

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP311/2016

CATCHWORDS

DOMESTIC BUILDING; agreement to terminate contract and have an independent valuation of works and cost to rectify defective works undertaken to facilitate a financial adjustment between parties; status of valuation carried out in circumstances where the valuation was not independently conducted; assessment of value of works on a quantum meruit; assessment of builder's counterclaim.

FIRST APPLICANT	Mrs Yasmin Nielsen
SECOND APPLICANT	Mr Evan Nielsen
RESPONDENT	Mr Luke Elliot t/as LE Contracting
WHERE HELD	Melbourne
BEFORE	C Edquist, Member
HEARING TYPE	Hearing
DATES OF HEARING	22 September 2016, 23 September 2016 and 5 December 2016
DATE OF ORDER AND REASONS	9 May 2017
CITATION	Nielsen v Elliot (Building and Property) [2017] VCAT 562

ORDERS

- 1 The respondent, Mr Luke Elliot, must pay the applicants, Ms Yasmin Nielsen and Mr Evan Nielsen, the sum of \$40,994.00.
- 2 The respondent's counterclaim is dismissed.
- 3 **By 31 May 2017**, the respondent must deliver to the applicants all the keys to the applicants' house in his possession or control.
- 4 **By 31 May 2017**, the respondent must provide to the applicants a glazing certificate relating to the glazing he installed.

- 5 **By 31 May 2017**, the respondent must provide to the applicants an insulation certificate for the insulation he installed.
- 6 **By 31 May 2017**, the respondent must attend at the applicants' residence and collect his gazebo tent tarpaulin and materials left on site.
- 7 Costs are reserved, with liberty to apply within 60 days. The principal registrar is directed to refer any application for costs to Member Edquist.
- 8 The issue of reimbursement of any filing fee and hearing fees paid under s 115B of the *Victorian Civil and Administrative Tribunal Act 1998* ('the VCAT Act') is reserved, with liberty to apply within 60 days. **The principal registrar is directed to refer any application for reimbursement to Member Edquist.**

MEMBER C EDQUIST

APPEARANCES:

For Applicants	Mr S Kirton of Counsel
For Respondents	Mr L Elliot, in person

REASONS

INTRODUCTION

- 1 The applicants, Mrs Yasmin Nielsen and Mr Evan Nielsen ('the owners'), entered into a contract with the respondent, Mr Luke Elliott trading as LE Contracting ('the builder'), for the performance of building works at their property in Waratah Avenue, Mordialloc in March 2015 ('the contract').
- 2 The works started in early June 2015. The owners developed concerns about both lack of progress and the quality of the works, and in January 2016 the parties agreed to part ways.
- 3 It is common ground that on or about 21 January 2016 the parties agreed that:
 - (a) the contract would come to an end;
 - (b) they would engage an independent consultant to value the works which had been performed by the builder; and
 - (c) there would be a financial adjustment between the parties, taking into account the monies paid by the owners to the builder, and the value of the works performed by the builder after allowing for defects.
- 4 After this agreement was reached, the owners proceeded to appoint a quantity surveyor named Tony Roberts to value the works. Mr Roberts assessed the value of the works at \$102,000 exclusive of GST, but after allowing \$35,000 exclusive of GST in rectification costs, the nett valuation was \$67,000 exclusive of GST. The owners contend that \$67,000 is the amount that should be allowed to the builder as he is not registered for GST. As they assert they have paid the builder \$144,500, they seek a refund of \$77,500. They would also like to recover the cost of preparation of Mr Roberts' report, which they have paid, and reimbursement of the application fee and hearing fees paid.
- 5 The builder filed a counterclaim claiming \$49,025, asserting that a number of items of work performed fell outside the scope of the contract. He also claims for materials left on site which were allegedly used by the owners and the cost of a tarpaulin.
- 6 The builder also initially disputed the amount which the owners said he had been paid, asserting in his counterclaim that he had received only \$132,475. However, at the hearing, he conceded that he had been paid \$144,500 as the owners contended, and the sum paid ceased to be in issue.
- 7 On the first day of the hearing, the builder raised an argument which the owners contended was novel, on the basis that it was not contained in the counterclaim. This was that the builder was entitled to be paid under the contract for all the stages he had completed. The builder insisted that he was entitled to staged payments as the contract had been amended by the adoption of a staged payment arrangement.

- 8 The parties have diverging views as to the status of the valuation carried out by the consultant. The owners contend that the valuation is binding, with limited exceptions. On the other hand, the builder takes the view that he is entitled to contest Mr Roberts' valuation of any item of work.

THE ISSUES

- 9 The issues to be determined include:
- (a) Is the builder entitled to be paid in respect of stages of the work completed under the contract?
 - (b) Are the parties bound by Mr Roberts' valuation?
 - (c) How should GST be treated?
 - (d) What is the total value of the work performed by the builder, including variations, without allowing for rectification of defects?
 - (e) What allowance should be made for the cost of rectifying defects?
 - (f) Is the builder entitled to be paid for materials he left on site used by the owners?
 - (g) Given that it is agreed that the owners paid the builder the sum of \$144,500, what further sum are the owners obliged to pay the builder, or what sum is the builder obliged to reimburse to the owners?
- 10 Once the primary issues have been resolved, and a determination has been made as to whether it is the owners or the builder who must pay money to the other party, it will be necessary to address the residual issues, which are:
- (a) is any party liable to pay the costs of the other party?
 - (b) is any party liable to reimburse to the other party the filing fee and hearing fees paid by the other party?

Background

- 11 The owners gave evidence that they settled the purchase of the house in January 2014. It was old and rundown, but the owners had allowed for renovations when they took out their mortgage. They had a strict budget of \$200,000. They anticipated it would take some time to get a permit from Council, having regard to the fact that the property was in a flood zone, and an engineer's report would be required concerning the stumps. They also required the services of a draftsman.
- 12 An engineering plan was prepared by Ian Windle and Associates. Plans were prepared by Design Creations.
- 13 The owners knew of the builder because he had done a job for Mrs Nielsen's sister. On 1 March 2015, Mrs Nielsen wrote to the builder outlining the project and inquiring whether he was interested. She emphasised she had a budget of \$200,000.

- 14 The builder responded on the same day indicating that he was happy to provide a quote. It was in this email that he suggested that the owners could save money by acting as owner builders.
- 15 The builder, on 10 March 2015, issued a quotation in the sum of \$194,785.
- 16 Negotiations between the owners and builder took place through an exchange of emails. Ultimately, an agreement ('the contract') was reached. The contract was constituted by a quotation from the builder to the owners dated 27 March 2015 and other emails. The contract sum was agreed at \$195,450, and was not to include GST. The parties agree that the effect of the emails was that the owners were owner-builders, and the builder was their subcontractor.
- 17 After the works got underway, the builder pressed for staged payments which did not reflect the rate of progress on the site, and the parties fell into disputes about cash flow. These were resolved when, by an email dated 8 July 2015,¹ the owners agreed to a new payment schedule based on 'that of Master Builders and Vic Consumer Affairs'. This is the reason the builder argued at the hearing that he is entitled to be paid on a progress claim basis.

THE TERMINATION AGREEMENT

- 18 The owners first proposed to the builder that they part ways late in 2015. A proposal regarding the appointment of an independent person to carry out a valuation of the works was put to the builder by the owners in an email dated 21 January 2016. In this email the owners indicated they had another builder ready to take over the job. The builder responded that this 'will be the only way to resolve the job, in an amicable way'. The owners raised the prospect of organising an independent valuation of the works again twice by text on 22 January 2016, and the builder responded positively to the second of these texts.²

Finding regarding termination agreement

- 19 As the context for this arrangement was that the builder was going to leave the site and be replaced by a new builder, I accept the owners' contentions. I find that the parties, on or about 22 January 2016, agreed that the contract would come to an end, that they would engage an independent consultant to value the works which had been performed by the builder, having regard to the cost of rectifying defects, and that there would then be a financial adjustment between the parties having regard to the payment already made by the owners to the builder of a substantial sum ('the termination agreement').

¹ Exhibit A10.

² Exhibit A20.

THE BUILDER IS NOT ENTITLED TO BE PAID IN RESPECT OF STAGES OF THE WORK COMPLETED UNDER THE CONTRACT

- 20 This finding provides the answer to the builder's argument that he is still entitled to be paid for the stages of the work completed. Although the builder was justified in asserting that the initial terms of the contract were amended by the owners email of dated 8 July 2015 in which they agreed to a new payment schedule based on 'that of Master Builders and Vic Consumer Affairs', the effect of the termination agreement must be that all the terms of the contract, including this varied term, had come to an end. The builder's entitlement to be paid on a staged basis was accordingly supplanted by an entitlement to be paid monies, alternatively an obligation to disgorge monies, based on the outcome of the process contained in the termination agreement.

THE IMPLEMENTATION OF THE TERMINATION AGREEMENT AND ITS EFFECT

- 21 Mrs Nielsen gave evidence that she got the name of the consultant appointed, a quantity surveyor named Tony Roberts, from the Yellow Pages. It is clear the builder was not consulted about the consultant's identity, because in a text dated 28 January 2016 he sought the name of the 'company' doing the valuation.
- 22 Mr Roberts produced an 'expert witness statement' dated 19 September 2016.³ In this document he confirmed that he had been engaged by the owners. He said that he had been instructed by the owners verbally and had been provided with plans and invoices relating to the purchase of the windows. He stated that the 'facts, matters and all assumptions upon which the report proceeds are those provided to me by the Applicants'. He said he inspected the works in late January 2016 and early February 2016. He took notes and made a video of the house, and prepared a costing dated 7 February 2017 using a software package called Cost X.
- 23 There is no evidence that Mr Roberts inspected the house in the company of the builder. However, it is clear that Mr Roberts did speak to the builder on at least one occasion, because in a text sent on or about 3 February 2016 one of the owners said:

I assume you are not going to pay the invoice for this evaluation-so do not contact him again. We will forward the report when we get it.⁴

Contentions of the parties regarding the effect of Mr Roberts' valuation

- 24 The owners, in their written submissions, argue that the parties are bound by Mr Roberts' assessment of the value of the works. They say:

The applicant's primary submission is that the respondent's actual costs are largely irrelevant, due to the agreement made on terminating

³ Exhibit A19.

⁴ Exhibit A20.

the contract. This was that the value of the works performed would be independently assessed-not that the respondent would prove what it cost him. The only items provided by the respondent which the tribunal should consider are those where Mr Roberts has omitted a cost altogether, or where Mr Roberts has been conceded to be in error.⁵

- 25 The builder did not put his position as clearly. In his counterclaim, the builder confirmed that when the owners said they wanted to part ways, he had agreed, but he did not discuss the terms of the termination agreement further. At the hearing he did not suggest that the termination agreement did not exist, or that it had been breached by the owners. He did not argue that Mr Roberts was not entitled to give evidence. However, by his conduct during the course of the hearing, including submitting alternative costings on 21 November 2016, the builder indicated that Mr Roberts' valuation was open to challenge.
- 26 In his written submissions the builder made the following points:
- (a) Mr Roberts' report contained a number of items which 'do not add up or make sense'. These items either were not seen on site by Mr Roberts, or Mr Roberts had been told by the owners that they were not done. These items are incorrect.
 - (b) Mr Roberts missed many items, and hence did not cost them.
 - (c) Mr Roberts' quantification of the area of roofing was challenged.
 - (d) Mr Roberts' assessment of the quantity of timber used was also challenged.
- 27 For all these reasons, it is clear that Mr Elliott does not regard himself as bound by Mr Roberts' valuation. Rather, it would appear that he sees Mr Roberts' valuation as merely an expression of opinion, and a flawed one at that.
- 28 In these circumstances, it is necessary for me to make a finding about the issue of whether Mr Roberts' assessment is binding on the parties.

Discussion regarding implementation of the termination agreement and the effect of Mr Roberts' valuation

- 29 There is no doubt that the parties to a building dispute can engage an independent expert to conduct a binding valuation of works performed or the cost of rectification of defective works or the cost of completion of works. However, such an agreement is usually clearly spelt out in writing, often in a formal document that sets out the manner in which the valuer is to proceed.
- 30 I do not think the owners have made out their contention that the parties are bound by Mr Roberts' valuation of the works.

⁵ Owners' written submissions, paragraph 8.

- 31 When Mr Roberts inspected the works in late January 2016 and early February 2016, it was in the presence of the owners, but not the builder. The builder appears to have had some contact with Mr Roberts, but the builder did not walk through the house with Mr Roberts, making submissions. Furthermore, the builder's contact with Mr Roberts was cut off after the owners informed the builder that because he was not going to pay Mr Roberts' invoice, he was not to contact Mr Roberts again.
- 32 In these circumstances, it is not surprising that when Mr Roberts gave evidence, he presented his written valuation in the form of an expert's statement rather than as the report of an independent assessor.
- 33 From these facts, it is clear that Mr Roberts was neither jointly appointed nor jointly instructed. It follows that the termination agreement, which included an arrangement to appoint an *independent* consultant, was not properly implemented.
- 34 Taken together, the manner in which Mr Roberts was appointed, the way in which he was instructed, and the way he undertook his task, create a legal impediment to the owners in making out their contention that Mr Roberts' valuation is to bind the parties. The valuer appointed under the termination agreement could only undertake his independent role properly if he afforded the parties natural justice, that is to say, he gave each party a right to be heard. Mr Roberts manifestly did not undertake the valuation in such a manner.

Finding regarding the issue of whether Mr Roberts' valuation is binding

- 35 For these reasons, I find that the parties are not bound by Mr Roberts' valuation.

PROCEDURE TO BE ADOPTED REGARDING ASSESSMENT OF VALUATION OF WORKS AND DEFECTS

- 36 However, that is not to say that Mr Roberts' assessment is to be discarded in its entirety. The contract was brought to an end by the termination agreement. The effect of the termination agreement was that there was to be an independent assessment of the value of the works, allowing for defects, to be followed by a financial adjustment having regard to the fact that the owners had paid to the builder a substantial sum. In the event, the agreement was not implemented. This leaves the parties in a situation where the original contract has been mutually determined more than a year ago, and financial matters between the parties cannot be dealt with as contemplated by the contract. The upshot, I find, is that the value of the builder's work will have to be assessed on a quantum meruit. As Mr Roberts is well qualified to carry out an assessment of the works, being a quantity surveyor with more than twenty years' experience as an estimator, it is appropriate that his elemental summary be used as the base upon which a quantum meruit can be developed.

37 The procedure I will undertake is this. Where neither party has made any comment in relation to a particular item assessed by Mr Roberts, that assessment will stand. Where I am persuaded by one party or the other that a particular item in Mr Roberts' elemental summary ought to be amended, I will make the relevant amendment. When I have concluded my assessment in relation to the particular items which have been the subject of comment by one or both of the parties, I will summarise the effect of my findings in a schedule which will follow these Reasons ('the Schedule'). I will indicate what the effect of my findings is on both the assessment of the value of the works exclusive of the cost of rectifying defects, and on the assessment of the cost of rectifying defects. When the amended figures for the value of the works and the cost of rectifying defects have been established, they will be netted off. I will then turn to the builder's counterclaim, and the builder will be credited to the extent the counterclaim is successful but has not otherwise been reflected in the Schedule. The necessary financial adjustment between the parties will then be identified, bearing in mind the payment of \$144,500 which the parties are now agreed has been made by the owners to the builder.

GST

38 The parties contracted on the basis that the contract sum was not to include GST. Mr Roberts, in his elemental summary, allowed for margin but not for GST. Neither party argued in written submissions that any allowance should be made for GST. In these circumstances, no allowance will be made by me for GST.

LIST OF ISSUES WITH MR ROBERT'S ASSESSMENT WHICH ARE AGREED TO EXIST

- 39 The parties are agreed that Mr Roberts was in error in respect of some items.
- 40 The owners concede that Mr Roberts' assessment that 149 stumps were required (item 12.9) was wrong.
- 41 The parties agree that Mr Roberts did not allow anything for asbestos removal (item 2.22); removal of framing (item 2.27); an asbestos bin (item 2.28); skip bins (item 2.29); and box gutter framing material (item 12.52.1) or box gutters (items 15.6-15.10).
- 42 The owners agree there is a dispute about the area of the ceiling that should have been allowed for (item 20.5), and that there is a dispute as to whether Mr Roberts allowed sufficiently for timber. The owners also accept that there is a dispute as to whether Mr Roberts allowed sufficiently for the following other items, even though none of the points is conceded:
- (a) removal of insulation (item 2.30);
 - (b) dust marks (item 2.31);
 - (c) drilling machine hire (item 12.5);

- (d) glue and nails (item 12.20.1);
 - (e) 90 x 45 top and bottom plates (item 12.32.1);
 - (f) flooring (item 12.52.2);
 - (g) timber fascia (item 12.52.3);
 - (h) wall insulation (item 14.12.1);
 - (i) roof area (items 15.4-15.5).
- 43 With the exception of timber items (including box gutter framing material, flooring and timber fascia), I now assess these claims sequentially, using or elaborating upon the system of numbering established by Mr Roberts in his elemental summary. I will deal with timber items separately for the reason that the builder made a general complaint that Mr Roberts' allowances for timber qualities were too light, and it is appropriate that they be dealt with as a group.

Asbestos removal (item 2.22)

- 44 Mr Roberts made no allowance for this item. The owners concede this. Mr Elliot says it took him 13.5 hours to remove the asbestos, at a total cost of \$600. The owners dispute that 13.5 hours were spent on the task, and that the hourly rate should be \$45 an hour when the work was shared between Mr Elliott and his son Hayden Elliott, whose rate was \$30 as distinct from the claimed rate of \$45. Despite the owners' view that I should disallow the item in the absence of the production of supporting evidence such as a work diary, I accept this work was carried out. I allow 6.75 hours for Hayden Elliott at \$30 per hour, or \$202.50, and 6.75 hours for Mr Elliott at \$50 per hour, or \$337.50. **The total allowance is \$540.**

Removal of framing (item 2.27)

- 45 The builder claims \$4,320 for this item. The owners do not concede that Mr Roberts did not allow for this item in his assessment of demolition costs.
- 46 I can see no specific reference to framing in Mr Roberts' detailed assessment of demolition costs.
- 47 The owners also do not accept the builder's evidence that his team spent 96 hours on this task. In the absence of any documentary evidence, the Tribunal is asked by the owners to draw an adverse inference on the *Jones v Dunkel*⁶ principle. I decline to do so as the removal of framing clearly was necessary.
- 48 However, I consider there is substance in the owners' remaining argument, which is that the relevant hourly rate should not be \$45 an hour when the builder's evidence is that he carried out the work with his son (whose hourly rate is \$30 an hour) a labourer (\$27 an hour) and two carpenters (\$45

⁶ (1959) 101 CLR 298.

an hour). I find for the purposes of the quantum meruit that a reasonable hourly rate for the builder is \$50. I also find that a reasonable hourly rate for the builder's son is \$30, for each labourer is \$27, and for a carpenter is \$45. The blended hourly rate for the five workers is \$39.40 per hour. I am prepared to accept the builder's assessment of 96 hours, and accordingly **find that a reasonable allowance for the removal of framing is \$3,782.**

Asbestos bin (item 2.28)

49 The builder claimed \$500 for hire of an asbestos bin. His evidence was that a 2m³ bin was used. He produced no invoice, but I accept that a bin was necessary to take away the asbestos eaves. As Mr Roberts overlooked this item, the parties did not have the benefit of his assessment of the cost of the hire of an asbestos bin, and so there is no basis to dispute the builder's assessment. **I allow the \$500 for this item.**

Skip bins (item 2.29)

50 No skip bins were allowed for by Mr Roberts. The builder says that he paid \$5,200 to hire 8 x 6m³ skip bins. The owners contend that in the absence of any receipt or purchase orders, the Tribunal should draw an adverse inference against the builder under *Jones v Dunkel*, and disallow this claim. I do not accept this argument, as clearly some skip bins were hired, and this was acknowledged by the owners in the hearing. Rejection of the claim in full is accordingly inappropriate.

51 The owners' evidence was that they only saw a 2 bins on site. I consider this evidence to be ambiguous. It may be that the owners, at any one time, saw only two bins on site. That does not mean that the bins were not changed over, possibly repeatedly. The builder contends that 8 bins were used, and in circumstances where Mr Roberts has assessed that 178m² of plasterboard and 138m of roof tiles have been demolished, 8 bins may well have been used as the builder contends.

52 The parties did not have the benefit of Mr Roberts' assessment as to the cost of hire of a 6m³ bin, as Mr Roberts missed this item altogether. However, a total cost of \$5,200 for 8 bins implies a cost of \$725 per 6m³ bin. I do not accept this costing. Surprisingly, having regard to its quantum, no invoice was produced to support it. I find a reasonable allowance for a 6m³ bin is \$425. **I allow a total of \$3,400 for bins.**

Removal of insulation (item 2.30)

53 The builder claims \$720. The owners do not concede that Mr Roberts did not allow for this item in his costing of demolition. Although I cannot find any reference to removal of insulation in Mr Roberts' elemental summary where he deals with demolition in detail, I note that in the builder's counterclaim he refers to the removal of old plaster 'along with old insulation'. I accordingly accept the owners' secondary argument that the cost of removal of insulation has already been allowed for in the cost of

removal of plaster. **I find against the builder in respect of this item and allow nothing for it.** It is accordingly not necessary for me to consider the owners' other arguments which relate to the hours spent on the work and the rate at which the work should be costed.

Dust masks (designated item 2.31)

54 The builder claims **\$65** in respect of the cost of 20 dust masks. This was not disputed at the hearing. **I allow this item.**

Drilling machine hire (item 12.5)

55 Mr Roberts made no allowance for hire of the stump drilling machine. The builder says that he paid \$485 to hire a machine. This is another claim in respect of which the owners say an adverse inference should be drawn against the builder under *Jones v Dunkel* because of the absence of documentary evidence. It is not appropriate to draw such an adverse inference as a drilling machine was clearly needed for the works. The issue is one of quantum. No evidence was given by either party as to the daily cost of hire of a drilling machine. I make a finding in the next section that 47 stump holes were installed. I consider that, in these circumstances, it is not unreasonable for the builder to have hired a drilling machine for several days. I see no reason to question the builder's assertion that he paid \$485 to hire the drilling machine, and find that this sum is to be allowed on the basis that it is reasonable. **The upshot is that the sum of \$485 is to be substituted for Mr Roberts' assessment of \$368 as the cost of excavation for stumps for the purposes of the quantum meruit.**

Stumps (item 12.9)

- 56 The owners assert in their submissions that only 24 stumps were installed. The builder says there are 55 stumps. A rate of \$54 per stump is agreed.
- 57 On the basis of calculations based on the photos, and what I saw at the inspection, I find that 47 stumps were installed. At \$54 per stump **the total allowance is \$2,538.** The upshot is that I find Mr Roberts' allowance for **item 12.9 of \$8,047 is to be reduced to \$2,538.**
- 58 Mr Roberts' allowance included some negative items. These were:
- (a) item 12.8 – 20 5Mpa concrete pad footings not installed or seen on site, valued at - \$116;
 - (b) item 12.10 – stumps not seen on site, valued at - \$1,674;
 - (c) item 12.11 – stumps stated by the owners not to be under the building, valued at - \$1,080;
 - (d) item 43.5 – additional cost to install stumps after floor to deck, valued at - \$1,550.
- 59 The owners in their final submissions concede that the negative allowances for items 12.10, 12.11 and 43.5 should be deleted, resulting in a positive

adjustment to Mr Roberts' schedule. I agree. I also think that the negative allowance for item 12.8 of (-) \$116 should also be reversed. **Accordingly, each of items 12.8, 12.10, 12.11 and 43.5 is to be reversed to 'nil'.**

Glue and nails (designated item 12.20.1)

60 An amount of **\$300** was claimed by the builder for glue and nails. Mr Roberts clearly made no specific allowance for it. **I consider this claim is reasonable and I accept it.**

90 x 45 top and bottom plates (designated item 12.32.1)

61 This item relates to the provision of 90 x 45 top and bottom plates. 40 are claimed at \$5.40 each. No invoices were produced by the builder, yet the builder claims \$691. **I accept that the builder used 40 plates, and accept a rate of \$5.40 each as being reasonable. I find the resulting cost of \$216 is to be included in the quantum meruit.**

Wall insulation (item 14.12.1)

62 The builder claims at item 14.12.1 for 66m² of wall insulation at a cost of \$13.5 per m², a total of \$891. The owners contend that wall insulation has been allowed for by Mr Roberts at item 12.87. Reference to Mr Roberts' schedule indicates that he has allowed \$891 for 66m² of installation at item 12.57, which is presumably the item the owners intended to refer to. **I disallow the builder's claim.**

Roof area (items 15.4-15.5)

63 **Mr Roberts, at item 15.4, allowed \$13,677** for the construction of 274m² of roof. In his alternative costing, the builder claimed that he installed 270m² of Colourbond at a cost of \$17,550. He also claimed \$3,000 for 60m² of metal deck roofing. In respect of neither of these claims were any invoices provided. Accordingly, **I find there is no reason to change Mr Roberts' assessment, and \$13,677 will be allowed for the purposes of the quantum meruit.**

OTHER ROOF AND GUTTER ITEMS

Box gutters (item 15.6)

64 Mr Roberts allowed nothing for **item 15.6**, which relates to the provision of box gutters. The owners concede this, but argue that in the absence of supporting documentation the Tribunal should draw an adverse inference, under the rule in *Jones v Dunkel*⁷ and disallow this item. I do not accept this argument, as the work was clearly performed. Mr Elliott claims 12m at \$40 per m or \$480. The owners did not dispute the quantity claimed. **I find both the quantity and rate claimed to be reasonable and allow \$480.**

⁷ (1959) 101 CLR 298.

Roof eave gutters (item 15.9)

65 Mr Roberts allowed nothing for this item. The builder claims 48m at \$28 per metre, a total of \$1,344. **I find both the quantity and the rate claimed to be reasonable, and allow \$1,344.**

Roof flashing (item 15.10)

66 Mr Roberts allowed \$944.02 for this item. The builder claims 48m at \$24 a metre, or \$1,152. The owners did not dispute the quantity claimed. **I find both the quantity and the rate claimed to be reasonable, and allow \$1,152.**

PLASTERBOARD

Wall and ceiling linings (items 19.5, 19.7, 19.9, 19.10, 20.5, 20.6 and 20.8)

67 At item 19.5 of his schedule Mr Roberts allowed for 194m² of 10mm plasterboard, at a rate of \$27.03 per m², yielding a total cost of **\$5,244**. Mr Roberts also allowed **\$2,100** for 71m² of 10mm water resistant plasterboard at item 19.7. Mr Roberts then allowed **\$3,045** in respect of 93m² of 10mm plasterboard fixed to ceilings, including the suspended ceiling (item 20.5). **\$231** was allowed at item 20.6 in respect of 10mm plasterboard affixed to bulkheads or pelmet framing. Finally, **\$606** was allowed for 12m² of 10mm water resistant plasterboard fixed to ceilings. The total of these sums is **\$11,226**.

68 On the other side of the ledger, Mr Roberts made a negative allowance for labour relating to plasterboard of \$1,760 at item 19.9, and a negative allowance in respect of materials, plaster and X-angles of \$500 at item 19.10. These negative allowances clearly related to work he considered had not been performed.

69 The builder claims **\$12,400** for plasterboard in his schedule of alternative costings, and includes a claim for this sum for plasterwork in his counterclaim.

70 In respect of the builder's counterclaim for the plasterboard, the owners say in their submissions:

Mr Elliott's evidence on 5.12.16 was that part of the plasterboard cost was for work carried out outside the contract price. In cross-examination he was taken to:

- the plans (exhibit A1) pages 3, 4, 10.
- the chain of correspondence (exhibits A3, A13, A14, A15, A16)

in support of the applicants contention that the respondent had agreed to install new plaster throughout the house. His explanation that the external walls, being any walls on the outside of the building, were excluded is nonsensical.

Further, he did not provide a satisfactory explanation of why [his] final invoice sent 10.2.16 (exhibit A 27) claimed \$2850 for this item, but the counterclaim prepared six months later claimed \$5200.

- 71 The dispute obviously centres on measurement of the area of plasterboard fixed by the builder. However, the parties raise different issues.
- 72 The owners contend that part of the scope of the contract was that the builder should replace the plaster in the old house. The builder initially disagreed. In respect of the builder's claim for plasterboard in the counterclaim, I do not accept the owners' contention that the builder's position, 'that the external walls... were excluded is nonsensical'. The specification – at page 10 – mandates that 'plasterboard or fibre cement sheet shall be installed in locations as shown on approved plans and in tradesperson like manner'. Drawing No 3 requires the demolition and removal of existing walls shown in black, and making good, in several areas. Some of these areas, but not all, are external walls. Accordingly, it appears the builder is partly correct.
- 73 At the hearing, the builder said that in allowing only 93m² for the ceiling plasterboard, Mr Roberts had underestimated, because the relevant area exceeded 200m². The builder also gave evidence that Mr Roberts had not allowed for wastage.
- 74 Although the builder criticised Mr Roberts' figures, he did not bring his plasterer's estimate, and so it was not possible to see what had been allowed for by the plasterer. The builder himself did not present any calculations as to the area of plasterwork installed, taken off the plans.
- 75 I note also that when the builder rendered his invoice dated 10 February 2016,⁸ just weeks after the termination of the contract, he claimed \$9,750 for 'plaster installed'. No explanation was offered as to why the claim for plaster had increased to \$12,400 in the counterclaim.
- 76 In the circumstances, I can see no reason to change Mr Roberts' assessments for plasterboard. **I find Mr Roberts' respective positive allowances set out above, totalling \$11,226, are reasonable and adopt them for the purposes of the quantum meruit. Mr Roberts' two negative allowances of \$1,760 and \$500 respectively will not be disturbed.**

OTHER ITEMS QUESTIONED BY THE BUILDER IN HIS SUBMISSIONS

- 77 The builder says that the following items in Mr Roberts' report either 'do not add up or make sense' and that Mr Roberts either had not seen them on site or had accepted the owners' statement that they were not done:
- (a) 25 Mpa concrete pad footings not installed or seen on site – item 12.8;
 - (b) concrete stumps not installed or seen on site – item 12.10;

⁸ Exhibit A27.

- (c) concrete stumps the owners say are not under the building – item 12.11;
- (d) 2/90 x 45 F7 bearers not installed or seen on site – item 12.14;
- (e) insulation not installed or seen on site – item 12.58;
- (f) 12.5% of roof area estimated as not done – item 15.5;
- (g) labour relating to plasterboard linings – item 19.9;
- (h) materials, plaster and x-angles – item 19.10;
- (i) loss of productivity of foreman – item 33.6;
- (j) additional cost to install stumps after floor to deck – item 43.5;
- (k) ceilings – item 43.11;
- (l) bin – item 43.13;
- (m) Compliance certificate issues – items 44-44.5.

78 The last four items are rectification or completion items and will be dealt with under that heading. I now address the other items in the order in which they appear above.

Mpa concrete pad footings not installed or seen on site (item 12.8); concrete stumps not installed or seen on site (item 12.10); concrete stumps the owners say are not under the building (item 12.11); and additional cost to install stumps after floor to deck (item 43.5)

79 These items have already been dealt with as part of the assessment of the stump claim. For the purposes of the quantum merit they will be reversed in Mr Roberts' elemental summary.

2/90 x 45 F7 bearers not installed or seen on site (item 12.14 and item 12.13)

80 These items relate to timber, and are dealt with under that heading.

Weatherboard cladding, sarking and insulation not installed or seen on site (item 12.58)

81 At items 12.55, 12.56 and 12.57, **Mr Roberts had allowed \$5,198, \$465 and \$891** in respect of 66m² of weatherboard cladding, sarking and insulation, but then made a deduction at item 12.58 of \$1,589 in respect of 16m² of those items 'not installed or seen on site'. Although the builder said that this did not make sense, I suspect this was because he had not understood that Mr Roberts had made a deduction of \$1,589 across all 3 items.

82 The builder, in his alternative costings, claimed \$2,442 in respect of 465 lineal metres of weatherboard and \$315 in respect of three rolls of sarking.

- 83 As these figures are lower than Mr Roberts' estimates, they will be accepted, and **\$2,442 in respect of weatherboard** and **\$315 in respect of sarking** substituted for Mr Roberts' figures.
- 84 The builder claimed \$891 for **insulation at item 14.12.1**. Mr Roberts' estimate at 12.57 will be accepted as it is for an identical sum.
- 85 As the builder's lower figures for weatherboard and sarking have been accepted, it is appropriate that Mr Roberts' negative allowance of **\$1,589** for weatherboard cladding, sarking and insulation not installed or seen on site **should be reversed to \$nil**.

12.5% of roof area estimated as not done (item 15.5)

- 86 Mr Roberts, at item 15.4, allowed \$13,677 in respect of 274m² of roof area. He then deducted \$1,710 in respect of his assessment that 12.5% or 34m² of the roof was not done.
- 87 I have already found that there is no basis to change Mr Roberts' allowance in respect of the construction of the roof.⁹ To allow the primary assessment about the cost of constructing the roof and then to disallow the deduction made by Mr Roberts would be unreasonable. The upshot is that **item 15.6 is confirmed at -\$1,710**.

Labour relating to plasterboard linings - 19.9 and materials, plaster and x angles (item 19.10)

- 88 These two items have been dealt with above as part of the discussion about plasterboard.¹⁰

Reduced productivity of site supervisor (items 33.5 and 33.6)

- 89 Mr Roberts had allowed for the cost of a general foreman at \$2,200 per week for an 8 week period, a total of \$17,600. However, he had reduced this allowance on account of reduced productivity by a factor of 6 weeks, reducing the total nett allowance to 2 weeks at \$2,200 per week, or \$4,400.
- 90 The builder's contention is that he acted as site supervisor on the job, and in respect of this work is entitled to be paid for 15 hours a week. He said the relevant costing is \$15,400.
- 91 I do not accept the builder's contention. The builder undertook the works as a subcontractor. The owners were acting as owner-builders. The builder himself was involved in the works, and supervised the works at least part of the time that he was at the site. He was not there full-time. The owners contend that there is no reason to change Mr Roberts' allowance of two weeks. I agree that \$4,400 is reasonable. **I find that the builder is entitled to an allowance of \$4,400 only in respect of site supervision.**

⁹ See paragraph 63.

¹⁰ See paragraphs 67-76 inclusive.

OTHER CLAIMS MADE BY THE BUILDER

Carport cut back (item 2.4)

92 Mr Roberts had allowed for \$409 for this item. The builder, in his schedule of alternative costings, said that the allowance should be \$90, representing two hours work in cutting back the carport. **This item will be adjusted from \$409 to \$90 accordingly.**

Demolition of plasterboard (item 2.8)

93 The builder, at item 2.8, said that the proper allowance for demolishing plasterboard should be \$5,760 as opposed to Mr Roberts' assessment of \$1,169. The builder gave evidence that four people were involved in this work, which involved the removal of 178m of heavy lath and plaster containing mesh. In his alternative costings, the builder said that 128 hours of work was involved, which implies a blended hourly rate of \$45. The discrepancy between Mr Roberts' assessment and the builder's apparently turned on measurement.

94 The builder gave evidence about this item on the first day of the hearing. During cross-examination, he was shown his invoice of 10 February 2016.¹¹ He had claimed \$2,565 for plaster removal. He was asked how he knew that 128 hours had been spent removing plaster. His answer was that he had a diary. When he was asked whether he had the diary at the hearing, he answered 'no'.

95 On the first day the hearing, the parties were given a *Jones v Dunkel* warning. They were informed that it was their responsibility to bring to the hearing all the evidence upon which they wished to rely, and that if they failed to call any particular witness, or failed to produce any particular document, then the Tribunal might be asked to infer that the evidence of that witness, or the evidence contained in that document, might not be of assistance to their case.

96 Notwithstanding this warning, the builder failed to produce his work diary on the second or third day of the hearings. Accordingly, in respect of this issue, I might well have been justified in drawing an adverse inference against the builder. However, I decline to do so, as the issue can be decided on the weight of the existing evidence.

97 The builder was given the opportunity to explain why he had invoiced only \$2,565 for removal plaster on 10 February 2016, that is to say, within days of the termination of the contract. He did not do so. He could not explain why, some months later, the cost had blown out to \$5,760. On the basis of the existence of the invoice of 10 February 2016, I find against the builder in respect of the proposition that Mr Roberts' figure of \$1,169 should be replaced by the builder's figure of \$5,760.

¹¹ Exhibit A27.

- 98 The builder did not suggest, as a fallback position, that the \$2,565 invoiced on 10 February 2016 should be substituted for Mr Roberts' figure. Even if the builder had done so, I would not have accepted the submission, given that the builder was allowed an opportunity to produce documentary evidence to justify his claim, but failed to do so.
- 99 **Mr Roberts' assessment of \$1,169 is confirmed**, as I find it is a reasonable figure for demolition of plasterboard.

Demolition of roof tiles (item 2.12)

- 100 Mr Roberts had allowed \$1,058 in relation to the removal of 138m² of roof tiles. The builder contended that \$2,100 should be substituted, on the basis that it had taken two or three people two and a half days to remove the roof tiles. If it is assumed that two people removed the roof tiles over two and a half days, that equates to 5 days, or 40 hours. This work could have been performed by labourers. At \$27 per hour, the cost for 40 hours would be \$1,080. This is very close to Mr Roberts' assessment.
- 101 The builder tendered no documentation to support his claim. There is, in my view, no proper basis to amend **Mr Roberts' assessment of \$1,058, which I regard as reasonable. It must stand.**

Removal of carpet (item 2.14)

- 102 Mr Roberts had allowed \$485 for the cost of removing 123m² of carpet. The builder costed this on the basis that 8 hours labour was involved at \$45 per hour, a total of \$360. During cross-examination, the builder conceded that he and his son had removed the floor covering, not 2 carpenters.
- 103 I have already accepted as reasonable the builder's hourly rate of \$50 per hour, and the son's rate of \$30.¹² The resulting blended rate is \$40. The builder conceded that \$40 an hour was appropriate, which yielded a total cost of \$320, rather than \$360. The builder's concession that he spent less on this item than Mr Roberts had allowed is sufficient justification for amending Mr Roberts' figure. **I adjust Mr Roberts' figure down to \$320.**

Joinery bench and under cupboards (item 2.17)

- 104 Mr Roberts had allowed \$139.41. The builder in his alternative costings claimed 16 hours of labour at \$45 per hour, a total of \$720. When he gave evidence about the matter, the builder said that it took 2 people a day to pull the bench and under cupboards apart and take the remains out to the front of the house. He later elaborated to say that the people involved included himself, his son Hayden, and 2 labourers. If this evidence is accepted at face value, then the relevant hourly rates (already accepted by me) are \$50 for the builder, \$30 for Hayden, and \$27 for each of the labourers. The blended hourly rate is accordingly \$134/4 or \$33.50. I adopt this rate.

¹² Paragraph 48 above.

105 I accept the evidence of the builder that it took 16 man hours to demolish the kitchen. I find that the reasonable cost to demolish the kitchen is 16 hours by \$33.50 per hour, which I calculate to be \$536. **I allow an adjustment of Mr Roberts' costing of \$139.41 up to \$536.**

Doors and windows (items 2.19 and 2.20)

106 Mr Roberts had allowed \$226 for removal of doors and a further \$161 for the windows, a total of \$387. The builder's alternative costing was that the removal of the doors and windows took 8 hours and cost \$360. The hourly rate used was \$45, which was the carpenter's rate.

107 I note the builder's evidence supports the reasonableness of Mr Roberts' two assessments taken together. However, as the builder's assessment for both windows and doors is lower than the total of Mr Roberts' assessments, **I adopt the builder's aggregate figure of \$360 and substitute it for Mr Roberts' assessments.**

Installation of windows (item 14.5)

108 The builder accepted Mr Roberts' assessment of the cost of the windows as supplied at \$11,837. However, the builder asserted that the cost of installation was \$1,350 as distinct from the sum of \$1,320 calculated by Mr Roberts. The difference lay in the fact that Mr Roberts had allowed an hourly rate of \$44.01, whereas the builder claimed \$45 per hour. As I have already accepted \$45 per hour as the rate for a carpenter,¹³ **I accept the builder's claim and adjust item 14.5 up to \$1,350.**

Margin (item 34)

109 In his schedule of alternative costings, the builder claimed a margin of 12%, rather than the 10% allowed by Mr Roberts at item 34. The builder said he had allowed 12% margin in his initial estimate, but provided no documents to support that rate or otherwise justify its reasonableness. He made reference to his tax returns, but did not produce them. In these circumstances, there is no reason to adjust the allowance made by Mr Roberts. **A margin of 10% is reasonable, and I allow it for the purposes of quantum merit. It will be applied to the total value of the works.**

Carpentry labour cost (item 12.52.4)

110 The builder claims \$25,920 for 24 days each for three carpenters at \$45 per hour. Surprisingly, the builder tendered no work diaries or time records or wages sheets to justify this substantial claim. The owners invite the Tribunal to draw an adverse inference against the builder under Jones v Dunkel. I decline to do so, as carpentry was clearly part of the works.

111 At **\$25,920** this is a significant item. The builder suggests that Mr Roberts completely overlooked the carpentry labour cost. The owners dispute this.

¹³ See paragraph 48 above.

Reference to Mr Roberts schedule indicates that he has almost universally not allowed for labour separately when assessing the value of an item. However, the fact that he has allowed for labour is evidenced in item 19.9 of his elemental summary where he allows (-\$1,760) in respect of labour on plasterboard not performed.

112 I also refer to:

- (a) the builder's claim for \$360, which represented the work of 2 carpenters in removing doors and windows (see items 2.19 and 2.20);
- (b) the removal of framing at item 2.27 for which \$3,782 was claimed by the builder for the work of five people, two of whom were carpenters;
- (c) item 12.25, where the builder claimed \$2,116 for 90 x 35 studs, and said at the hearing that this included carpentry; and
- (d) the installation of windows at item 14.5 where the builder has been allowed \$1,350 based on the carpenter's rate of \$45 per hour, from which I infer that carpenters performed this work.

113 Taken together, these items strongly suggest that the builder has included labour in his claims for carpentry items.

114 **I find the builder is not entitled to a separate allowance in respect of carpentry at item 12.52.4, on the basis that he has already included the cost of labour in his carpentry items. I also find the carpenter's work is reasonably reflected in Mr Roberts' figures for carpentry.**

TIMBER

115 In his written submissions the builder made a general complaint that the allowances made by Mr Roberts for timber were insufficient.

116 I consider that there is a danger inherent in the process of opening up the timber items in Mr Roberts' elemental summary on an item by item basis. The reason for this is that Mr Roberts made an assessment of the timber used on the job after taking quantities off the plans. To adjust some items at the request of the builder without doing a full reconciliation of all the builder's claims regarding timber against all the allowances made for timber by Mr Roberts has the potential of doing one party or the other an injustice.

117 A further problem which arises if individual timber items are addressed in isolation is illustrated by the dispute over item **12.17.1** in respect of which the builder claims for 56m of 240 x 45 F7 Tpine at a cost of \$1,036. The owners point out that as the builder submitted his costings late, Mr Roberts was not given an opportunity to consider the builder's contention. I am attracted to the owners' argument. Mr Roberts gave evidence on the first day of the hearing. He was not cross-examined by the builder about this particular matter. The builder was ordered, on 23 September 2016, to send to the owners and to the Tribunal, by 3 October 2016, a copy of Mr

Roberts' spreadsheet showing his comments and/or alternative calculations. That time-limit was extended by a subsequent order to 10 November 2016 and was extended again to 28 November 2016. The builder's document setting out his comments and/or alternative calculations was only filed on 21 November 2016. In these circumstances, I accept that the owners have been deprived of a reasonable opportunity to have their consultant review the builder's costing of this item.

118 As with other items in Mr Roberts' elemental summary, except those where the owners have conceded he is in error, my starting point is that his assessment of timber items is reasonable.

119 Because:

- (a) there is a danger inherent in opening up individual timber items without doing a full reconciliation of all of Mr Roberts' assessments regarding timber, and reconciling them against the builder's quantifications; and
- (b) the late submission of the builder's costings meant that the owners were not able have Mr Roberts' review those costings,

my general approach to timber items is that, in the absence of evidence satisfying me that any particular assessment made by Mr Roberts is unreasonable, I will leave his assessments undisturbed. I now turn to the remaining timber items in dispute.

2/90x 45 F7 bearers (item 12.13)

120 In his schedule of alternative costings, the builder asserted that he had installed 62 lineal metres of subfloor 2/90 x 405 F17 bearers at a cost of \$1,302. This compared with Mr Roberts' allowance of 41 lineal metres as a total cost of \$805. No invoices were produced, but the item was the subject of evidence. The builder deposed that the bearers over stumps were laminated together to create 90 x 90mm bearers, which resulted in an increase of quantity to 60 lineal metres. The balance of 2 lineal metres was accounted for by wastage.

121 Although I accept that the builder may have laminated bearers together to create 90 x 90mm bearers, and that this would explain the quantity claimed by the builder, I am not convinced by the builder's evidence. In the first place, no invoices were produced. Secondly, the builder did not tender any photographic evidence of the laminated bearers. In these circumstances, **I am not prepared to alter Mr Roberts' assessment in respect of item 12.13 of \$805.**

2/90x 45 F7 deduction (item 12.14)

122 Mr Roberts, in his elemental summary at item 12.14, deducted \$393 in respect of 20m of the bearers assessed at item 12.13 which were 'not installed or seen on site'. It would be unfair to the builder to accept Mr Roberts' primary assessment but then to ignore Mr Roberts' own set off

against that assessment. Accordingly, **the negative allowance of \$393 must stand.**

90 x 63 VL Hyspan bearers (item 12.15)

123 Mr Roberts allowed \$998 for 60m of these bearers. The builder claimed that he had used 90m, and sought an uplift to \$1,620. After the builder had given evidence about this item, he was challenged to explain how 90m of this particular bearer and 62m of the 90x 45F7 bearer could have been used in the house. His answer was that they were under the 'long room' under stud walls.

124 The builder produced no invoices. In these circumstances, **Mr Roberts' figure for item 12.15 will not be changed.**

120 X 45 LVL Hyspan joists (item12.17)

125 Mr Roberts had allowed \$3,236 for 173m of these joists. The builder, in his alternative costing, claimed that he had used 190m of 140 x 45 Hyspan instead, at a cost of \$3,390. The figures claimed are obviously similar. In the absence of any invoice from the builder, I am not prepared to alter Mr Roberts' allowance. **Mr Roberts' figure of \$3,236 is confirmed.**

240 x 45 F7 treated pine (item 12.17.1)

126 The builder claimed that 56m of 240 x 45 F7 treated pine had been used for the decks at a cost of \$1,036. However, he produced no invoices. **The builder's alternative assessment is not accepted.**

90 x 35 studs (items 12.25 (new), 12.26 and 12.27)

127 **Mr Roberts allowed \$316 for 17 metres of MGP 10 Pine 90 x 35 double stud** at item 12.26, and **\$5,670 for 154m² of 90 x 35 MGP 10 studwall** at 45 centres at item 12.27.

128 The builder claimed \$2,116 for an unstated quantity of 90 x 35 studs (new item 12.25). The builder did not make it clear whether he was seeking to substitute \$2,116 for one or both of Mr Roberts' figures, and tendered no documents which might explain the nature of his claim. However, at the hearing, it was agreed that part of the builder's claim for carpentry included work on the studs. **In these circumstances, I consider there is no basis to alter Mr Roberts' assessments.**

90 x 45 studs (items 12.29 to 12.30)

129 **Mr Roberts allowed \$157** at item 12.29 for MGP 10 Pine 90 x 45 double stud, and **\$2,446** for 90 x 45 MGP 10 stud wall at 450 centres at item 12.30.

130 The builder claimed \$389 for an unstated quantity of 90 x 45 studs. The builder did not make it clear whether he was seeking to substitute \$389 for one or both of Mr Roberts' figures, and tendered no documents which

might explain the nature of his claim. **In these circumstances, I consider there is no basis to disturb Mr Roberts' respective assessments.**

Lintels (item 12.32)

131 The builder claims for 40 190x 4517F lintels at a total cost of \$620. Mr Roberts' schedule indicates that lintels were not measured by him, but framing over windows was instead. **In these circumstances, I do not think it is reasonable to allow the builder's claim, as to do so could lead to double counting.**

Noggins (item 12.32.2)

132 This item relates to the provision of 90 x 35 noggins at a cost of \$560. Mr Roberts did not expressly allow for noggins. He may have made an allowance for noggins in some other items. Moreover, no invoices were produced by the builder. In the absence of satisfactory evidence from the builder that Mr Roberts' assessment of timber items is unreasonable, **I reject this claim.**

190 x 45 pine luv (item 12.38)

133 Reference to Mr Roberts' schedule indicates that here he allowed \$438 for additional rafters to the original roof. The builder claims \$2,059 for 190 x 45 luv. The builder has not justified his claim by reference to any invoices. **There is nothing to justify disturbing Mr Roberts' assessment.**

190 x 45 pine rafters (item 12.38.1)

134 In this item the builder claims \$2,116 for 190 x 45 pine rafters. The number of metres and the rate per metre claimed is not clear.

135 Although, as noted, Mr Roberts allowed for additional rafters for the original roof at item 12.38, he appears to have made no allowance for rafters for the extension. However, it is possible that Mr Roberts made allowance for these rafters elsewhere. The builder has not justified his claim by reference to any invoices. There is nothing to justify disturbing Mr Roberts' assessment. Accordingly, **the builder's alternative claim for item 12.38.1 is rejected.**

75 x 38mm graded battens (item 12.39, 20 x 45 F17 roof beams item 12.39.1)

136 Mr Roberts allowed \$703 for 69m of 75 x 38mm graded battens at \$10.13 per metre at item 12.39. The builder claimed for 600 lineal metres at \$2.80 per metre, a total \$1,680, and made a separate claim for 20 x 45 F17 roof beams at a cost of \$990.

137 At the hearing, the point was made that Mr Roberts had allowed for fascia's, barges, beams, laminated beams and posts at items 12.42-12.52. In the absence of any documentary evidence from the builder, **I see no basis**

to find that Mr Roberts' figures for battens and 20x45 F17 roof beams are unreasonable and ought to be changed.

OTHER TIMBER ITEMS

138 In respect of a very limited number of other items involving timber, the nature of the item is such that it is possible to attempt a valuation without running the risk of allowing a claim made by the builder where an allowance has already been made by Mr Roberts. These items are now dealt with.

Flooring (items 12.19, 12.20 and 12.52.2)

139 Mr Roberts had allowed for 70m² of flooring at a rate of \$39.53, or \$2,767. The builder's alternative costing indicated that he had used 23 sheets of panel flooring at a cost of \$920. **Mr Roberts' allowance of \$2,757 will be reduced to \$920.**

140 At item 12.20 Mr Roberts had made a negative allowance in respect of the failure to install flooring of \$118. As the builder's costing has been preferred over that of Mr Roberts, **Mr Roberts' negative allowance will be reversed to \$nil.**

141 The builder also claimed \$120 in respect of 3 sheets of flooring at \$40 each. As Mr Roberts' costing of \$2,767 for flooring at item 12.19 has been reduced to \$920, it is appropriate that the **builder be allowed to recover this further \$120 at item 12.52.2.**

Timber fascia (item 12.43)

142 The builder's claim in respect of timber fascia sheets is for \$1,092. The owners do not concede that Mr Roberts has not allowed for this item. They also dispute the builder's figure, and contend that the Tribunal should draw an adverse inference under *Jones v Dunkel* in the absence of any documentation being tendered by the builder. I decline to draw an adverse inference. However, I note that at item 12.43, Mr Roberts said that there were 'no fascias'. The builder did not cross-examine Mr Roberts when he gave evidence, and as the builder's alternative costing was made available so late that the owners were deprived of a reasonable opportunity to obtain Mr Roberts' comment on it, I accept Mr Roberts' evidence. **The builder's claim, at item 12.43, is rejected.**

Box gutter framing material (item 12.52.1)

143 The builder claims \$227. No allowance was made by Mr Roberts for this item. The owners again invite the Tribunal to draw an adverse inference under *Jones v Dunkel* in the absence of documentation, but I again reject this contention on the basis that box gutter framing material was clearly used. The owners in effect concede this as they say the relevant allowance is to be found within items 15.6 (roof box gutter), 15.7 (roof capping), 15.8 (roof downpipes), 15.9 (roof eaves gutter), and 15.10 (roof flashing). I do

not accept that any of these items include an allowance for box gutter framing material. **I accordingly allow \$227, on the basis that I find the builder's figure for item 12.52.1 is reasonable.**

RECTIFICATION OF THE BUILDER'S WORKS

Overview of Mr Roberts allowances for rectification

- 144 The owners' position is that the cost of rectification is to be deleted from the value of the work performed by the builder. I accept that this is appropriate when work is being assessed on a quantum meruit.
- 145 Starting at item 43.5, Mr Roberts made allowances for the installation of stumps 'after the floor to deck' of \$1,550, and the installation stumps 'after floor' of \$2,000. In addition, \$770 was allowed for the installation of sub insulation. In respect of plasterboard, \$4,401 was allowed for rectification work, \$5,000 for materials, and \$610 for bin hire. \$1,500 was allowed for new cylinders and locks, and a further \$440 for their installation. \$280 was allowed for rectification of plumbing in the kitchen, together with \$50 for materials. The total of all these items is \$16,601.
- 146 In addition to these specific items, Mr Roberts had allowed a provisional sum of \$15,000 for the costs associated with:
- (a) testing and replacement of existing work;
 - (b) paying for work that was already paid for by the owners but not by the builder;
 - (c) obtaining compliance certificates for:
 - (i) termite treatment;
 - (ii) roofing;
 - (iii) hydraulics; and
 - (iv) electrical work.
- 147 The upshot is that Mr Roberts allowed \$31,601 as the cost to the owners of having work performed by the builder rectified. I now turn to each of these items in turn.

Additional cost to install stumps after floor to deck (item 43.5)

- 148 Mr Roberts allowed \$1,550 in respect of the '[a]dditional cost to install [s]tumps after floor to deck'. As previously noted in connection with the assessment of the stump claim, the owners, in their submissions, concede that this entry should be deleted, and I have already indicated I agree.¹⁴ **Mr Roberts' negative allowance of \$1,550 at item 43.5 is to be reversed.**

¹⁴ See paragraph 59 above.

New stumps after the floor (item 43.6)

- 149 Mr Roberts also allowed \$2,000 in respect of installing new stumps after the floor had been laid.
- 150 At the hearing, the owners conceded that Mr Roberts' assessment of the number of stumps installed was wrong. They said that the total number of stumps required was 49, rather than 121. The owners said that 24 stumps had actually been put in. The owners contended that under the floor 20 extra stumps were required. At a cost of \$100 per stump including installation, the relevant figure was \$2,000.
- 151 I have found above that 47 stumps have been installed.¹⁵ This finding invites a consequential finding that only 2 further stumps need to be installed. However, I consider this to be a simplistic view, because the builder did not follow the engineer's initial plan, which required 8 lines of stumps to be installed. The builder installed 5 lines of stumps. There is, accordingly, a question as to whether from a structural point of view a sufficient number of stumps are in place. The owners say more stumps are needed, and put into evidence a quotation for \$3,700 from Donahue Constructions regarding the installation of extra stumps, which were said to be required 'due to over spanning'.¹⁶
- 152 I am not satisfied that the owners can recover the amount quoted, for a number of reasons.
- 153 Firstly there is no independent engineering evidence to support the contention that extra stumps are required due to over spanning. It is noted that the builder did not disregard the project engineer's requirements. For instance, in an email dated 28 June 2015¹⁷ he explained to Mr Nielsen that the engineer had requested that to span a distance of 2.4m, 120 x 45 lvl joists should be used. The builder confirmed he had used larger timber to span the same distance, namely 140 x 45 lvl. In these circumstances I am not satisfied more stumps are required.
- 154 Secondly, as the value of the builder's work is being assessed on a quantum meruit, the relevant enquiry is an assessment of the value of the work actually performed, taking into account defects. The value of work which has not been performed is not relevant. Only if the cost of completing work which is required – such as the installation of two new stumps – is impacted by the manner the builder has performed his work, will a consequential adjustment be made. In the present case, the fact that the floor has been installed will make it harder to install the two new stumps required. What the extra cost will be to install the stumps will have to be determined.
- 155 Valuation of this extra cost, ie, the marginal cost now, over and above the cost of installing the stumps if the floor had not been laid, is difficult as

¹⁵ Paragraph 57 above.

¹⁶ Quotation 112 dated 7 June 2016, part of Exhibit A22.

¹⁷ Exhibit A9.

there is no direct evidence of the issue. The Donahue Constructions quotation is not specific as to how many extra stumps are required, so there is no way of understanding what the rate per stump quoted is. Nor does the quotation throw any light on the possible extra cost involved in placing the stumps after the floor has been laid.

- 156 I find the appropriate allowance to be made is for 2 new stumps only. Doing the best I can on the available evidence, I also find that \$100 per stump, as assessed by Mr Roberts, is a reasonable allowance. **Mr Roberts' allowance of \$2,000 at item 43.6 is to be reduced to \$200.**

Additional subfloor installation (item 43.8)

- 157 Mr Roberts allowed \$770 for the 'additional cost' of installing 70m² of subfloor installation after the new floor had been installed. I comment that as Mr Roberts expressly referred to the cost as 'additional', it is legitimate to set it off against the value of the builder's work.
- 158 At the hearing, the builder initially argued that the subfloor installation was not allowed for in the contract, but later reversed his position, and conceded that Mr Roberts' allowance of \$770 was appropriate. **Mr Roberts' allowance is confirmed.**

Rectification of plasterboard (items 43.11, 47.12 and 43.13)

- 159 At item 43.11, **Mr Roberts estimated the cost of rectification of the plasterboard and ceilings at \$4,401**, based on 80 hours \$55.01 per hour. **He also allowed \$5,000 for materials (at item 43.12), and \$610 for bin hire (item 43.13).** One justification for the replacement of the plasterboard was that the builder had not installed insulation behind some of the plasterboard. This was referred to in an email from the owners to the builder dated 13 December 2015.¹⁸ The owners also assert that, at the inspection, damage to the plasterwork caused by saw cuts, by the electrician, by the plumber, and by water, was evident. The owners say also that the bathroom had been plastered before the rough-in had occurred. At the hearing, Mr Roberts confirmed that he had costed putting new plasterboard on all walls and ceilings.
- 160 As to justification of the costings, Donahue Constructions had on 7 June 2016 quoted for a number of items, including removing plaster and rehangings to internal walls due to water damage at a cost of \$960. The owners say that Donahue Constructions had already attended to the replacement of two walls. Presumably these were the walls quoted for.
- 161 The builder asserts that insulation had been placed on the internal walls. However, this evidence was not borne out by photos put in evidence by the owners.¹⁹ Also, the builder had nothing to say about the assertion in the owners' email of 13 December 2015 (referred to above) that all plastering

¹⁸ Exhibit A16.

¹⁹ Exhibit A16.

would have to be removed in order to install the insulation correctly as per the plans. The builder made no comment about these issues in his written submissions other than to refer to the estimate for rectification of plasterboard and ceilings and the estimate for bin hire as items that did not add up or make sense. In these circumstances I find that the failure to install insulation behind the plasterboard is a defect, and the owners are entitled to set off against the valuation of the builder's work the cost of rectifying the plasterboard.

- 162 As to assessment, I see no basis to alter Mr Roberts' valuation of \$4,401 in respect of rectification of plasterboard, or the \$610 allowed for bin hire.
- 163 The builder made no comment at all about the estimate of \$5,000 for materials.
- 164 **I find that the owners are entitled to a credit of \$4,401 in respect of the cost of rectification of plasterboard and ceilings, \$5,000 for materials and \$610 for bin hire. In other words, Mr Roberts' respective assessments for items 43.11, 43.12 and 43.13 are confirmed.**

Door hardware (item 43.20)

- 165 Mr Roberts allowed \$1,500 for the provision of new cylinders and locks, at item 43.20. He also allowed the sum of \$440 at item 43.21 for installation (8 hours at \$55 per hour).
- 166 The owners' position is that the builder did not hand over the keys to them at the completion of his involvement, and the keys all need to be changed for security purposes.
- 167 The builder challenged this. He said the changeover of locks at the end of a building job is standard, and this is not an expense that should be charged to him.
- 168 I consider the owners are entitled to be given possession of all the keys to their house in the builder's possession or control. **I will make an order to that effect.**
- 169 If the owners wish to change the locks in any event, that is a cost they must bear.

Rectification of the plumbing in the kitchen (items 43.23 and 43.24)

- 170 The issue here was that the plumbing did not line up with the refrigerator as installed. Mr Robert's assessment of the cost of rectification was \$280 for labour, and \$50 for materials.
- 171 The builder does not argue that as the owners were owner-builders they were responsible for the plumber. He accepts the plumber is his subcontractor. However, he raises a factual defence, saying that the plumber had asked the owners where to put the plumbing before he installed it. If the plumbing is wrong, he argues, it will have to be fixed as a variation.

- 172 I am not persuaded by the builder's response. He did not arrange for the plumber to give evidence, even by telephone or by swearing a statutory declaration. There is accordingly no direct evidence to support the proposition that the owners had directed the plumber.
- 173 A plumber subcontracted to a builder ought to be taking instructions from the builder, not from the owners. **I find against the builder in connection with this particular issue, and confirm Mr Robert's assessments of \$280 and \$50 respectively at items 43.23 and 43.24.**

Summary of rectification items claimed

174 **In summary, the owners are entitled to be credited with the following amounts in respect of the following items:**

- (a) installation of stumps after the floor to deck: \$nil;
- (b) installation of new stumps after floor: \$200;
- (c) installation of sub-floor insulation: \$770;
- (d) plasterboard rectification work: \$4,401;
- (e) plasterboard rectification materials: \$5,000;
- (f) plasterboard rectification bin hire: \$610;
- (g) new cylinders and locks: \$nil;
- (h) installation of new cylinders and locks: \$nil;
- (i) rectification of plumbing in the kitchen: \$280; and
- (j) materials: \$50.

The total of all these items is \$11,311.

Compliance certificate issues (items 44-44.5)

- 175 Provisional sums have been allowed by Mr Roberts for costs associated with:
- (a) testing/replacement of existing work;
 - (b) paying for work already paid for by the owners, but not by the builder; and
 - (c) obtaining compliance certificates for termite treatment, roofing, hydraulic and electrical work.
- 176 No evidence was given by or on behalf the owners as to the cost of testing or replacement of existing work, and so no finding can be made about this item.
- 177 No specific claim was pressed in respect of work allegedly paid for by the owners rather than the builder, and so no allowance can be countenanced for this item.

178 It remains to deal with the respective claims for provisional sums in connection with certificates.

Electrical certification

179 The builder claims \$4,200 for electrical rough-in. The issue of a compliance certificate is inherently bound up with that claim in the sense that when the electrical rough-in is completed, it will have to be certified by the completing electrician. No specific evidence as to the cost of obtaining such a certificate was given, in any event. No separate allowance will be made for an electrical compliance certificate here.

Plumbing certification

180 The builder claims \$4,750 in connection with plumbing rough-in. As with the electrical rough-in, once the plumbing rough-in is completed, it will have to be certified. And as with the electrical rough-in, no specific evidence as to the cost of procuring a compliance certificate was presented. No separate allowance will be made for a plumbing certificate either.

Roof plumbing certificate

181 It is possible that the owners will be able to obtain a certificate from the roof plumber for the constructed roof without difficulty. The owners gave no evidence about this, or about the likely cost to them of obtaining certification of the roof from another roof plumber. Accordingly, no allowance will be made for this item.

Termite treatment certification

182 The owners gave no evidence as to the likely cost of obtaining a certificate for termite treatment. There was no evidence from the builder that he had carried out termite treatment by the time the contract was brought to an end, and Mr Roberts made no allowance for this item. It follows that the owners will have to arrange for termite treatment of the house. They can obtain a certificate from the relevant contractor. The cost of obtaining that certificate is not an issue for the builder. This claim is accordingly disallowed.

Glazing certificate

183 No allowance for this item was made by Mr Roberts. At the hearing, the builder said that he can procure a glazing certificate. He has not done so.
An order will be made that the builder provide a certificate in respect of the glazing he installed.

Insulation certificate

184 As with the glazing certificate, no allowance for this item was made by Mr Roberts. Again, at the hearing, the builder said that this could be provided.

An order will be made that the builder provide a certificate in respect of the insulation he installed.

THE OWNERS' CLAIM FOR FULL REIMBURSEMENT OF THE FEES PAID TO MR ROBERTS

- 185 According to the owners' submissions, they paid fees to Mr Roberts of \$2,310. They claim from the builder not 50% of these fees, but 100%.
- 186 As Mr Roberts submitted his evidence in the form of a statement of an expert witness, engaged by the owners, his fees constitute a part of the owners' costs of the proceeding and must be claimed as such. I now turn to the owners' claim for costs.

THE OWNERS' CLAIM FOR COSTS

- 187 The owners contend they are entitled to an award of costs. Having regard to the fact that under s 109 of the *Victorian Civil and Administrative Tribunal Act 1998*, the default position is that each party is to bear their own costs, costs are to be reserved. Each party must be given an opportunity to make submissions about costs.

THE OWNERS' CLAIM FOR REIMBURSEMENT OF THE APPLICATION FEE AND HEARING FEES PAID

- 188 Any claim for reimbursement of the application fee and hearing fees paid can be made at the same time as an application for costs.

THE BUILDER'S COUNTERCLAIM

- 189 In his counterclaim the builder claimed for a number of items totalling \$49,025 as follows:
- (a) additional insulation to roof area: \$5,200;
 - (b) plaster works: \$12,400;
 - (c) front and rear decks: \$7,500;
 - (d) rough-in electrical: \$4,200;
 - (e) rough-in plumbing: \$4,750;
 - (f) old house plaster removal: \$9,700;
 - (g) gazebo tent tarpaulin: \$200;
 - (h) level floor to existing house: \$755;
 - (i) kitchen bulkhead: \$475;
 - (j) removal of asbestos eaves sheet: \$1,100;
 - (k) materials left on site: \$2,745.
- 190 These claims were pressed at the hearing, but the claim for removal of plaster was revised down to \$5,760 in the builder's schedule of costs filed in November 2016.

191 The basis of the builder's counterclaim was not explicitly stated by the builder in the document he lodged on 12 September 2016, but it is apparent that he is seeking \$49,025 in respect of:

- (a) work he says he performed which was outside the contract and hence not assessed by Mr Roberts;
- (b) work he says he performed which was either not costed at all by Mr Roberts, or assessed at a value lower than he claims; and
- (c) a gazebo tent tarpaulin, and materials, left on site.

192 Some of these items have been discussed. These items include the claims for the plasterworks, plaster removal and asbestos removal. In particular:

- (a) I confirmed Mr Roberts' positive allowances for plasterwork, totalling \$11,226 and declined to disturb and his two negative allowances of \$1,760 and \$500 respectively;²⁰
- (b) in respect of old house plaster removal, I rejected the builder's claim and confirmed Mr Roberts' assessment of \$1,169;²¹ and
- (c) I allowed \$540 for asbestos removal out of a claim for \$600²² and a further \$500 for the hire of an asbestos bin.²³

193 I now turn to the other items.

Roof insulation

194 The builder claims of **\$4,450 in respect of insulation** placed under the roof and **24 hours labour for installation** at \$45 per hour, or **\$1,080**. He gave detailed evidence about this. The work was clearly separate to making the roof. In particular, his evidence was that the roof had to be removed temporarily in order to place the insulation. The roof was then replaced. Three men, including the builder, were involved for a day. The builder was cross-examined and his evidence was not shaken. **I allow the claim for labour of \$1,080 in full.**

195 The owners point out that Mr Roberts, at item 15.11, referred to roof insulation and sarking. However, Mr Roberts made no allowance for these materials.

196 The owners also point out that in his final invoice, rendered on 10 February 2016, the builder claimed \$2,850 for insulation. The owners contend that this is a reference to roof insulation. I have reviewed the builder's claim and note that there is a separate claim for wall insulation of \$891. I therefore accept the owners' argument that the final invoice must be for roof insulation.

²⁰ See paragraph 76 above.

²¹ See paragraphs 93-99 above.

²² See paragraph 44 above

²³ See paragraph 49 above.

197 The builder did not explain why he has claimed for \$4,450 for insulation when he had invoiced only \$2,850 for it in the days after the termination. **I accordingly reject the builder's later claim for \$4,450, and allow the invoiced sum of \$2,850 for roof insulation.**

Front and rear decks - \$7,500

198 The builder's initial stance was at the front deck was not included in the contract price. This was a surprising position to take, given that the letter of 27 March 2015, which established the contract,²⁴ expressly required the builder to:

Build new front porch

Build sub floor to front porch. (Owners to lay decking of their choose) (sic).

199 When the builder was shown the contract, he agreed the front deck was included, as well as the rear deck.

200 I consider that when he agreed that the rear deck was part of the contract, the builder made no concession, as the letter of 27 March 2015 required the builder to build the sub-floor to the rear deck area, leaving it to the owners to supply and install the decking.

201 The builder then changed tack, saying neither of the decks had been invoiced or paid for.

202 The builder's attention was drawn to item 12.16 of Mr Roberts' valuation, where \$1,186 had been allowed for 120 x 35 F7 joists. He then agreed that item 12.16 incorporated the joists, and accordingly conceded this sum should be deducted from the counterclaim.

203 The owners, in their written submissions, say that the builder could not explain why he had not invoiced anything for the decks when he submitted his final claim on 10 February 2016. The owners contend that nothing should be allowed for the front and rear decks.

204 In circumstances where the builder has been given credit by Mr Roberts of \$1,186 in respect of the decking joists, and where a separate significant allowance has been made by me in respect of carpentry, I consider the builder's failure to include anything for the front and rear decks in his final invoice is telling. I find against the builder on this claim. **Nothing further will be allowed for the front and rear decks.**

Rough-in electrical - \$4,200 (item 28.2)

205 The builder says that he is entitled to be paid \$4,200 for having an electrician rough-in the electrical works. Mr Roberts, at item 28.2 of his schedule, had allowed \$4,700 for electrical works.

206 **The builder's figure is accepted, and Mr Roberts' figure, at item 28.2, is reduced from \$4,700 to \$4,200.**

²⁴ Exhibit A7.

Rough-in plumbing - \$4,750 (items 26.3 and 26.4)

- 207 The builder says that he is entitled to be paid \$4,750 in respect of the plumbing rough-in work. However, at the hearing, he did not produce a plumber's invoice.
- 208 Mr Roberts, at item 26.3 of his schedule, had allowed \$4,200 for the plumber and, at item 26.4, allowed \$500 for materials. The total is \$4,700. At the hearing, the owners, through their counsel, conceded the extra \$50.
- 209 **The upshot is that Mr Roberts' assessment of \$4,700 at item 26.3 is to be increased to \$4,250, and item 26.4 is confirmed at \$500.**

Gazebo tent tarpaulin - \$200 and materials left on site - \$2,745

- 210 At the hearing on 22 and 23 September 2016, the owners told the builder that he could collect his equipment and materials. That was not done by 12 November 2016, as evidenced by the owners' email to the builder of that date.²⁵ The owners, at the hearing on 5 December 2016, again confirmed to the builder that he could pick up his tarpaulin and materials but according to the owners' final submissions, filed on or about 14 December 2016, this had not been done. The builder is not entitled to damages in respect of the tarpaulin or other materials he has left behind. On the contrary, **the owners are entitled to an order that the builder collect his materials including the tarpaulin.** The owners are not entitled to an order for damages instead because they produced no evidence regarding the cost of removal of these items at the resumed hearing on 5 December 2016, even though they threatened to do so in their email of 12 November 2016.

Level floor to existing house - \$755

- 211 The builder claims \$755 as the cost of having the floor levelled in the old house. The owners dispute that this work was done, and demonstrated that they had had other contractors carry out work to level the floor.
- 212 The explanation is to be found in the builder's counterclaim in which he acknowledges that the owners had restumped the house before he started work. He says this delayed his start by 2 weeks. When he started the sub-floor and stumps he found the levels were out from one side of the house to the other side and he spent \$775 to adjust the levels.
- 213 I have already found that the builder is entitled to a substantial award in respect of carpentry. He has not attempted to explain why this work is different to general carpentry work. In the absence of any supporting details at all, I am not satisfied that the floor levelling work is over and above the scope of work already allowed for as carpentry. I find against the builder in respect of this claim.

²⁵ Exhibit A28.

Kitchen bulkhead - \$475

214 The owners concede that this is a variation to the contract. However, they say that the work has already been allowed for by Mr Roberts in his schedule as part of the carpentry framing work and the plasterwork. In respect of the carpentry aspect, I refer to and repeat the comments I made above in connection with the claim for floor levelling. Because the builder has not given any details as to who did the plasterwork, or when it was done, and has not provided any explanation as to why this is not covered by the general allowance for plasterwork, I reject the plasterwork aspect also. In summary, **I find against the builder on this claim.**

SUMMARY IN RESPECT OF COUNTERCLAIM

215 Accordingly, I find that allowance should be made for the following items which have not been assessed elsewhere:

• roof insulation materials	\$2,850
• roof insulation labour	\$1,080
• front deck and rear decks	\$nil
• gazebo tent tarpaulin and materials left on site	\$nil
• level floor of house	\$nil
• kitchen bulkhead	\$nil
Total	\$3,930

216 The remaining items claimed by the builder in his counterclaim have been reflected in Mr Roberts' elemental summary, as amended below, as follows:

- plasterworks – items 19.5, 19.7, 19.9 and 19.10;
- electrical rough-in – item 28.2;
- plumbing rough-in – items 26.3 and 26.4;
- old house plaster removal – item 2.8;
- removal of asbestos – items 2.22 and 2.28.

CONCLUSION

217 This conclusion completes my view of individual items. I now summarise my conclusions and findings in the Schedule which follows. I have replicated Mr Roberts' elemental summary and indicated where I have found that his assessments ought to be changed. Allowances for some new items claimed by the builder, but not addressed by Mr Roberts, are also included. Claims made by the builder which are not addressed in the Schedule totalling \$3,930 are referred to at paragraph 215 above.

218 It is to be noted that:

- (a) The value of the works in Mr Roberts' elemental summary as adjusted is \$100,806.
- (b) Margin of 10% is to be applied to the sum of \$100,806, and is calculated at \$10,081 (rounded-up).
- (c) The total of the assessed works plus margin is \$110,887.
- (d) The cost of rectification is \$11,311.
- (e) The net value of the assessed works plus margin less rectification is \$99,576.
- (f) The builder is entitled to \$3,930 in respect of the elements of his counterclaim, not already reflected in the Schedule.
- (g) The builder's total entitlement is therefore \$103,506.
- (h) Allowing for the \$144,500 already paid by the owners to the builder, the amount to be refunded by the builder to the owners is \$40,994.

219 I will made an order accordingly.

MEMBER C EDQUIST

SCHEDULE

CODE	DESCRIPTION	MR ROBERTS' ASSESSMENT	COMMENT	TRIBUNAL'S ASSESSMENT
	DEMOLITION			
2.4	Demolition of Carport	409	Builder's figure accepted	\$90
2.5	Timber Flooring including subfloor	46	No challenge	\$46
2.6	Deck including subfloor	259	No challenge	\$259
2.7	120 thick plaster partition	1,130	No challenge	\$1,130
2.8	Plasterboard	1,169	Claim for \$5,760 rejected	\$1,169
2.9	120 thick glass partition	53	No challenge	\$53
2.10	Eaves Lining	135	No challenge	\$135
2.11	Ceiling	791	No challenge	\$791
2.12	Roof Tiles	1,058	Claim for \$2,100 rejected	\$1,058
2.13	Roof tiles and Structure (Measured in Plan)	955	No challenge	\$955
2.14	Carpet	485	Builder's figures accepted	\$320
2.15	Vinyl	51	No challenge	\$51
			Total this page	\$6,057

2.17	Joinery Bench and Under Cupboards (Measured in Plan)	139	Builder's figure of \$720 adjusted, then accepted	\$536
2.18	Joinery Overhead Cupboards	72	No challenge	\$72
2.19 + 2.20	Doors + windows	226 + 161	Builder's figure substituted	\$360
2.22	Asbestos removal	No allowance	Builder's claim for \$600 partially allowed	\$540
2.27	Removal of framing	No allowance	Builder's claim for \$4,320 partially allowed	\$3,782
2.28	Asbestos bin	No allowance	Allowed	\$500
2.29	Skip bins	No allowance	Allowed	\$3,400
2.30	Removal of insulation	No allowance	Builder's claim for \$720 rejected	\$NIL
2.31	Dust masks	No allowance	Allowed	\$65
	CARPENTRY			
12.5	Drilling machine to excavate for stumps	368	Builder's claim allowed	\$485
12.6	Less stumps not installed or seen on site	-75	Reversed	\$NIL
12.7	25 Mpa Concrete to Pad Footing	281	No Challenge	\$281
12.8	Less those not installed or seen on site	(-116)	Reversed	\$NIL
12.9	Concrete Stumps	8,047 (149 Stumps)	Reduced (47 Stumps)	\$2,538
12.10	Less those not installed or seen on site	(-1,674)	Reversed	\$NIL
12.11	Less that client states are not under the building	(-1,080)	Reversed	\$NIL
12.13	2/90 x 45 F7 bearers	805	Claim for \$1,302 disallowed	\$805
12.14	Less those not installed or seen on site	(-393)	Confirmed	(-\$393)
			Total this page	\$12,971

12.15	90 x 63 LVL Hyspan Bearers	998	Claim for \$1660 rejected	\$998
12.16	120 x 35 F7 Joists	1,186	No challenge	\$1,186
12.17	120 x 45 LVL Hyspan Joists	3,236	Claim for \$3,390 disallowed	\$3,236
12.17.1	240 x 45 F7 Tpine	No allowance	Claim for \$1,036 rejected	\$NIL
	FLOORING			
12.19	Flooring	2,767	Builder's figure accepted	\$920
12.20	Less those not installed or seen on site	(-118)	Reversed	\$NIL
12.20.1	Glue and nails	No allowance	Allowed	\$300
12.25	90 x 35 studs	No allowance	Claim for \$2,116 rejected	\$NIL
12.26	MGP10 Pine 90 x 35 Double Stud	316	Builder's alternative claim rejected	\$316
12.27	Studwall 90 x 35 MGP10 at 450 centres	5,670	Builder's alternative claim rejected	\$5,670
12.29	MGP10 Pine 90 x 45 Double Stud	157	Builder's alternative claim rejected	\$157
12.3	Studwall 90 x 45 MGP10 at 450 centres	2,446	Builder's alternative claim rejected	2,446
12.32	Small Lintels not measured, framing measured over windows instead	\$NIL	Builder's claim for \$620 rejected	\$NIL
12.32.1	90 x 45 top and bottom plates	No allowance	Partially allowed	\$216
12.32.2	Noggins	No allowance	Builder's claim for \$560 rejected	\$NIL
12.37	ROOF AND CEILING FRAMING			
12.38	Additional Rafters to original roof	438	Builder's claim for \$2,059 rejected	\$438
12.38.1	Further rafters	No allowance	Builder's claim for \$2116 rejected	\$NIL
12.39	75 x 38mm graded battens	703	Builder's claim for \$1,680 rejected	\$703
			Total this page	\$16,586

12.39.1	20 x 45 F17 roof beams	No allowance	Builder's claim for \$990 rejected	\$NIL
12.43	Timber Fascias	No allowance	Builder's claim for \$1,092 disallowed	\$NIL
12.45	190 x 45 MGP10 beam(RB1)	2,768	No challenge	\$2,768
12.47	2 x 190 x 45 F17 HWD beam (B2)	225	No challenge	\$225
12.49	240 x 45 F17 HWD beam (B3)	2,000	No challenge	\$2,000
12.50	2/240 x 25 F17 HWD beam (B1)	294	No challenge	\$294
12.52.1	Box gutter framing material	No allowance	Allowed	\$227
12.52.2	3 sheets of flooring	No allowance	Allowed	\$120
12.52.4	Carpentry	No allowance	Rejected	\$NIL
13.2	2 x 190 x 45 F17 HWD beam (B3, B4)	742	No challenge	\$742
12.55	Weatherboard cladding	5,198	Builder's figure accepted	\$2,442
12.56	Sarking	465	Reduced	\$315
12.57	Insulation	891	Builder claimed \$891 at 14.12.1	\$891
12.58	Less those not installed or seen on site	(-1,589)	Reversed	\$NIL
14.1	Windows, Film, Curtains and Blinds			
14	Windows			
14.4	Quote to Supply Windows	11,837	Agreed	\$11,837
14.5	Install Windows	1,320	Allowed	\$1,350
14.12.1	Wall insulation	Allowed	\$891 claimed	\$NIL as already allowed at item 12.57
14.12.2	Roof insulation	Not allowed	Claim for \$4,450 reduced	\$2,850
14.12.3	Labour installing roof insulation	Not allowed	Allow	\$1,080
15.1	Roofing and Tanking			
15	Metal Deck Roofing			
15.4	Roof Area	13,677	Builder's claims for \$17,550 and \$3,000 rejected	\$13,677
15.5	Less works not done say 12.5%	(-1,710)	Confirmed	(-\$1,710)
15.6	Roof Box Gutters	Not allowed	Allowed	\$480
			Total this page	\$39,588

15.7	Roof Capping	181	No challenge	\$181
15.9	Roof eaves gutter	No allowance	Allowed	\$1,344
15.10	Roof Flashing	944	Increase allowance	\$1,152
17.3	DOOR FRAMES			
17.6	Door frames	611	No challenge	\$611
19.3	PLASTERBOARD LININGS			
19.5	10mm Plasterboard	5,244	Challenge dismissed (part of claim for \$12,400)	\$5,244
19.7	10mm Water Resistant Plasterboard	2,100	Challenge dismissed (part of claim for \$12,400)	\$2,100
19.9	Labour (relating to plasterboard)	(-1,760)	Confirmed	(-\$1,760)
19.10	Materials, plaster and X angles	(-500)	Confirmed	(-\$500)
20	Suspended Ceilings			
20.5	10mm Plasterboard (fixed to and including ceiling suspension system)	3,045	Challenge dismissed (part of claim for \$12,400)	\$3,045
20.6	10mm Plasterboard (fixed to and including bulkheads, or pelmet framing)	231	Challenge dismissed (part of claim for \$12,400)	\$231
20.8	10mm Water Resistant Plasterboard (fixed to and including ceiling suspension system)	606	Challenge dismissed (part of claim for \$12,400)	\$606
26	Hydraulics			
26.3 + 26.4	1.5 Weeks (60 hours) x 1 plumber + materials	4,200 + 500	Builder's claim for \$4,750 conceded	\$4,250 500
28	Electrical			
28.2	Quote	4,700	Builder claim for \$4,200 accepted	\$4,200
33.1	PRELIMINARIES			
33.5 + 33.6	General Foreman Less productivity	17,600 -\$13,200	Challenge dismissed	\$4,400
			Total this page	\$25,604

34	TOTAL TO WHICH MARGIN IS TO BE APPLIED		(page 36) \$6,057 (page 37) \$12,971 (page 38) \$16,586 (page 39) \$39,588 (page 40) \$25,604	\$100,806
34.1	Margin	10%	Claim for 12% rejected	10%
34.2	\$ Allowance for margin (10% x \$100,806)			\$10,801
	TOTAL VALUE OF WORKS PERFORMED INCLUSIVE OF MARGIN			\$110,887
	RECTIFICATION ITEMS			
43.5	Additional Cost to install Stumps after floor to deck	(-1,550)	Reversed	\$NIL
43.6	Additional Cost to install Stumps after floor	(-2,000)	Builder's challenge partially accepted	(-\$200)
43.8	Additional cost to install subfloor insulation after new floor installed	(-770)	Builder conceded this	(-770)
43.10	Plasterboard Linings & Ceilings			
43.11	Estimate of Rectification for Plasterboard & Ceilings	(-4,401)	Builder's defence rejected	(-4,401)
43.12	Materials	(-5,000)	Not challenged	(-5,000)
43.13	Bin	(-610)	Not challenged	(-610)
43.19	Door Hardware			
43.2	New Cylinders and Locks	(-1,500)	Builder's defence accepted	Nil
43.21	Install	(-440)	Builder's defence accepted	Nil
43.23	Kitchen plumbing supply in wrong spot	(-280)	Builder's defence rejected	(-280)
43.24	Materials	(-50)	Builder's defence rejected	(-50)
44.1	Compliance Certificate Issues			
44.2	Provisional Sum allowed for cost associated with either	15,000		

44.3	Testing implements of early work			No allowance
44.4	Paying for work that was already paid for by owners but not by builder			No allowance
44.5	Termite Treatment to obtain compliance certificate			No allowance
	Roofing			No allowance
	Hydraulic			No allowance
	Electrical work			No allowance
	Glazing			Builder to provide certificate
	Insulation			Builder to provide certificate
			Total allowed for rectification	(-\$11,311)