d) in Mr Fullinfaw's witness statement he refers at [17] to Alison High's email of 10 June 2015 and quoted extensively from it. However he did not refer to the drawing, nor did he exhibit the drawing to his witness statement. Having regard to the importance that the owners attach to the notations on the drawing, I find that a surprising omission;

(e) Mrs Fullinfaw's witness statement did not refer to the drawing;

(f) when the owners emailed the builder on 3 March 2016, they listed twenty questions to which they required answers by 4 March 2016. None of those questions related to the front stacker doors; and

(g) the owners were unable to point to any other correspondence from them concerning the front stacker doors.

189 Taking these matters into account, I accept Mr Fletcher's evidence that the owners agreed to change the front stacker doors, and I accordingly find against the owners in respect of this issue.

190 By way of completeness, I note that neither side referred to s 37 of the DBC Act, which creates a procedure to be followed if the builder wishes to vary the plans and specifications set out in a major domestic building contract. Section 37(2) provides that the builder must not give effect to any variation unless it is given a consent to the variation signed by the owner, or the circumstances set out in subsection (2)(b) apply, arising from the giving of a building notice or a building order under the *Building Act 1993.*

191 The parties may have considered that s 37 was not relevant because the builder was not seeking payment for the change in specification of the stacker doors. In any event, as s 37 was not raised, I take the issue of its applicability no further.

Timber floor first floor

192 Mr Mitchell opined that the polished Victorian Ash timber flooring to the first floor is springy and loose in a number of locations. He contended that the floor requires replacement. He costed this work at $29,948.50.

193 Mr Mackie suggested that an area towards the balcony sliding door on the west side was springy. He suggested that the fix he had recommended in relation to the ground level floor would be appropriate, namely the use of hardwood flooring epoxy repair. Mr Mackie rejected Mr Mitchell's method of repair and his costing, on the basis that "a simple and widely used method of injecting epoxy to stabilise the local areas" could be used at a fraction of the cost.

194 The owners presented no arguments on the issue in their primary written submissions. In their final written submissions they noted that the builder had relied on its submissions with respect to the ground level floor, and the owners confirmed that they relied on their submissions and their final (response) submission in respect of the ground level floor.

195 In respect of the ground level floor, I have determined the issue in favour of the builder, and accepted Mr Mackie's recommendations and costing for the repair.

196 The owners have not presented any new arguments, and I accordingly accept that Mr Mackie's recommended method of rectification for the ground level timber floor is relevant to the first level floor also.

197 Mr Mackie costed the repair of the first level floor at $375, allowing two hours labour at $60 per hour and four cartridges of epoxy at $35 each. Contingencies of 5%, margin of 25% and GST were added. I find these costings to be reasonable, and accordingly assess the owners' damages in relation to this defect at $375.

198 As this work can be carried out at the same time as the repair of the ground level floor is carried out, there is no need to make a separate allowance for temporary accommodation for the owners.

Awning at rear

199 At the hearing the owners confirmed they had abandoned this item.

Front water stains

200 This claim was also abandoned at the hearing.

Summary of findings regarding house defects

201 I have assessed damages in respect of house defects as follows:

(a)	ground floor timber flooring	$1,500.00
(b)	bedroom 2	$1,600.00
(c)	bedroom 1	$1,600.00
(d)	ensuite toilet	$4,000.00
(e)	front stacker doors	$0.00
(f)	first level timber flooring	$375.00
Sub-total:		$9,075.00

THE OWNERS' CLAIM FOR OTHER DEFECTS

202 The builder's primary submission on this class of defects is that as the owners did not produce any expert evidence regarding defective work other than from Mr Quick and Mr Mitchell, no damages should be allowed under this heading.

203 The builder specifically attacked the probative value of the Inspect Direct reports prepared by Mr Salvatore Mamone, and I have already indicated that I am not prepared to accept those reports as evidence of defective work as at the date of termination of the contract.[71]

[71] See paragraph 86 above.

204 The owners concede that "Mr Fullinfaw is not an expert and is not qualified to express a probative opinion as to whether the work was defective or incomplete."[72] I consider that I should disregard Mr Fullinfaw's contentions regarding defects, except where the defects are consistent with the evidence of others better qualified.

205 I am not disposed to summarily dismiss the evidence regarding defects provided by the three trade contractors who gave evidence, namely the carpenter Matthew Angwin, the electrician Raymond Mendoza, and the plumber Mark Garvey. Although each of them gave evidence as a witness of fact rather than as an expert, I consider that it is permissible for me to review their evidence with a view to ascertain whether their evidence contains a reference to any work that is self-evidently in the nature of defects rectification. I accordingly address their evidence in turn.

The evidence of Mr Mathew Angwin

206 As noted above, Mr Angwin is a carpenter who was engaged to assist the owners to complete and rectify carpentry works. In paragraph 3 of his witness statement he lists a number of items which he says were pointed out to him by Mr Fletcher. They can be disregarded, because it became clear when Mr Angwin gave evidence that they were not all still issues at the time of termination of the contract. More relevantly, he listed in his statement the works he says he undertook for the owners. The following items by their nature appear to be defects:

- replastering walls that were out of plumb;
- reframe and plaster sky lights;
- re-attach correctly the garage door motor support and plaster;
- block and plaster holes;
- remove and replace skirting after plaster out of plumb wall was replaced;
- jack hammer and grind away concrete over poured at side of house;
- add tri moulding upstairs on the floor boards to try to prevent squeaking;
- repair cavity slider door;
- cut back cement sheet on roof extending into box gutter;
- change lock on garage door to key lock type;
- cement sheet on roof needed cutting back;

[72] Owners written submissions dated 21 December 2017, paragraph 79

- nail cement sheet on gable ends correctly;
- add timber edging to eliminate step in the floor from hallway to bathroom upstairs;
- adjust doors in son's room upstairs as door jamb was out of plumb.

Mr Angwin's invoice

207 Mr Angwin sent an invoice in respect of labour and materials to the owners dated 17 August 2016 in the sum of $7,124.80.

208 That invoice did not indicate separate costings in relation to each item of work. Having regard to the fact that there were a total of 21 items of work, of which the 14 items above clearly constituted rectification works, I assess the proportion of Mr Angwin's invoice that is referable to rectification works at 14/21 or 2/3. I accordingly assess damages arising from Mr Angwin's rectification work at **$4,749.87.**

The evidence of Mr Ray Mendoza

209 As noted, Mr Mendoza was engaged by the owners to complete the electrical works to both units in 2016. I have reviewed the scope of work he says in his witness statement that he completed at unit A (which is the unit which has been sold by the owners). The items which by their nature appear to be rectification works are as follows:

- replace single power outlet in walk-in robe on first floor to a double outlet to accommodate alarm system;
- replace all existing light switches and supply and install Clipsal Saturn Series light switches to the ground floor.

The rest of the work on unit A appears to be completion work.

210 I have also read the scope of work Mr Mendoza said he carried out in unit B (in which the owners continue to reside). The work appearing to be the nature rectification work is as follows:

- change single power outlet behind fridge to a double outlet;
- remove all existing lighting switches on ground and first floors and change to Clipsal Saturn Series switches;
- supply wire and intermediate light switch in hallway lighting circuit to make two way lighting circuit work correctly;
- change faulty wiring and circuit breakers in electrical switchboard;
- reconnect and rerun ducting from bathroom exhaust fans, remove extra ducting to allow fans to run effectively;

- replace two power outlets above kitchen bench as cover plates were missing from installed outlets;
- rewire stair lighting circuit for two way switching.

Mr Mendoza's invoice

211 Mr Mendoza's evidence was that he rendered an invoice dated 17 August 2016 to the owners in the sum of $9,590 for his work. Reference to that invoice (which was issued on the letterhead of Jodan Electrics Pty Ltd) indicates that the work is not broken down beyond components for labour, materials, and GST. Accordingly, it is not possible to make a scientific assessment of the cost of rectification works carried out by Mr Mendoza. It is not appropriate to take the view that nothing should be allowed for ratification works simply because the rectification costs have not been isolated. Doing the best I can with the evidence available, and noting that in the two units 26 items of work were carried out but that only 9 of these items were rectification works, I assess the damages rectification at 9/26 of $9,590, namely **$3,319.62**.

The evidence of Mr Mark James Garvey

212 Mark Garvey is the plumber who began working for the owners on 6 July 2016. I note from his witness statement that the following items of work performed at unit A appear to be in the nature rectification works:

- Gas line: Test the gas line. As the test demonstrated there was an extremely fast leak coming from underneath the driveway, between the meter and the house, a new 32mm copper line was run from the meter to the gas line coming up the wall inside the garage. This involved cutting the gas line into the slab below the papers at the front door, through the bricks to the right of the door and into the garage.
- Downstairs powder room: Cut into 50mm waste pipe to create 40 tundish trap so the air-conditioning drain could be connected properly. Fixed WC to floor as it was loose and re-tightened cistern pan.
- Kitchen: Replaced hot water mini-stop. Fixed aerator.
- Upstairs ensuite: Fixed WC to floor as it was loose. Switched the hoses around on the shower rail as they were fitted off incorrectly, and fixed rail to wall securely.
- Upstairs bathroom: Fixed WC to floor as it was loose. Switched the hoses around on the shower rail as they were fitted off incorrectly, and fixed rail to wall securely.

213 I note from his witness statement that Mr Garvey performed the following items of work at unit B which appear to be in the nature rectification works:

- Kitchen: Cut into 50 mm waste pipe under kitchen sink to create tundish to drain air-conditioning split system.

- Downstairs bathroom: Fixed WC to floor as it was loose, and re-tightened cistern pan. Switched the hoses around on shower rail as they were fitted of incorrectly, and fixed rail to wall securely.
- Upstairs bathroom: Fixed WC to floor as it was loose, and adjusted seat. Switched the hoses around on shower rail as they were fitted off incorrectly, and fixed rail to wall securely
- Upstairs ensuite: WC reinstalled and caulked, as it was leaking from the waste pipe. Switched the hoses around on shower rail as they were fitted off incorrectly, and fixed rail to wall securely.

214 Mr Garvey charged for his works in five separate invoices.

Tax Invoice 1204 dated 18 July 2016

215 This invoice refers to 35 hours labour at $75 an hour ($2,625) and materials "mostly coming from new copper gas line" costed at $950. With GST the invoice came to $3,932.50. On the balance of probabilities I accept that this invoice relates to the installation of the new copper gas line. The invoice appears to be reasonable, and I would have been disposed to allow it in full, save for the fact that the owners do not seem to press for payment of the full amount. I return to this point below.

Tax invoice 1206 dated 27 July 2016

216 This invoice is for 14.5 hours of labour at $75 an hour, a total of $1,087.50. With GST, the invoice comes to $1,328.25. The invoice relates partly to labour for fixing the upstairs bathroom toilet seat and fixing the toilet to the ground and caulking it; fixing a leak in the ensuite toilet; providing a repair kit for a scratch; and investigating ducts which were not venting to the atmosphere. The invoice also related to works which are in the nature of completion. The invoice contains insufficient detail to enable me to separate with any certainty the labour costs associated with rectification works and the labour costs associated with completion works. I allow nothing for it.

Tax Invoice 1215 dated 10 August 2016

217 The invoice relates to the supply and fitting of flashing and cappings, and a new garden tap to unit 9B, and installing ORG domes, all of which appear to be completion works. However, a running toilet was fixed, and the flush adjusted in other toilets, and these appear to be minor rectification works. The invoice is not compartmentalised into completion and rectification works, and I allow nothing for it.

Tax invoice 1221 dated 23 August 2016

218 This invoice covers three hours of labour at $75 an hour, a total of $225, plus $95 with materials. With GST it comes to $352. The invoice relates to works that appear to be in the nature of completion works and I allow nothing for it.

Tax invoice 1243 dated 27 October 2016

219 This invoice partly relates to work on the roof to ensure that it was made "safe, secure and watertight as best as possible", and partly relates to jack hammering up concrete and setting up the storm water pit to collect water which had been pooling. I allow the work associated with the roof, which is itemised at $2,510, but disallow the $297.57 associated with the stormwater pit. The amount allowed, with GST added, is $2,761.

Tax invoice 1117 dated 23 March 2017

220 This invoice relates to capping off the plumbing in the kitchen ready for removal of cabinetry, and then fitting off the stove, sink and dishwasher. This appears to be the nature of completion works, and I disallow the invoice.

Summary regarding Garvey invoices

The owners in their December submissions claimed that Mark Garvey incurred rectification costs of $6,454.[73] This figure is less than the total of invoice 1204 in the sum of $3,932.50, which I would have been disposed to have allowed in full, $664.13, and invoice 1243 for $2,761, which I also think is allowable in full. I have no hesitation in accepting the owners' assessment of the Garvey rectification costs at **$6,454**.

Obvious defects referred to in Mr Fullinfaw's evidence

221 The owners also contend that other works carried out under Mr Fullinfaw's direction are obviously in the nature of defects rectification. The owners in their December submissions contend [at 98] that of the costs to complete the project "those items of expenditure that are clearly and undeniably costs for rectification works" total $51,769. I note that some of the items in Mr Fullinfaw's list are the subject of invoices rendered by Mr Angwin, Mr Mendoza or Mr Garvey. Plastering works, and carpentry work appear to fall into this category, as do repairs to the gas line. I do not propose to go through the list item by item as Mr Fullinfaw is not qualified as an expert in building matters, and I accordingly disregard his contentions as to whether any particular item is rectification or completion.

222 I reject Mr Fullinfaw's assessment of the cost of the owners' rectification works at $51,769, and confine my assessment to the figures I have reached in respect of the defect rectification work carried out by Mr Angwin, Mr Mendoza and Mr Garvey.

Summary of Angwin, Mendoza and Garvey invoices allowed

223 In summary, I have allowed Mr Angwin's invoice to the extent of $4,749.87, Mr Mendoza's invoice to the extent of $3,319.62, and Mr

[73] Owners submissions dated 21 December 2017, paragraph 102.

Garvey's invoices to the extent of $6,454. The total allowance in respect of these three invoices for rectification works is accordingly **$14,523.49**.

SUMMARY OF ALL ALLOWANCES FOR DEFECTS

224 I have allowed above:

(a) $71,909.00 for roof plumbing defects;[74]

(b) $9,075 for house defects;[75]and

(c) $14,523.49 for defects attended to by Mr Angwin, Mr Mendoza and Mr Garvey.

The total allowance for rectification of all defects is accordingly assessed at **$95,507.49.**

General damages

225 As noted earlier, the owners had claimed general damages for financial losses due to an alleged delay in obtaining an occupancy permit, supervision expenses, and a sum in respect of physical inconvenience, distress, loss of enjoyment and loss of amenity. Ultimately, only the last claim was pressed.

226 On the basis that no damages can be claimed following a termination under s 41 of the DBC Act, I have found above against the owners in respect of their remaining claim, for general damages, which they put at the hearing as a claim for hardship, inconvenience and suffering. [76]

227 If I am wrong in finding on the basis statutory interpretation that s 41bars a claim for general damages, I think the claim must fail in any event on a factual basis.

228 In support of their claim for hardship, inconvenience and suffering the owners rely on the evidence of Mrs Fullinfaw. The basis of the claim, as summarised in the owners' response submissions is as follows:

> The evidence of Enid Fullinfaw as set out in her witness statement regarding the somewhat unique family situation that they faced, and the necessity to move with as little difficulty as possible into the new house.
>
> The evidence that for a period of time the owners were required to care for their disabled son whilst living in a house that was subject to ongoing completion works.
>
> The evidence of Neil Fletcher in his witness statement in reply that he was aware of the unique family situation of the owners, and that he accepted that the termination of the contract was based upon the need to vacate the property in Heatherton and move into their new home.[77]

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[74] See paragraph 125.
[75] See paragraph 201.
[76] See paragraph 40 above.
[77] Owner's submissions dated 21 December 2018.

229 The builder's response to these allegations is to refer in detail to the decision relied on by the owners, *Archibald v Howlett*.[78] Here the Court of Appeal had indicated that damages for anxiety, stress and disappointment had been awarded following breach of a building contract in cases that involved physical imposition upon the plaintiff. Furthermore, the Court of Appeal indicated that when the Court had occasion to consider an award of damages in a building contract for "inconvenience" in *Bonchristiano v Lohmann*,[79] the Court had taken this to include damages for deleterious consequences to health flowing from the physical inconvenience.

230 The builder's point, which I accept, is that any claim for damages of the type being pressed here by the owners must be based on some physical imposition.

231 If the claim is for hardship, inconvenience and suffering arising from the builder's delay in completing their house, the claim fails because such a breach has not been established. This issue is explored more fully below in the context of the claim for liquidated damages.

232 If the claim is for damages for hardship, inconvenience and suffering arising out of completion works, it must fail because the need for completion works does not arise, as pointed out above,[80] from any breach of the contract, but from termination on a no fault basis under s 41.

233 If the claim is based on the existence of defective works, no specific evidence was given as to how any defects, or their rectification, up to the date of the hearing had caused physical hardship or inconvenience.

234 The upshot is that even if I had found that a claim for damages could stand notwithstanding the wording of s 41, the owners claim for damages for hardship, inconvenience and suffering would have failed in any event on the basis of the evidence tendered.

THE CLAIM FOR LIQUIDATED DAMAGES

235 The owners make a claim for liquidated damages for the 28 weeks between the date they say the contract works should have been completed, namely 13 December 2015, to 24 June 2016, which is the day after the date of termination. They contend that the rate for liquidated damages was increased from the contracted figure of $250 to $500 during the course of the contract, and the builder accepts this. The owners accordingly claim $14,000 for liquidated damages.

236 In the discussion of general principles concerning the operation of s 41 above, I indicated that a claim for liquidated damages is a type of claim for damages. Whether such a claim lies under s 41 is to be determined on the same basis as whether a claim for general damages lies. It follows that a claim for liquidated damages can arise only if an entitlement to such

78 [2017] VSCA 259.
79 [1998] 4 VR 82.
80 See paragraph 37 above.

damages had crystallised prior to the date of termination of the contract, and in this way had become relevant to the assessment of the reasonable price for the works to which the builder is entitled.

237 In the counterclaim, the owners contend that there has been a breach of the express term in the contract, alternatively the warranty implied into the contract under s 8 of the DBC Act, that the works will be completed by the date specified in the contract.

238 The contract is the HIA standard form. This requires the builder to complete the work within a defined Building Period. The Building Period means the construction time estimated by the builder to carry out the defined Building Works as stated in the contract schedule, subject to extensions of time under clause 34. The stated Building Period was 270 days, including estimated delays of six days delay for inclement weather, unspecified delays for weekends, public holidays, rostered days off and other foreseeable breaks, and five days of other reasonable delays .[81]

239 The owners say that the Building Period finished on 12 December 2015. They seek liquidated damages from 13 December 2015 at $500 a week for 28 weeks. They contend that all they have to do, in order for the claim for liquidated damages to crystallise, is to demonstrate that the works ran after 12 December 2015.

240 The builder in its defence to counterclaim denies that it was late in completing the works as at the date of termination, as it was entitled to extensions of time under clause 34. However, the builder gave no evidence about delays.

241 In his witness statement, Mr Fullinfaw gave evidence that a claim for 38 days delay for inclement weather was made by the builder. As there was an allowance of six days for inclement weather, the owners contended at the hearing that the net claim for inclement weather was 32 days.

242 Under clause 34, the builder is entitled to an extension of time for inclement weather and certain other delays including anything done or not done by the owner. The process is that the builder must give the owner a written notice informing the owner of the extension of time, stating the cause and the extent of the delay claimed. There is no express time limit as to when this notice can be served.

243 If the owner wishes to dispute the extension of time claimed, clause 34 requires the owner to give to the builder a written notice, including detailed reasons why the owner disputes the claim, within seven days of receiving the builder's notice.

244 Mr Fullinfaw in his witness statement deposed that he sent an email to the builder disputing the claim for 38 days extension of time within the seven day time limit.

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[81] Contract, Schedule 1, Item 1

245 I consider that the effect of this is that the issue of the builder's time to complete the works is in dispute, and that in order to sustain a claim for liquidated damages the owners must do more than demonstrate the builder failed to complete by 12 December 2015. Specifically, there must be a determination about the extensions of time to which the builder is entitled, and any necessary adjustment to the completion date must be made.

246 I find support for this view in what Senior Member Walker said in respect of the issue of time in *Shao*, starting at [183]:

> Clause 15 of the Contract entitles the Builder to extensions of time for various causes including variations, interference by the Owner or the failure of the Owner to provide instructions. The procedure is for the Builder to inform the Owner of the existence of, and the estimated length of, the delay and if the Owner does not notify the Builder in writing or dispute the notice of delay within 14 days then the Contract is automatically extended for the delay period stated in the Builder's notice. If the Owner disputes the Builder's notice of delay, the Builder is entitled to a reasonable time.
>
> 184. In some architect-supervised contracts there is a power conferred upon the architect or supervisor to grant an extension where appropriate and that power can, while the contract remains on foot, be exercised by the tribunal in some circumstances. However there is no such provision in this Contract.
>
> 185. Even if I have power to extend the construction period specified in the Contract, I would need to consider each variation, or other alleged ground for an extension of time, and make a finding as to its impact on the critical path of construction. That would require detailed evidence…

Conclusion

247 The fact that the issue of time is in dispute is sufficient to dispose of the owners' claim for liquidated damages in the present case. As I noted above, I consider that liquidated damages may be taken into account under s 41 of the DBC Act only if, as at the date the contract is terminated, the operation of the contract gives the owners a crystallized entitlement to liquidated damages. In circumstances where the builder has claimed an extension of time, and that claim has been disputed by the owners, the builder's entitlement must be assessed on evidence which facilitates a critical time path analysis. Accordingly, I find that the owners had no crystallized entitlement to liquidated damages as at the date the contract came to an end.

248 I accordingly find against the owners in respect of their claim for liquidated damages.

DETERMINATION OF THE BUILDER'S ENTITLEMENT BEFORE CONSIDERATION OF THE CAP CREATED BY S 41

249 It has been established above that the reasonable price of the work completed by the builder as of the date of termination was $945,000, before any deduction for the cost of rectifying defects is made.[82]

250 It has also been established that the total value of defects which is to be deducted from that reasonable price is $95,507.49.[83]

251 The reasonable value of work performed by the builder for the date of completion less defects is, accordingly, $849,492.51.

252 As I have found that the owners are not entitled to recover anything for general damages or for liquidated damages, the builder's entitlement assessed under s 41(5) is confirmed at $849,492.51, which I round up to $849,500.

253 It is common ground that any amount paid by the owners must be taken into account. The parties are agreed that the owners paid to the builder the sum of $811,065. The builder is accordingly entitled to be paid $38,435, unless this would result in the cap created by s 41(6) being activated.

THE CAP CREATED BY S 41(6)

254 As noted, the builder may not recover under s 41(5) more than the builder would have been entitled to recover under the contract. The appropriate methodology according to Senior Member Walker in *Shao*, which is accepted by the parties, is to establish the adjusted contract sum allowing for variations, and then deduct the cost of defects and deduct the cost of completion.

255 The adjusted contract price and the allowance for defective works have been identified. In order to identify the cap, it is necessary to assess the cost of completion of the work.

The cost of completion

256 The builder contends in its points of claim that the cost to complete was $53,012.[84] This figure was based on a list of items which Mr Fletcher says were being completed in the 10 days prior to hand over. He also deposes that he ascertained the quantity of work to be completed by reference to the bill of quantities, plans and specifications, and his "extensive experience and knowledge as a designer and builder of domestic commercial constructions."[85] He goes on to say that he ascertained the remaining cost to complete based upon the remaining works, any quote he had for the remaining works, and the rates that he considered to be applicable.[86]

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[82] See paragraph 102 above.
[83] See paragraph 218 above.
[84] Builder's Points of Claim dated 28 September 2016, at [12].
[85] Mr Fletcher's primary witness statement dated 26 September 2017, at [30]
[86] Mr Fletcher's primary witness statement dated 26 September 2017, at [31]

257 Mr Fullinfaw in his primary witness statement states that this list was not a complete list of all the work required, and also opines that the actual cost of completing the items was $86,476.[87]

258 Mr Fullinfaw also says [at 126] that he prepared a chronology of the time he spent in the six weeks following termination of the contract in managing and arranging trades to complete the works. (This chronology, exhibited as NF1 has already been referred to.) At [128] he deposes that he kept a list to tally the costs incurred in rectifying and completing the townhouses. He says that most of the works were finished by August 2016, and at this stage the tally was $127,408.60. After this point a damaged skylight was replaced, and crushed rock was supplied and laid along the fence line, and a plumber was engaged to secure the roof and perform other work. These items brought the total cost of completion as of November 2016 to $130,981.25, which is the figure referred to in the owners' counterclaim. However, in a supplementary witness statement tendered at the hearing, Mr Fullinfaw exhibited (as NF4) a list of works which he deposed the owners undertook after the building contract was terminated. The owners in their December submissions assert the total of the amounts listed in NF4 is $132,694.46.[88] I am prepared to accept this figure as the total amount incurred by the owners in completing the project, noting that Mr Fletcher was not in a position to challenge it, but also noting that in the end result nothing turns on the precise amount allowed for this item.

259 The owners concede that, included within the total costs they incurred to complete the building work, are rectification costs.[89] As noted, the owners contend that of the costs to complete the project "those items of expenditure that are clearly and undeniably costs for rectification works" total $51,769.[90]

260 I have found against the owners on this point, and assessed rectification works carried out by Mr Angwin, Mr Mendoza and Mr Garvey at $14,523.49.[91] On this basis, I assess the cost of completion works performed by the owners at $132,694.46 less $14,523.49, which calculates as **$118,170.97.**

Calculation of the cap

261 The cap under s 41 (6) is to be determined by deducting from the adjusted contract sum (including variations) the allowance for defective works and the assessed cost of the cost of completion of the works. The calculation of the cap is as follows:

Contract sum	$1,030,000.00

[87] Mr Fullinfaw's primary witness statement dated 28 September 2017, at [134]
[88] Owners written submissions dated 21 December 2017, at [86]
[89] Owners written submissions dated 21 December 2017, at [97]
[90] Owners written submissions dated 21 December 2017, at [98]
[91] See paragraph 216(c) above.

Variation as agreed	$8,659.00
Adjusted subcontract sum	$1,038,659.00
Less defective works	$95,507.49
Subtotal	$943,151.51
Less cost to complete	$118,170.97
Cap	$824,980.54

EFFECT OF THE CAP

262 Pursuant to s 41 (6) of the DBC Act the builder may not recover under s 41(5) more than the builder would have been entitled to recover under the contract. The builder's entitlement under s 41(5) has been assessed above at $849,500. This figure exceeds the cap, and accordingly the builder will not be able to recover its full entitlement as assessed under s 41(5).

263 However, the builder has been paid only $811,065 to date. This means the builder can recover $824,980.54 less $811,065, which is $13,915.54. I round this figure up to $13,916.

THE OWNERS' COUNTERCLAIM

264 The counterclaim contained three elements, namely general damages for hardship, inconvenience and suffering, liquidated damages arising from delay and damages in respect of cost of rectifying the effects and completing the works.

265 I have found against the owners in respect of the claim for general damages. I have also found against the owners in respect of their claim for liquidated damages.

266 As to the cost of rectifying defects, the owners contend in their written submissions that:

> In the event that the cost of the owners to rectify building defects cannot be set off against the reasonable price, then the owners are entitled to recover damages for the excess of damages. [92]

267 The owners' entitlements regarding the cost of rectifying defects have been taken into account in assessing the reasonable price for the work carried out under the contract as at the date of termination under s 41 (5). The owners accordingly must be taken to concede, on the basis of their own argument, that the counterclaim must collapse in so far as it concerns the cost rectification works. Indeed, to award damages for defective works to the owners, in the circumstances, would enable them to recover twice in respect of the same loss.

268 No damages are available to the owners in respect of the cost of completion of the works, as the termination of the contract was a no fault termination

[92] Owners submissions dated 21 December 2017, paragraph 41

under s 41(5), although the cost to complete was of course relevant to the calculation of the cap on the builder's recovery created by s 41(6).

269 The counterclaim accordingly must be dismissed.

SUMMARY

1. I will order that the owners are to pay the builder the sum of $13,916.00.
2. The counterclaim will be dismissed.
3. Issues of interest, costs and reimbursement of fees will be reserved.

C. Edquist
Member