

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP873/2016

CATCHWORDS

Applicant (builder) and respondents (owners) entered two domestic building contracts for construction of two homes on adjacent blocks. Delay in construction of the works and disputes as to sums invoiced by the builder. Suspension of works by builder pending payment of outstanding invoices. Finding that the builder not entitled to the sums invoiced. Finding that the builder's claim and demand for invoiced sums, and suspension of the contracts, constituted a repudiation of the contracts. Finding that owners accepted the repudiation and terminated the contracts, as they were entitled to do.

Interpretation of (standard) contract clauses as to builder's entitlement to charge a builder's margin charge on provisional sums overrun and variations.

Consideration of builder's claimed entitlement to an extension of time. Finding the builder not entitled.

Consideration of section 40 Domestic Building Contracts Act, and agreement between the builder and the owners as to payment of fixing stage before fixing stage reached.

Finding that owners entitled to delay damages at general law, in addition to contract prescribed liquidated damages for delay.

Final orders to be made after submissions on interest.

APPLICANT	Oakmont Properties Pty Ltd (ACN 106 786 010)
RESPONDENTS	Duan Lan Zhang and Ling He
WHERE HELD	Melbourne
BEFORE	Senior Member M. Farrelly
HEARING TYPE	Hearing
DATE OF HEARING	2017 – October 31, November 1, 2, 3, 6, 10, 13, 14, 15. 2018 – April 23, 24, 26, 27, 30, May 1, 2, 3, 21, 22, December 14.
DATE OF ORDER	29 January 2019
CITATION	Oakmont Properties Pty Ltd v Zhang (Building and Property) [2019] VCAT 92

ORDER

- 1. The proceeding is listed for further hearing before Senior Member Farrelly at 10 AM on 25 March 2019 at 55 King Street Melbourne, with a half day allocated, for the purpose of hearing submissions on the question of interest.**

SENIOR MEMBER M. FARRELLY

APPEARANCES:

For Applicant: Mr B. Reid of Counsel for the first 9 days of the hearing; Mr P.J. Adams of Counsel thereafter.

For Respondents: Mr T. Sedal of Counsel.

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REASONS

INTRODUCTION

- 1 In 2013, the respondents (“**the owners**”) decided to build a new home on each of two neighbouring properties they owned in Balwyn, 7 Page Street and 9 Page Street. The owners speak very little English, and they entrusted the management of the project to their son, Alex Zhang (“**Alex**”), who would act as their agent.
- 2 The owners obtained architectural drawings from ‘Planning Design P/L’ and engineer drawings from ‘BK Consultant Engineers’ (“**the engineer**”). Mr Ramadan of ‘Permit Point Building Consultants’ (“**the RBS**”) was engaged as the relevant building surveyor for the purpose of issuing necessary permits and carrying out required inspections.
- 3 Alex sought a quotation from the applicant (“**the builder**”) for construction of the proposed new homes. Alex discussed the project with Mr Just, the director of the builder.
- 4 Several quotations were prepared as Mr Just and Alex negotiated a price. Agreement was eventually reached on the builder’s quotation dated 23 April 2014 (“**the contract quotation**”) which confirmed the price of \$2,135,000 for construction of the two new homes, \$1,075,000 for 9 Page Street and \$1,060,000 for 7 Page Street. The contract quotation generally sets out the works specifications including certain *inclusions* and *exclusions* in the contract price. It also sets out the allowances for a substantial range of *prime cost* and *provisional sum* items.
- 5 On or about 29 April 2014, Alex (as agent for the owners) and the builder signed a building contract for each of the proposed new homes (**the contracts**). Each contract document is the standard form ‘New Home Contract’ document, edition 2007, produced by the Master Builders Association. Save for the contract price, \$1,075,000 for 9 Page Street and \$1,060,000 for 7 Page Street, and the construction period, the terms of the contracts are the same. Each of the contracts references the contract quotation as a contract document.
- 6 The contracts provided for a construction period of 12 months for the home to be constructed at 9 Page Street, and 14 months for the home at 7 Page Street. The contracts also provided that there would be “*Nil*” liquidated damages for delay in completion of the works.
- 7 Works commenced on around 11 July 2017.
- 8 The progress of the works was considerably slower than expected. The builder says delays were caused or exacerbated by the variations to the works as requested by the owners, and also by the owners’ delay in finalising the selection of some provisional sum/prime cost items. The

owners dispute this. They say the builder was involved in a number of other building projects and was responsible for the delays.

- 9 On 11 November 2015, Mr Just, Alex and Alex's father met on site to discuss a number of matters, including the owners' concern as to the delay in progress of the works and the builder's concern as to payment for accruing "extra" costs, that is the extra cost of prime cost and provisional sum items over and above the provisional allowance in the contracts ("**provisional sums overrun**"), and the extra cost of variation works. The parties discussed revised completion dates for the building works, the application of liquidated damages if the revised dates were not met, and arrangements for further payments to the builder. Agreement on matters discussed at the meeting was confirmed in subsequent email correspondence between the parties. The revised completion dates were 14 December 2015 for 9 Page Street and 15 February 2016 for 7 Page Street.
- 10 Unfortunately, the amended timeframes were not met.
- 11 An Occupancy Permit for 9 Page Street was issued on 21 December 2015, and the works at 9 Page Street were close to completion, with only a small number of minor items of work to be carried out, by the end of February 2016.
- 12 The works at 7 Page Street were some way behind.
- 13 The builder issued further payment claims, including significant claims for variation works and provisional sums overrun. The parties fell into dispute, particularly in respect of the builder claiming a builder's margin charge as part of the charge for variation works and provisional sums overrun. The owners say that when the contracts were entered, it was agreed that no such margin charge would be made. They say also that the contracts do not allow for such charge. The parties were also in dispute as to the owners' claimed entitlement, pursuant to the agreement reached in November 2015, to an allowance in their favour for liquidated damages for delay.
- 14 On 10 March 2015, the builder suspended works pending payment of invoices issued by the builder up to that time. The total outstanding sum claimed was \$214,390.
- 15 The builder carried out no further works and the owners made no further payments. The contracts were terminated. There is dispute as to how, when and by whom the contracts were terminated. There is considerable correspondence in this regard between the parties' lawyers.
- 16 The owners subsequently completed the remaining items of work to complete 9 Page Street, including two items required by the RBS.
- 17 The owners also subsequently completed construction of 7 Page Street as 'owner-builders'.
- 18 7 Page Street was sold at auction on 8 October 2016 for \$3,690,000, with settlement occurring on 3 November 2016.

- 19 The owners, with their daughter and grandchildren, occupied 9 Page Street for a short period from around November 2016 to early February 2017. The 9 Page Street home was sold at auction in early April 2018 for \$3,740,000.
- 20 The builder commenced this proceeding on 4 July 2016. The owners commenced their counterclaim on 3 March 2017.

THE BUILDER'S CLAIMS

- 21 The builder makes a number of assertions against the owners:
 - a) failure to pay the outstanding invoices;
 - b) failure to provide satisfactory evidence of capacity to pay the contract price in answer to the builder's request dated 16 March 2016;
 - c) wrongfully demanding liquidated damages;
 - d) wrongfully purporting to terminate the contract;
 - e) wrongful '*actual, attempted or purported withdrawal, cancellation, infringement or restriction, of the applicant's free and uninterrupted access to and occupation of the Project.*'¹
- 22 Initially the builder claimed the sum outstanding on invoices, \$214,390, as damages arising on breach of contract, or alternatively as restitution for unjust enrichment. Alternatively, the builder claimed damages on a quantum meruit basis in the sum of \$938,779. By its latest pleading, its Second Further Amended Points of Claim which was filed pursuant to leave granted by me during the course of the hearing on 24 April 2018, the builder's claim was amended to:
 - a) a claim for damages in the sum of \$170,823 as restitution for unjust enrichment in respect of works carried out and not paid for;
 - b) alternatively, damages on a quantum meruit basis in the sum of \$894,256;
 - c) alternatively, \$204,628.05 as the value of the works, over and above the sum of total payments made by the owners, completed by the builder. (This figure includes the \$170,823 referred to in paragraph (a) above, plus \$33,805.05 for further works allegedly progressed but not invoiced by the builder);
 - d) interest and costs.

THE OWNERS' CLAIMS

- 23 The owners assert that the builder breached the contract by demanding and receiving payments to which it was not entitled, and by wrongfully suspending the contracts. The owners say the builder's breaches were repudiatory, and that the owners were entitled to accept the builder's

¹ Paragraph 36 (d) (iii) in the applicant's Second Further Amended Points of Claim dated 24 April 2018.

repudiation and bring the contracts to an end, which they say they did on 14 April 2016.

24 By their latest pleading, their Further Amended Defence and Counterclaim and Amended Particulars of Loss and Damage which were filed pursuant to leave granted by me during the course of the hearing on 30 April 2018, the owners claim:

- a) a refund of the 7 Page Street fixing stage payment, \$265,000, paid by the owners on 16 November 2015. The owners say the fixing stage was never reached and, as such, the builder had no entitlement to demand or receive the payment;
- b) \$164,185.50 as the alleged cost, over and above the contract price for 7 Page Street, incurred by the owners to complete the contract works at 7 Page Street;
- c) \$4301.76 as the cost of works carried out by the owners to 9 Page Street after the termination of the contract.
- d) \$54,598 as the cost, in respect of 9 Page Street, assessed by the owners' expert witness Mr Ryan to rectify defective works and to bring the works to conformity with the contract;
- e) Delay damages:
 - Common law damages for delay:
 - i. \$94,228.57 as lost rental in respect of 7 Page Street for the period 28 August 2015 (the alleged original due completion date) to 19 September 2016, the date the owners completed construction of the home; and
 - ii. \$101,750 as lost rental in respect of 9 Page Street for the period 28 May 2015 (the alleged original due completion date) to 16 June 2016, the date the owners completed works to the satisfaction of the RBS;
 - Further or alternatively, delay damages of \$203,483.37 (\$138,212.24 in respect of 9 Page Street and \$65,271.13 in respect of 7 Page Street) as interest incurred on loans to finance the construction project;
 - Further or alternatively, liquidated damages pursuant to the November 2015 agreement for the period from the agreed due date for completion of the works to the owners' termination of the contracts on 14 April 2016. The sums claimed are \$42,142.86 in respect of 7 Page Street and \$48,571.43 in respect of 9 Page Street;
- f) interest and costs.

25 In relation to the owners' claim for a refund of the fixing stage payment for 7 Page Street, the builder says that fixing stage was reached, save for minor matters. The builder says further that the owners waived compliance with

the progress payment schedule in the contract in respect of the fixing stage payment. That is, as part of the matters agreed in November 2015, the owners agreed to make the fixing stage payment even though fixing stage was not reached.

THE HEARING

- 26 The hearing was conducted over 19 days in the period October/November 2017 and April/May 2018. Extensive written closing submissions and reply written submissions were received by 29 November 2018. The proceeding concluded with a final day to hear closing submissions on 14 December 2018.
- 27 The builder was represented by Mr Reid of Counsel in October/November 2017, and thereafter by Mr Adams of Counsel. The owners were represented by Mr Sedal of Counsel.
- 28 Mr Just gave evidence for the builder.
- 29 For the owners, most of the lay evidence was given by Alex. Each of the owners also gave brief evidence through the aid of a mandarin interpreter.
- 30 A view of 9 Page Street was conducted on day 9 of the hearing, 15 November 2018.
- 31 Concurrent expert evidence was given in three separate stages:
 - a) Consultants Mr Senogles (called by the builder) and Mr Andrews (called by the owners) gave evidence in respect of delay in the construction of the homes. Their different conclusions were founded on different methodologies for assessing/calculating delays in building projects. They also produced written reports.
 - b) Consultants Mr Nguyen and Mr Berkowitz (called by the owners) and Mr Garrard (called by the builder) gave evidence in respect of the costs incurred by the owners to complete works at 9 Page Street and 7 Page Street. Mr Garrard and Mr Berkowitz also gave evidence as to a quantum meruit assessment of all the building works carried out by the builder. The consultants also produced written reports.
 - c) Building consultants Mr Lorich and Mr Garrard (called by the builder) and Mr Ryan (called by the owners) gave evidence as to the alleged remaining defective/non-compliant works at 9 Page Street. They also produced written reports. Mr Lorich and Mr Ryan attended the view of 9 Page Street on day 9 of the hearing.
- 32 Mr Carozza, a licensed real estate agent called by the owners, gave expert evidence as to the rental value of 7 Page Street and 9 Page Street. He also produced a written report.

SECTION 40 DOMESTIC BUILDING CONTRACTS ACT 1995

33 Section 40 of *Domestic Building Contracts Act 1995* (“the Act”) provides:

40 Limits on progress payments

(1) In this section—

base stage means—

- (a) in the case of a home with a timber floor, the stage when the concrete footings for the floor are poured and the base brickwork is built to floor level;
- (b) in the case of a home with a timber floor with no base brickwork, the stage when the stumps, piers or columns are completed;
- (c) in the case of a home with a suspended concrete slab floor, the stage when the concrete footings are poured;
- (d) in the case of a home with a concrete floor, the stage when the floor is completed;
- (e) in the case of a home for which the exterior walls and roof are constructed before the floor is constructed, the stage when the concrete footings are poured;

frame stage means the stage when a home's frame is completed and approved by a building surveyor;

lock-up stage means the stage when a home's external wall cladding and roof covering is fixed, the flooring is laid and external doors and external windows are fixed (even if those doors or windows are only temporary);

fixing stage means the stage when all internal cladding, architraves, skirting, doors, built-in shelves, baths, basins, troughs, sinks, cabinets and cupboards of a home are fitted and fixed in position.

(2) A builder must not demand or recover or retain under a major domestic building contract of a type listed in column 1 of the Table more than the percentage of the contract price listed in column 2 at the completion of a stage referred to in column 3.

Penalty: 50 penalty units.

TABLE

Column 1	Column 2	Column 3
<i>Type of contract</i>	<i>Percentage of contract price</i>	<i>Stage</i>
Contract to build to lock-up stage	20%	Base stage
"	25%	Frame stage
Contract to build to fixing stage	12%	Base stage
"	18%	Frame stage
"	40%	Lock-up stage
Contract to build all stages	10%	Base stage
"	15%	Frame stage
"	35%	Lock-up stage
"	25%	Fixing stage

- (3) In the case of a major domestic building contract that is not listed in the Table, a builder must not demand or receive any amount or instalment that is not directly related to the progress of the building work being carried out under the contract.

Penalty: 50 penalty units.

- (4) Subsections (2) and (3) do not apply if the parties to a contract agree that it is not to apply and do so in the manner set out in the regulations.
- (5) If a court finds proven a charge under subsection (2) or (3) against a builder, it may order the builder to refund to the building owner some or all of the amount the building owner has paid the builder under the contract. ...

EVENTS UP TO 7 MARCH 2016

- 34 The contracts were signed on 29 April 2014. The contracts provided for payment of a deposit followed by monthly progress payments.
- 35 On about 29 April 2014, the owners made a deposit payment of \$25,000.
- 36 Sometime after the deposit payment was made (the parties cannot recall the exact date), the parties agreed to amend the contracts so that progress payments would be made, not on a monthly basis, but rather in accordance with the standard regime as set out in section 40 of the Act. This amendment was made to meet the requirement of the owners' bank, Westpac, which was providing finance for the project.
- 37 The contracts, as amended, provided for a deposit payment of 5% of the contract price, and subsequent stage payments in compliance with section 40(2) of the Act, namely:
- base stage 10%
 - frame stage 15%

- lock-up stage 35%
- fixing stage 25%

38 The contracts also provided that the remaining 10% of the contract price was to be paid upon completion of the works.

39 As to the construction period, in early April 2014 the builder had prepared a works program setting out construction time estimates including:

- commencement of site works on around 5 May 2014
- commencement of construction of the home at 9 Page Street on 22 July 2014, with a completion date of 23 April 2015;
- commencement of construction of the home at 7 Page Street on 25 July 2014, with a completion date of 3 August 2015;

The works program assumed that site works, demolition and ground slab construction would occur at 9 Page Street and 7 Page Street at approximately the same time. Thereafter, there would be a lag of approximately three months between works carried out first at 9 Page Street, and subsequently at 7 Page Street. The proposed new homes, although not identical, were similar. The three months lag between the two homes reflects the intention that the builder's trade sub-contractors would complete tasks at 9 Page Street first, and then move on to 7 Page Street. This construction program is not referenced in the contracts. The builder emailed the program to Alex in early May, after the contracts were signed.

40 In the copy of the 9 Page Street contract provided to the Tribunal, a total construction period of 365 days is specified. In the copy of the 7 Page Street contract provided to the Tribunal, the total construction period specified is not visually clear, although it appears to be 14 months. As I understand it, there is no dispute between the parties that the contract for 7 Page Street specifies a construction period of 14 months.

41 Although the RBS issued a building permit for 9 Page Street on 24 January 2014, an amended permit was required to reflect changes to the architectural drawings made at the request of the owners. The amended building permit for 9 Page Street and the building permit for 7 Page Street were issued by the RBS on 14 May 2014.

42 The owners say that, pursuant to the terms of the contracts, the commencement date for the works for both 7 Page Street and 9 Page Street was 28 May 2014, that being 14 days after the issue of the building permits.

43 I accept the evidence of Mr Just that, after the issue of the building permits, commencement of the works was delayed while the owners arranged for the termination of the electricity and gas services to the existing old homes on the properties. The builder says that, by reason of this delay, work did not commence until around 11 July 2014. The owners do not dispute that there was delay while they finalised the termination of utility services to the old buildings.

- 44 On the evidence before me, I find 11 July 2014 to be the commencement date for the contract works at both 9 Page Street and 7 Page Street.
- 45 With the 9 Page Street contract specifying a construction period of 365 days, the due date for completion of the 9 Page Street contract works was 10 July 2015. With the 7 Page Street contract specifying a construction period of 14 months, the due date for completion of the 7 Page Street contract works was 10 September 2015.
- 46 By email from the builder to Alex dated 6 October 2014², the builder stated:
- Apart from the demolition which was 1 month late, the works since then are about 2 – 3 days ahead of the program.
- So this would have #9 [9 Page Street] finishing in early July, and #7 [7 Page Street] finishing around the 10th of October
- 47 By email from the builder to Alex dated 27 November 2014³, the builder stated:
- (Taking into account the delayed start to the demolition)
- #9 Page- is still keeping track with the program which indicated completion by end of June. This looks like a very achievable target.
- #7 Page... was initially programmed to finish 3 months behind #9, i.e. end of September. But now that you don't need to separate completion of the 2 homes, I can aim to pull this forward a little. End of August should be targeted.
- 48 As at the date of the second email, 27 November 2014, the builder had issued, and been paid, payment claims up to and including the *frame* stage for 9 Page Street, and the *base* stage for 7 Page Street. It is apparent from the email of 27 November 2014 that, at that time, the builder considered the works were progressing in a timely manner.
- 49 However, thereafter the progress of the works fell considerably behind the intended schedule.
- 50 On 30 January 2015, the builder issued the *frame stage* payment claim, \$159,000, for 7 Page Street. For reasons which are not entirely clear, the owners made a payment in the sum of \$51,685 on 5 February 2015, and a further payment of \$159,000 on 12 February 2015. (As noted below, the overpayment of \$51,685 was corrected when the subsequent *lock-up* stage claim for 9 Page Street was issued). The *frame stage* claim was premature as the RBS did not approve the frame until 11 May 2015. Even then, the approval was provided on the condition that the porch was to be completed at a later stage.
- 51 On 12 March 2015, the builder issued the *lock-up* stage claim for 9 Page Street in the sum of \$324,565. Under the contract, the lock-up stage payment (35% of the contract price) should have been \$376,250. The lesser

² Tribunal Book Page 1081.

³ Tribunal Book Page 1086.

sum was claimed as a means of rectifying the above-mentioned overpayment of \$51,685 in respect of the 7 Page Street *frame* stage claim. The owners paid the sum claimed in two stages, \$295,059 paid on 19 March 2015 and the balance of \$29,506 paid on 1 April 2015.

- 52 On 11 May 2015, the builder issued the *lock-up* stage payment claim for 7 Page Street, \$371,000. The claim was paid in full by the owners on 19 May 2015.
- 53 On 13 July 2015 the builder issued the *fixing* stage payment claim for 9 Page Street, \$268,750. The owners paid the claim in full on 16 July 2015.
- 54 On 17 October 2015, the builder issued a payment claim for 7 and 9 Page Street, invoice number 11, in the sum of \$100,000. The invoice describes the progress payment as being for “*Extra-Over Provisional Sums, Progress Contribution*”. Accompanying the payment claim was an email from the builder to Alex dated 17 October 2015 with an attached spreadsheet. The spreadsheet sets out the allowances specified in the contracts for provisional sum/prime cost items, which together are noted as ‘provisional’ items, totalling \$720,757. The spreadsheet also sets out the cost of ‘provisional’ items allegedly actually incurred by the builder up to that time, \$909,326.91. The difference between the two figures, \$188,570, is the provisional sums overrun identified by the builder at that time.
- 55 I note, for clarity, that that in communications with the owners, including progress claims, spreadsheets and invoices, the builder used the term ‘provisional sums’ as a collective reference to both *provisional sum* items and *prime cost* items under the contracts. Also, the term ‘extras’ was frequently used to reference the extra cost of variation works and provisional sums overrun.
- 56 The email accompanying the invoice and spreadsheet states:

Attached is a spreadsheet tallying the Provisional Sums on the project. I’ve updated it as best I can. There are still a few items where costs are unknown or being finalised. But it’s as accurate as I can get it at the moment.

The bottom line shows:

Original Provisional Sums: 720,757

Current Provisional Sums 909,326

Additional amount: \$188,570

I’m also tidying up the tally of other additional items. I still have a little work to make them presentable & understandable. It looks like these will be touching on \$40k. Items like: bulkheads, plaster columns, balcony frame, framing items, rangehood ducts, balcony doors. I’ll hope to get the list to you during the week.

I’ve attached an invoice for \$100k. If you could manage to stretch a payment for this, it would be greatly appreciated.

- 57 Neither the email, the spreadsheet or the invoice make any reference to, or allowance in respect of, a builder's margin on the provisional sums overrun sum.
- 58 The owners made part payment, \$50,000, of this invoice on 20 October 2015.
- 59 On 6 November 2015, the builder issued the *fixing* stage payment claim for 7 Page Street - invoice number 12, in the sum of \$265,000. Accompanying the claim was an email from the builder to Alex dated 6 November 2015, wherein the builder states amongst other things:
- I am just forwarding this claim to you fractionally ahead of time due to banks often showing a degree of lethargy in processing stage-payment claims.
- We are "all but" to the point of the fixing stage claim for number #7 with only the installation of the bench tops to the joinery to get us to that point.
- The prompt payment of this claim will not only be appreciated but will also help to expedite works at both 7 & 9 PAGE, which is in everyone's interest.
- 60 As discussed later in these reasons, as at 6 November 2015 the works required to reach fixing stage at 7 Page Street were considerably more than just the installation of bench tops. Fixing stage at 7 Page Street was in fact *never* reached by the builder.
- 61 On 7 November 2015, Alex sent a response email to the builder wherein, amongst other things:
- he confirmed that he had inspected the project that day;
 - he expressed his disappointment at the slow progress of works;
 - he expressed his offence at the terms of the builder's email of 6 November 2015, which he took to be a threat that works would be delayed if the fixing stage payment claim was not submitted to the bank immediately, even though fixing stage was not yet reached.
- 62 The builder responded with an email later that day, 7 November 2015, in which the builder commented that the early request for the fixing stage payment should be considered in light of payments for "additional works" not yet made. By "additional works", the builder meant the provisional sums overrun and variation works.

The November 2015 agreement

- 63 The parties agreed to meet on site to discuss matters. The meeting took place on 11 November 2015. Attending the meeting was Mr Just for the builder, Alex and Alex's father, Mr Zhang. Alex provided language translation for his father. As at the date of this meeting:

- a) the builder had issued, and been paid, stage payment claims up to and including *fixing* stage for 9 Page Street, and stage payment claims up to and including *lock-up* stage for 7 Page Street;
- b) the builder had issued, and been paid, a *variation* claim in the sum of \$1,815 in respect of rock breaking in September 2014;
- c) the builder had issued the payment claim on 17 October 2015 in the sum of \$100,000 for part payment of accruing provisional sums overrun cost. On 20 October 2015, the owners made part payment, \$50,000, of this payment claim.
- d) the builder had issued the *fixing* stage payment claim for 7 Page Street in the sum of \$265,000, albeit that fixing stage had not been reached. The owners had not paid that claim.

64 At the meeting, the parties inspected the works, discuss their concerns, and reached agreement on a number of matters.

65 The following day, 12 November 2015, the builder sent an email to Alex setting out matters discussed and agreed at the meeting:

Hi Alex,

As requested, following is a quick summary of our discussions yesterday.

Regarding timing for completing the works:

At #9 Page, I have a programme in place to achieve Occupancy Certificate by 30 November and full completion by 14 December.

A penalty rate of \$2500 per week was agreed for me failing to meet these timeframes.

At 7 Page, I have a programme in place to achieve Occupancy Certificate by 18 December and full completion by February 15.

A penalty rate of \$2500 per week was agreed if the OC not received by 21 January or full completion not finished by February 15.

Regarding progress payments:

On the basis that I am making every effort to achieve the above dates, you offered:

- to make a further \$50k payment this week towards the accumulated Provisional Sum Overruns +/-Extras.
- To attempt to have the bank process the 7 Page fit-off claim to paid by end of next week.
- If the fit-off claim is not completed by next week, then you would make a further \$50k payment towards the 'extras', and the fit-off claim would be processed at the time approved by the bank.
- After completion of the OC at #9 Page, we will get the overall payments for 'extras' to be pro-rata with where they should be.

Hopefully this reflects the discussion.

Please excuse any clumsily written sentences.

I know I'm looking forward to 'smooth sailing' from here.

PS: Adriatic measured & took templates for #7 today as well as #9
BBQ.

66 There is no dispute that reference to the '*fit-off claim*' in the above email is a reference to the *fixing stage* claim for 7 Page Street. There is also no dispute that reference to '*extras*' is a reference to the extra cost of provisional sums overrun and variation works.

67 Three days later, on 15 November 2015, Alex sent the following response email to the builder:

Hi Steve,

Thanks preparing the amended contract term and your proposal is accepted.

For clarity around 7 Page Street, you will book in an inspection no later 18th of December before the building surveyor breaks for Christmas in an attempted [sic] to achieve Occupancy Certificate by 2015.

In addition please find attached following:

1. Payment receipt for \$50,000 towards PS's as agreed.
2. Wrought iron design for 7's balcony and window wrap around.
3. Wrought iron design for the staircase rail
4. Urn that is to go in both front gardens of 7 and 9, please ask the electrician to have some lights for it as per image.

There are few minor matters

1. Can we add an air vent for the study?
2. Garage door to be stained same colour as the entry door, not clear stain.
3. Design of the fencing for 7 is to be more closely follow the Fairmont Av image that I sent earlier.
4. I have also ordered and paid 20% deposit for the mirrors for each of the house, 9 will be ready by Thursday this week, price includes delivery, which you should be included in the email from the supplier.
5. Westpac have promised me to process the payment for fixing by Wednesday.

Lastly, I'm at the airport heading to Shanghai for urgent family matter, I'll be returning on Friday this week. I am contactable on email and phone on a different number 0434

My dad's number is 0403 ... if you need something done urgently.

Hope everything goes to plan from now and good luck with your Severn Street.

- 68 Reference to '*Severn Street*' in the above email is a reference to an unrelated building construction project, the construction of a home in Severn Street Balwyn, that the builder was also working on at that time.
- 69 In my view, the builder's email of 12 November 2015 and Alex's response email of 15 November 2015 confirm agreement between the builder and the owners that:
- a) the due date for completion of the contract works under the 9 Page Street contract was amended to 14 December 2015;
 - b) the due date for completion of the contract works under the 7 Page Street contract was amended to 15 February 2016;
 - c) under each of the contracts, the sum of liquidated damages in favour of the owners for late completion of the works was amended from "Nil" to \$2500 per week;
 - d) the owners agreed to make a further payment of \$50,000 towards accumulated provisional sums overrun (\$50,000 being the balance outstanding on the above-mentioned builder's invoice number 11 issued 17 October 2015); and
 - e) the owners agreed to attempt to expedite release of funds from Westpac to enable payment of the 7 Page Street *fixing* stage claim issued on 7 November 2015, albeit that the fixing stage had not been reached. In the event that fixing stage payment could not be expedited, the owners agreed to make a further additional payment of \$50,000 towards "extras". (As noted above, "extras" means the cost of variation works and provisional sums overrun).
- ("the November 2015 agreement")**
- 70 In accordance with the November 2015 agreement:
- a) On 15 or 16 November 2015 (the precise date is not clear), the owners made a further payment of \$50,000 to the builder; and
 - b) the owners were able to expedite release of funds from Westpac which enabled payment of the *fixing* stage claim for 7 Page Street, \$265,000, on 16 November 2015.
- 71 There is nothing in the November 2015 agreement as to any entitlement to the builder to charge a builder's margin on provisional sums overrun or the cost of variation extra works.
- 72 On 17 November 2015, the RBS notified the builder that the RBS required certification from the engineer as to the adequacy of the foundations to the retaining walls and the front fence at 9 Page Street.⁴

⁴ RBS email to the builder 17 November 2015, Tribunal Book page 1188.

- 73 On 4 December 2015, the builder made application to the RBS for the issue of an Occupancy Permit for 9 Page Street. For clarity I note that references by the parties to ‘Occupancy Permit’, ‘Occupancy Certificate’ and ‘Certificate of Occupancy’ are all references to the Occupancy Permit to be issued by the RBS.
- 74 An Occupancy Permit for 9 Page Street was issued by the RBS on 21 December 2015. On the same date, 21 December 2015, the RBS also issued:
- a) a ‘Building Order for Minor Work’ for 9 Page Street. The order required minor works – alteration to windows in two of the bedrooms from fixed windows to openable windows. The builder had installed fixed windows as noted in the construction drawings prepared by the architect, Planning Design P/L. The RBS required the windows to be openable to provide satisfactory ventilation; and
 - b) a ‘Building Notice’ in respect of the retaining wall at 9 Page Street. As noted above, the RBS had previously called for engineer certification of the foundations to the retaining wall. The certification had not been provided. The Building Notice addressed this issue, requiring the owners to show cause why, in the absence of the required certification, the retaining wall should not be demolished.

Invoice 13 issued 20 January 2016 - builder’s margin charge

- 75 On 20 January 2016, the builder issued a payment claim, invoice number 13, in the sum of \$152,045 (inclusive of GST) in respect of variation extra works and provisional sums overrun for 9 Page Street and 7 Page Street. The invoice was emailed to Alex together with a brief summary of the variation extra charges incurred up to that time totalling \$104,350, and a spreadsheet setting out the provisional sum items.
- 76 Like the spreadsheet that accompanied the prior invoice number 11 on 17 October 2015, the spreadsheet identifies the contracts allowances for provisional items, totalling \$720,757. The actual incurred cost of provisional items is identified as \$915,261.17. The difference between the two sums, \$194,504.17, is the provisional sums overrun that is also identified in the spreadsheet.
- 77 However, unlike the prior spreadsheet of 17 October 2015, the spreadsheet of 20 January 2015 includes an extra allowance for builder’s margin on the provisional sums overrun. The margin allocated is 15%. The 15% allowance, \$29,176, increases the total provisional items overrun cost from \$194,504.17 to \$223,680.
- 78 As noted above, accompanying the invoice was a brief summary of the variation charges incurred up to that time, totalling \$104,350. Although it is not readily apparent from that summary, the sum also includes a builder’s margin allowance of 15%.

- 79 The builder calculated the sum of the invoice 13, \$152,405, by a novel methodology, which I explain as follows:
- The allocation for both 7 Page Street and 9 Page Street for variations extras, \$104,350, and provisional sums overrun, \$223,680, together total of \$328,030;
 - the \$328,030 is allocated evenly between 9 Page Street and 7 Page Street, that is \$164,015 each;
 - of the \$164,015 attributable to 9 Page Street, the builder considered 90% thereof, \$147,614, as due and payable. The builder considered 90% to be appropriate because, in respect of the progress stage of works, fixing stage had been reached, leaving only the final 10% completion stage yet to be completed;
 - of the \$164,015 attributable to 7 Page Street, the builder considered 65% thereof, \$106,610, as due and payable. The builder considered 65% to be appropriate because, in respect of the progress stage of works, lock-up stage had been reached, with fixing stage and completion stage yet to be completed;
 - The builder's allocation for 9 Page Street, \$147,614, and the allocation for 7 Page Street, \$106,610, total \$254,223. From this sum the builder deducts \$101,818 as the total of payments previously made by the owners towards "extras". (The previous payments being \$1,818 for the rock breaking variation extra charge in October 2014, and the payments of \$50,000 on 20 October 2015 and \$50,000 on 16 November 2015 in satisfaction of invoice number 11). The balance, after deducting \$101,818, is the sum of the invoice, \$152,405.
- 80 The builder considered the sum invoiced, \$152,405, to be a fair allowance for "extras" (provisional sums overrun cost and variation works) claimable, under the terms of the contracts, as at *fixing* stage for 9 Page Street and as at *lock-up* stage for 7 Page Street.
- 81 As discussed later in these reasons, I find that the builder had no entitlement to charge a builder's margin on the provisional sums overrun.
- 82 On 21 January 2016, Alex sent an email to the builder raising his concern that invoice 13 allowed for a builder's margin on provisional sums overrun and variation works. The builder responded with an email on 22 January 2016, in which the builder says, amongst other things:
- ... I didn't intend to surprise you with the added margin on the extras. I intended to discuss with you on site, but our conversations became a bit rushed at the end.
- I didn't expect that you would necessarily be happy with a margin applied on the extras but am glad that we can have an open discussion about it. I'd like to also share my perspective & thought process on it with you.

Yes I did indicate at the commencement of the project that I wouldn't charge a margin on PC over-runs or extra works. That was my intention, which is why I began presenting the costs to you without a margin. However, I wouldn't have offered no margin if I knew there would be 300k of extra works. But it's not like there was a sudden occurrence & \$300k of works were added. It has been a very gradual process...

It was only around the middle of the year it became apparent to me the tally was mounting, then by October the impact on my cash flow was becoming clearer to me. It was at that stage I raised the invoices for part of the extra works.

...

Of course I will press on with the works, and I'm happy to have conversations about this topic. Though I really don't feel it's an unreasonable charge...

- 83 Throughout late January and February, the builder made a number of enquiries to Alex as to when invoice number 13 would be paid. On 25 February 2016, the owners made a part payment in the sum of \$50,000. The owners did not change their view that the builder had no entitlement to a builder's margin charge on the cost of variation extra works or provisional sums overrun.
- 84 On 29 February 2016, the builder issued three payment claims, invoices 14, 15 and 16.
- 85 Invoice 15 was the *final* stage payment claim for 9 Page Street, \$107,500. As at this date, the works at 9 Page Street were almost, but not fully, completed. Plumbing connection of the dishwasher, and connection of the barbecue and rangehood in the alfresco area, were yet to be done. The alterations to two bedroom windows, required pursuant to the Building Order issued by the RBS on 21 December 2015, were yet to be done. Engineer certification of the retaining wall foundations, as required by the RBS and addressed in the Building Notice dated 21 December 2015, was also yet to be provided. There was a range of other relatively minor items to be done including paint touch-ups, minor gap filling and caulking.
- 86 Invoice 14 claimed \$45,401 as '*Progress payment For Additional works & Provisional Sum over-runs: Refer excel sheet for details. Pro-rata component for fixing stage at 7 Page*'.
- 87 Invoice 16 claimed \$12,005 as '*Progress payment For Additional works & Provisional Sum over-runs: Refer excel sheet for details. Pro-rata component for completion at 9 Page*'.
- 88 The builder's methodology in calculating the amounts in invoices 14 and 16 was similar to the methodology for invoice 13. An updated spreadsheet of provisional sum items was provided, and the allowances for provisional sums overrun and variation works were split equally between 7 Page Street and 9 Page Street.

- 89 Invoice 14 claimed amounts calculated on the assumption that the works at 7 Page Street had, since invoice 13 was issued, progressed from *lock-up* stage to *fixing* stage. As noted above and discussed later in these reasons, fixing stage at 7 Page Street was never reached by the builder.
- 90 Invoice 16 claimed amounts calculated on the assumption that the works at 9 Page Street had progressed to *completion*. As noted above, the contract works at 9 Page Street were not completed.
- 91 As with invoice 13, invoices 14 and 16 included an allowance for builder's margin, 15%, on the cost of variation works and the provisional sums overrun.
- 92 On 2 March 2016 Mr Just, Alex and Alex's father met on site. The parties inspected the works. Mr Just made a written record of items to be attended to at 9 Page Street. The items on the list, all relatively minor, included:
- connection of gas to the barbecue;
 - plumbing connection to dishwasher;
 - install gate handle;
 - minor work/adjustment to a couple of door fittings;
 - filling a number of minor cracks in plasterwork;
 - caulking in a couple of locations;
 - minor paint touch-ups/cleaning;
 - installation of flu to the alfresco range hood;
 - installation of co-ax to TV box.
- 93 The builder considered the last two items on the list, installation of flu to alfresco range hood and installation of co-ax to TV box, to be outside the scope of works under the contract. The builder was prepared to attend to these two items, but considered they constituted variation extra works for which the builder was entitled to claim extra payment.
- 94 In addition to these minor works, the requirements of the RBS as set out in his notices issued on 21 December 2015 – alteration of two bedroom windows and obtaining engineer certification of the retaining wall – were also still to be attended to.
- 95 The parties also discussed the invoices 14, 15 and 16 issued by the builder. The owners maintained their objection to the builder's margin charge on provisional sums overrun and variation works. The owners also reiterated their view that, pursuant to the November 2015 agreement, they were entitled to an allowance in their favour as liquidated damages for delay.
- 96 In his witness statement, Mr Just says:⁵

⁵ witness statement of Mr Just, paragraphs 412 – 414.

I told Alex and Mr Zhang that I did not agree with their position and that the 15% margin was a fair amount and less than most builders would charge...

I also told them that if I had been aware of the extent of the extra work at the time of initial quoting, the margin applied to the extra costs would have been higher...

However, in order to try and prevent a dispute occurring I offered to provide a discount on some of the margin and a further discount equating to some of their nominated delay costs. I suggested a discount of a 50% deduction of my margin on some of the PC/PS extra costs plus a further deduction equating to 3 weeks of their nominated LD [liquidated damages] figure. This discount, which totalled \$26,720 would be offered on the condition of payment of Payment Claim 13 [invoice 13] in full immediately...

- 97 The owners say that no agreement was reached at the meeting, save that they agreed to make payment of invoice 15, the *completion* stage payment claim for 9 Page Street, in the sum of \$107,500. That payment was made on 7 March 2016.
- 98 Two days after the meeting, on 4 March 2016, the builder issued a further payment claim, invoice 17, in the sum of \$54,579. The invoice was emailed to Alex together with an explanatory email and an updated spreadsheet on "extras". The invoice picked up further '*Additional works & Provisional Sum overruns*' not included in invoice 16. The total sum of variation extra works was noted as \$113,197. The total sum identified for provisional sums overrun was \$272,285.
- 99 It is clear from the email and spreadsheet that came with invoice 17 that the total sum invoiced, \$321,890, includes the 'discount' offer raised by the builder at the meeting on 2 March 2016. The discount offer was, first, a reduced builder's margin, 7.5% instead of 15%, on the alleged outstanding provisional sums overrun. That discount equates to a builder's margin charge on provisional sums overrun of \$19,520. Rather than amending the sum claimed in previous invoices 13, 14 and 16 to take account of the 'discount offer', the discount was applied entirely in invoice 17. Second, a further 'discount' of \$7,500 was allowed for delay, calculated as \$2500 per week (for 7 and 9 Page Street together, not separately) for three weeks.
- 100 The builder's accompanying email confirmed the total sum claimed as owing as follows:

- amount outstanding on invoice 13	\$102,405
- invoice 14	\$45,401
- invoice 15	\$107,500
- invoice 16	\$12,005
- invoice 17	<u>\$54,579</u>

TOTAL

\$321,890

- 101 By response email from Alex to the builder on 4 March 2016, the owners reiterated their view that they were entitled to delay damages in accordance with the November 2015 agreement, and maintained their objection to the builder's charge for builder's margin on provisional sums overrun and variations. The email concluded with the following statement:

At this point in time, have have [sic] observed that you intentionally put off all works on 7 Page St. We have had no choice but to finalise contractual obligations with you for number 9 and terminate 7 formally and call for liquidated damages if we don't have a satisfactory reply in writing COB 7/3/16

[underlining added]

- 102 As noted above, on 7 March 2016 the owners paid the builder \$107,500 in full payment of invoice 15, the *completion* stage payment for 9 Page Street.
- 103 On 7 March 2016, at around 3 PM in the afternoon, the builder sent a response email. At the beginning of the email, the builder states "*That's an interesting response. Instead of paying for invoices, you think you'd like to cancel the contract*". The builder goes on to make various assertions as to project delays caused by the owners and the owners' failure to make timely payment of invoices. No further proposal is put by the builder. The email ends with the statement "*As such, this still needs to be resolved*".
- 104 The builder carried out no further works at 7 Page Street or 9 Page Street after 7 March 2016, and the owners made no further payments to the builder.

FIXING STAGE 7 PAGE STREET

- 105 As at 7 March 2016 the works at 7 Page Street had not reached fixing stage. The builder says that the works were very close to fixing stage. I do not agree.
- 106 The status of the works reached at 7 Page Street has been addressed by expert witnesses called by both parties. Mr Nguyen, a quantity surveyor engaged by the owners, inspected the properties on 7 and 11 May 2016 and took a number of photographs. He estimated the cost, to the owners, to bring the works to fixing stage as approximately \$81,000. Mr Garrard, a quantity surveyor engaged by the builder during the course of this proceeding, estimated the cost as \$18,703 if the works were carried out by the owners, and \$13,553 if carried out by the builder. Mr Garrard's estimate was formed on his examination of documents and photographs.
- 107 Expert evidence as to the cost to complete all works (not just the fixing stage at 7 Page Street) is discussed in more detail later in these reasons. For present purpose it is enough to note that both Mr Nguyen and Mr Garrard are of the view that further works were required to bring the works at 7 Page Street to fixing stage.

- 108 Mr Just confirmed in evidence that he inspected and took photos of 7 Page Street on 7 April 2016. He did this to obtain a pictorial record of the status of the works. The photos were produced at the hearing. In my view, it is abundantly clear from the photos that the works were considerably short of fixing stage. The photos depict, amongst other things:
- Cabinetry stacked in the alfresco area yet to be installed;
 - a number of shelves, cupboards and cupboard doors throughout the home not yet installed or completed;
 - basins/sinks yet to be installed;
 - a bath tub sitting on site yet to be installed;
 - skirtings in several places yet to be installed;
 - some bench tops yet to be installed;
 - internal doors not installed.
- 109 The builder says that the cabinetry to the alfresco area is not included in fixing stage because it is not “internal”. I do not agree. The alfresco area is accessed via opening doors from the living area. The alfresco area has a plaster ceiling with downlights. In my view the cabinetry to the alfresco area forms part of the cabinetry to be installed at the home and falls within fixing stage.
- 110 The builder says that internal doors had initially been supplied and hung, but that they had been removed for ‘two pack’ painting and would have been reinstalled once they had been painted if the contracts had not been brought to an end. That may be true, however the simple fact is that the doors were not *fitted and fixed in position*, the requirement for fixing stage.
- 111 As to the yet to be installed bath, bench tops, basins, sinks, skirtings and other miscellaneous cabinetry items, the builder has no argument. When giving evidence, Mr Just commented that the “*fixing stage definition* [in the Act] *is far too simplistic a view of things.*” That may be Mr Just’s opinion, but it is not what the Act provides.
- 112 On the evidence, I find that the works at 7 Page Street were, at the time the builder ceased works, considerably short of fixing stage.
- 113 The owners submit that this is reason enough for them to be refunded the fixing stage payment for 7 Page Street made on 16 November 2015. They say that the builder’s demand and retention of the fixing stage payment is a breach of section 40 (2) of the Act, entitling them to an order under section 40 (5) of the Act for refund of the payment.
- 114 I do not agree.
- 115 In my view the owners knew that fixing stage had not been reached, and they knew that, absent agreement otherwise from them, the builder was not entitled to payment in respect of fixing stage until fixing stage was reached.

I am satisfied that, with this knowledge, they agreed to make the fixing stage payment.

- 116 As discussed above, by the November 2015 agreement the parties made amendments to the contracts. One of the amendments was the timing of the fixing stage payment. The parties agreed that the payment identified in the contracts as the fixing stage payment would be made before fixing stage was actually reached.
- 117 It follows, in my view, that the builder's retention of the fixing stage claim does not constitute a breach of the contracts, and nor does it constitute a breach of section 40 (2) of the Act.
- 118 I am mindful that section 40 (4) of the Act provides that section 40 (2) does not apply if the parties to a contract agree that it does not apply and that they do so in a manner set out in the [Domestic Building Contracts] *Regulations*. The relevant regulation⁶ provides that the manner of such agreement is to include in the major domestic building contract a warning to the owners in the form prescribed in the regulations.
- 119 As the contracts are standard form documents, they include the prescribed form warning.
- 120 The prescribed form warning is intended to alert owners, at the time they are entering a domestic building contract, to the provisions of section 40 of the Act. In my view it may be presumed that, at the time the owners agreed to the early payment of the fixing stage claim, they had knowledge of section 40 and the requisite prescribed form warning because they were set out in the contracts.
- 121 I note for completeness that section 40 (5) of the Act provides that where *a court finds proven a charge* that the builder has contravened section 40 (2) or (3), then the court *may* order the builder to refund some or all of the payments made to the builder. In my view, the reference to a 'court' finding '*proven a charge*' finds context from the fact that sections 40 (2) and (3) each reference a penalty payable by a builder who has not complied with the sub-section.⁷ In my view it might well be said that the express discretionary power provided in section 40(5) is a power exercisable by a court, but not the Tribunal.
- 122 Having said that, however, I accept that the Tribunal's wide powers under section 53 the Act enables the Tribunal to order the refund of a payment made to a builder, if the Tribunal considers it fair to do so.
- 123 For the reasons discussed above, I find that there is no proven breach of section 40 (2) of the Act. But if I am wrong, I would in any event decline to order the refund of the fixing stage payment because, having regard to the November 2015 agreement, I would not consider such order to be fair.

⁶ Regulation 12 of the *Domestic Building Contracts Regulations* 2007.

⁷ The penal nature of sections 40(2) and (3) has been confirmed by Supreme Court in *Imerva Corporation Pty Ltd v Kuna* [2016] VSC 461.

124 In conclusion on this issue, I find that:

- a) Fixing stage at 7 Page Street was never reached by the builder, however the builder's receipt of the fixing stage payment for 7 Page Street does not amount to a breach of the 7 Page Street contract or a breach of section (40) (2) of the Act.
- b) There should be no order for a refund of the fixing stage payment.

PROVISIONAL SUMS OVERRUN

Builder's margin

125 Alex says that at the time the parties were entering the contracts, Mr Just told Alex that there would be no builder's margin charge on provisional sums overrun or the cost of variation works. Mr Just agrees that he told Alex this, however he says that his agreement to make no such margin charge was conditional on the total sum of the extra cost of variation works and provisional sums overrun incurred being minimal. Alex disputes that any such condition was discussed.

126 The dispute as to the builder charging a margin on provisional sums overrun arose in January 2016 when the builder issued invoice 13. This was the first invoice that identified any such charge. The owners objected to the charge. As discussed earlier in these reasons, Mr Just sent an email to Alex on 21 January 2016 in which he states, amongst other things:

Yes I did indicate at the commencement of the project that I wouldn't charge a margin on PC overruns or extra works. That was my intention, which is why I began presenting the costs to you without a margin. However I wouldn't have offered no margin if I knew there would be 300 K of extra works.

127 The email, on its face, suggests that the builder considered the agreement to not charge a builder's margin on provisional sums overrun and variation works became unreasonable as the number and quantum of extra charges increased during the course of the works.

128 The evidence before me as to what was discussed by Alex and Mr Just in respect of the builder's margin charge at the time the parties entered the contracts is uncertain. Whatever was discussed and agreed was not recorded in writing in the contracts. In the face of such uncertainty, I look to the express terms in the contract documents.

129 Clause 9.6 in the contracts provides:

Contract price to be adjusted for amount expended in excess of prime cost item or provisional sum allowed

If the amount expended on a Prime Cost Item or Provisional Sum is in excess of the sum allowed for that item, the excess amount plus the Builder's margin as stated in Item 21 or Item 22 (as applicable) in the Appendix will be added to the Contract Price and paid to the Builder in the next payment payable under this Contract.

- 130 In the items 21 (prime cost items) and 22 (provisional sum items) in the appendix in each contract, the words ‘*as per attached table in quote*’ have been written, and there is otherwise no amount specified for a builder’s margin. It is not disputed that the reference to the ‘quote’ is a reference to the contract quotation. The contract quotation sets out the sums allowed for the considerable number of provisional sum and prime cost items, but makes no reference to, or allowance for, a builder’s margin.
- 131 I am satisfied that the contracts documents do not prescribe any builder’s margin charge on provisional sums overrun cost. The contracts contemplate the possibility of such charge, but no actual charge is specified. In my view, with no charge specified, there is no contractual entitlement to make such charge.
- 132 The parties have not, by the November 2015 agreement or otherwise, agreed to amend the contracts in this regard. The owners have consistently maintained that the builder had no entitlement to charge such a margin.
- 133 The builder is not entitled to unilaterally change the contracts provisions simply because the builder considers a change is fair.
- 134 Clause 9.9 in the contracts provides:

Builder to provide copies of invoices, receipts etc to the owner

The Builder will give to the Owner a copy of any invoice, receipt or other document that shows the actual cost incurred to the Builder for any Prime Cost item or that relates to any Provisional Sum and will do so as soon as is reasonably possible after receiving the invoice, receipt or document.

- 135 The builder did not follow this contractual procedure. The builder allowed the cost of provisional sum items to accumulate throughout the course of the building works without providing relevant invoices and receipts to the owners as they came to hand. The builder made periodic claims in respect of provisional sums overrun, providing to the owners the spreadsheets, discussed earlier in these reasons, setting out the costs allegedly incurred in respect of provisional sum items. The actual invoices evidencing the costs incurred by the builder were, for the most part, not provided to the owners until after the commencement of this proceeding.
- 136 The owners say the builder’s failure to comply with clause 9.9 is one reason why the builder was not entitled to issue invoices 13, 14, 16 and 17, all of which included a charge for provisional sums overrun. I do not accept that submission. In my view, the builder’s primary entitlement to claim payment for provisional sums overrun is found in clause 9.6 in the contracts, and clause 9.9 in the contracts is not a precondition to the operation of clause 9.6.
- 137 But, as discussed above, I find that the builder had no entitlement under the contracts to charge a builder’s margin on provisional sums overrun. It follows, that the builder had no entitlement to issue, and demand full

payment of, invoices 13, 14, 16 and 17, all of which include a builder's margin charge on provisional sums overrun.

PROVISIONAL SUM ITEMS QUANTUM

- 138 Quite apart from the builder's margin charge, the owners say also that the total sum the builder claims to have expended on provisional sum overrun cost is inflated. That is, they say that the builder did not actually incur the expense claimed to have been incurred in respect of some provisional sum items.
- 139 During the interlocutory stages of this proceeding, and pursuant to the Tribunal's order,⁸ the builder produced a spreadsheet in respect of provisional sum items (including prime cost items). The spreadsheet identifies the provisional allowance for items as set out in the contract quotation, the invoices received from subcontractors/suppliers in respect of those items, and the amounts allegedly paid or incurred by the builder in respect of those items. During the course of the hearing, the spreadsheet was amended so that it included up-to-date information in respect of invoices received and payments made ("**the PS spreadsheet**").

'Residual liability' sums

- 140 The PS spreadsheet identifies several '*residual liability*' sums. This is a reference to charges claimed by the builder for the alleged incurred cost of provisional items, which can be referenced in invoices to the builder from suppliers/subcontractors, which have not yet actually been paid by the builder. The builder says it retains liability to pay the invoices, and as such, it was entitled to claim the cost from the owners.
- 141 The builder's invoices 13, 14, 16 and 17, do not identify any *residual liability* sums. They are first identified in the PS spreadsheet produced during the course of the VCAT proceeding.
- 142 Mr Just says that, in respect of some of the residual liability sums, he has an arrangement with the relevant supplier/subcontractor that the builder will pay the invoice, or the unpaid balance of the invoice, when the builder itself has been paid by the owners. There is no supporting documentary evidence, or any evidence from the relevant suppliers/subcontractors, in this regard. And it is not clear, from Mr Just's evidence, whether the builder is relieved from liability by these suppliers/subcontractors in the event the builder never receives any further payment from the owners. It is already more than two years since the relevant suppliers/subcontractors issued invoices to the builder.
- 143 Mr Just says that some other suppliers/subcontractors have waived their entitlement in respect of *residual liability* items. That is, the subcontractors/suppliers no longer press for payment of the invoice. This is

⁸By order made 3 November 2016, the builder was required to file and serve a provisional sum adjustment schedule and a variation schedule.

partly the reason why the sum of money claimed by the builder in this proceeding was reduced in the builder's most recent articulation of its claim in the Second Further Amended Points of Claim filed 24 April 2018.

- 144 It is not difficult to understand why a builder may seek payment from an owner for the overrun cost of a provisional item before the builder has actually paid for the item. Builders run trade accounts with regular suppliers and make payments towards those accounts on a periodical basis. For example, a builder may obtain a basin from Bunnings, a more expensive basin than the basin nominated in the contract works specifications, and claim the overrun cost of the basin at the time the builder makes its fixing stage payment claim, at which time the basin has been installed. Yet the builder's actual payment to Bunnings for the basin may occur at a later date when the builder makes a periodical trade account payment.
- 145 What is the builder entitled to charge under the contracts?
- 146 Clause 9.6 in the contracts, set out above, makes provision for the builder's entitlement to payment of provisional sum overrun cost that has been *expended*. In my view, 'expended' in this context should be afforded a generous interpretation, such that it means that the builder has incurred the liability to pay for the item in question.
- 147 Such an interpretation is, in my view, consistent with clause 9.9 in the contracts, also set out above, which requires the builder to provide to the owners' copies of invoices, receipts or other documents that show the actual cost *incurred* in respect of provisional sum items.
- 148 If, after a passage of time, a builder does not actually pay, or fully pay, a supplier/subcontractor in respect of a provisional sum item, it *may* be that the builder must account to the owners for a reduced sum. I say that the builder *may* have to account to the owners because, in my view, it cannot be a hard and fast rule. It will depend on the facts in each case. There may be any number of reasons why a builder and a subcontractor/supplier may reach an accommodation in respect of the cost of goods and services provided by the supplier/subcontractor, such that it might be considered that the builder has borne the expense of the supplied goods and services even though no money, or a discounted sum of money, is paid by the builder to the supplier/subcontractor.
- 149 In my view, actual payment in respect of a provisional sum item is not a necessary precondition to the builder's entitlement to make a claim on the owners for the overrun cost of such item. What is required is that the builder has incurred liability to pay for the item. It may be that, with the passage of time, the builder's liability to pay for a provisional item changes, in which case an appropriate reduction allowance in favour of the owners might be required.
- 150 I will, below, assess the provisional sum item charges which are challenged by the owners. In respect of some items, the assessment may include a

finding that the builder was entitled initially to claim the cost of an item, on the basis that the builder had incurred liability to pay for the item, but that there should now be an adjustment in favour of the owners because of the reduction or dissipation of the so-called *residual liability* of the builder in respect of the item.

- 151 Where a provisional item charge has not been specifically allocated to 7 Page Street or 9 Page Street, I will assume the charge is allocated half to 7 Page Street and half to 9 Page Street.

Cabinetry/joinery

- 152 The PS spreadsheet references a number of invoices from ‘Window House Material Pty Ltd’ (“WHM”) in respect of joinery for 7 and 9 Page Street. The PS spreadsheet identifies bank statements and other documents as evidence of the builder’s payment of the invoices. The documents referenced are included in the Tribunal books produced for the hearing.
- 153 The owners say that the WHM invoices are unsatisfactory in that, although they reference 7 Page Street and 9 Page Street, they provide no detail as to the joinery items for which the charge is made.
- 154 I am satisfied, on the evidence of Mr Just, that the joinery to be supplied was discussed and agreed with Alex during the course of the building works. There is no evidence to the contrary from Alex.
- 155 Having examined the invoices, I am also satisfied that the invoices relate to joinery at 7 Page Street and 9 Page Street.
- 156 Accordingly, I am satisfied that the builder was entitled to claim the provisional sum overrun cost for the joinery (but without any builder’s margin charge).
- 157 Having examined the documents produced by the builder as to payment of the invoices, I am satisfied that the invoices, in so far as they relate to 9 Page Street, have been paid by the builder.
- 158 In relation to 7 Page Street, the PS spreadsheet identifies one invoice from WHM dated 12 October 2015 in the sum of \$22,527.78, in respect of which the builder has made payment of only \$5,000. The balance, \$17,527.78, is noted in the spreadsheet as a *residual liability* sum.
- 159 On the evidence before me, which includes evidence as to the status of the works at 7 Page Street as discussed earlier in these reasons, I am satisfied that the cabinetry in question was supplied by WHM, and that the builder incurred liability to pay for it. Although, as discussed earlier, installation of the cabinetry at 7 Page Street was not fully completed by the builder, I am satisfied that the cabinetry had been delivered to site, albeit a significant portion of it was yet to be installed. For this reason, and also noting that there is no evidence that the residual liability sum, \$17,527.78, has been waived by WHM, I am satisfied that for the purpose of calculating

provisional sums cost, it is fair to allow the cost of the cabinetry as claimed by the builder.

- 160 The cost incurred by the owners to complete the installation of cabinetry will be discussed later in these reasons.

Bench tops/stone 7 Page Street

- 161 The PS spreadsheet notes a total charge by the builder in respect of stone, predominantly bench tops as I understand it, for 7 Page Street in a sum of \$43,103.03, That sum includes a *residual liability* sum of \$20,022.20.
- 162 There is no dispute that some bench tops and other stonework intended for 7 Page Street had not been supplied and installed at the time the contracts were terminated.
- 163 As discussed later in these reasons, the owners expended a considerable sum of money to complete the contract works at 7 Page Street following the termination of the contract. Some of that expense included the cost of stonework / bench tops.
- 164 I am unable to say, on the evidence before me, whether the residual liability sum claimed by the builder is greater or less than the cost of stonework that was not actually supplied to the owners.
- 165 In my view, having regard to the considerable passage of time since the builder was invoiced by the stone supplier, there must be doubt as to the whether the builder retains the *residual liability* to pay for the stone. Unlike the cabinetry as discussed above, I am not satisfied on the evidence before me that the stone in question was delivered to site and that the owners obtained the benefit of it. This being the case, I find that the builder has no entitlement to maintain its claim in respect of this *residual liability* sum. That is not to say that the builder was never entitled to claim the sum. I do not find that the builder had no entitlement to claim the sum at the time the builder issued invoices to the owners. I find that the builder is *now* not entitled to maintain the claim in respect of the *residual liability* sum.

Doors

- 166 Doors were included in the contracts (the contract quotation) as a provisional sum item.
- 167 I am satisfied, on the evidence of Mr Just, that after the contracts were signed, the owners requested a change to the internal doors to both 9 Page Street and 7 Page Street from pre-hung standard doors to custom-made higher quality doors. This is not disputed by the owners.
- 168 The PS spreadsheet notes a supply cost for the doors of \$18,587.80, with such cost split evenly between 7 Page Street and 9 Page Street. I accept that the number of doors in each home was similar, and as such it is reasonable to split the cost evenly between the two homes. That is, \$9293.90 for each home.

- 169 I accept the evidence of Mr Just, not contested by the owners, that installation of the doors involved a two-step process. The doors were initially fitted and hung. They were then removed and sent off site for 'two pack' painting, following which they were to be returned to site and re-hung.
- 170 At the time of the builder's suspension of the contracts, and the subsequent termination of the contracts, the internal doors were not installed at 7 Page Street. I accept the evidence of Mr Just that the first step had been carried out, that is the doors had been initially fitted and hung, and that the doors were off-site for the painting at the time the works were suspended by the builder. The doors were never returned to site and re-hung.
- 171 As the owners never obtained the benefit of the doors at 7 Page Street, I do not accept that the builder is entitled to claim the cost from the owners. Further, as Mr Just confirmed in evidence, the doors were ultimately returned to the builder and used in other building projects.
- 172 Accordingly, I find that the builder is not entitled to maintain the claim for the cost of the internal doors to 7 Page Street, that is \$9293.90 as the supply cost of the doors and \$1172.60 as the claimed cost of two pack painting of the doors, a total of \$10,466.50. This is not a finding that the builder was not entitled to initially claim the sum. It is a finding that, after the termination of the contracts, the builder was not entitled to maintain the claim.

Door glazing

- 173 The PS spreadsheet identifies the sum of \$3237.37 as the cost to glaze other doors installed at 7 and 9 Page Street. Having viewed the invoice to the builder in respect of the cost of such glazing, I am satisfied that the builder is entitled to claim this charge.

Doors carpentry

- 174 The PS spreadsheet identifies \$13,860 as the cost for carpentry labour in respect of the installation of doors. The builder has produced its own timesheet records, and invoices from 'James Donahue', as documentary evidence of carpentry labour charges⁹. The records cover works carried out on a number of construction projects, including projects at Severn Street Balwyn and also at 'Cochrane Avenue', but there is no discrimination/isolation of the charges which allegedly relate only to 7 and 9 Page Street. For this reason, coupled with the fact that there is no evidence from James Donahue, I find the builder is unable to substantiate any entitlement to the sum claimed, \$13,860. When reconciling contracts figures later in these reasons, I split this sum equally between 7 Page Street and 9 Page Street, that is \$6930 not allowed for each.

⁹ supplementary Tribunal Book pages 951 – 975.

Door furniture 9 Page Street

- 175 The builder claims the cost of door fittings with reference to various invoices from the supplier 'Exclusive Hardware'. One of the invoices, dated 7 September 2015, identifies a total sum of \$3147.20 in respect of 11 items of door hardware, four of which are for the unrelated project at Cochrane Avenue. The builder says the remaining 7 items relate to 9 Page Street, and in this regard the builder claims \$2669.12. It is apparent the builder's arithmetic is wrong in that the correct sum for the seven items is \$2496.80, not \$2669.12.
- 176 It is not readily apparent from the invoice itself that the items claimed by the builder are items for 9 Page Street. The four items in respect of Cochrane Avenue are clearly identified. But the remaining seven items are not identified as related to any particular project.
- 177 There is nothing in the description of the items themselves to assist in determining which project they were destined for.
- 178 The invoice is addressed to the builder at '36 Severn Street Balwyn North'.
- 179 However, in the top right-hand corner of the invoice there is a reference to '9 Page St'. It is not much to go on, but, coupled with Mr Just's evidence, I consider it sufficient to find that the invoice, save for the Cochrane Avenue items, is an invoice for items for 9 Page Street. I am satisfied that this provisional sum item should be allowed, although the correct allowance is a sum of \$2496.80 rather than \$2669.12. The net effect, after the correction, is a deduction of \$172.32.

Door furniture 7 Page Street

- 180 The PS spreadsheet includes the supply cost of a side gate from Exclusive Hardware for 7 Page Street in a sum of \$2610.96. As Mr Just confirmed in evidence that the side gate was never actually supplied to the owners, I do not allow this sum.
- 181 The PS spreadsheet also includes an allowance for lever sets, \$519.94, and privacy snibs, \$35.55, in respect of internal doors. These items were never actually supplied to the owners. They were intended for the doors which, as discussed above, were never re-hung following their removal for two pack painting. As they were never supplied to the owners, I disallow the cost claimed for these items.
- 182 Accordingly, I disallow a total of \$3166.45 for these door furniture items.

Stair balustrade 7 Page Street

- 183 The PS Spreadsheet identifies a claim of \$5497.80 for the stair balustrade to 7 Page Street. Mr Just confirmed in evidence that the stair balustrade was never supplied and installed, and for this reason, I disallow the builder's claim for this item.

Fireplaces

184 One of the fireplace items identified in the PS spreadsheet is \$979 as the cost for supply and installation of a hearth and step at 7 Page Street. The builder relies upon an invoice addressed to the builder from 'K and K Marble Stonemasons' that appears to be dated 9 November 2015. The invoice identifies a charge of \$979 for '*supply + install hearth and step*', but there is nothing in the invoice to suggest it relates to 9 Page Street or any other building project address. Without such identifying information, I am not satisfied that the builder has substantiated the claimed entitlement. Accordingly, I disallow the sum claimed, \$979.

Shower screens 7 Page Street

185 The PS spreadsheet identifies a charge of \$7800 for shower screens for 7 Page Street. The builder produced an invoice from 'Just Splashbacks' dated 28 March 2016 verifying the supply of the screens for 7 Page Street at a cost of \$7800. The builder says it has made a part payment of \$4000 on the invoice, leaving \$3800 as a 'residual liability'. The builder produced a bank statement which evidences the payment of \$4000 to Just Splashbacks on 23 June 2016, with reference to the corresponding invoice number.

186 I accept the evidence of the builder, not contested by the owners, that although the shower screens were not fully installed, they were present on site at the time of termination of the contracts. Accepting that the owners have received the benefit of the supply of the screens, I think it fair to allow the full sum claimed, \$7800.

Bathroom fixtures

187 The PS spreadsheet identifies a number of bathroom fixtures, the cost of which has been split evenly between 7 Page Street and 9 Page Street. One document produced by the builder is deposit receipt dated 5 March 2015 from 'E & S Trading Co' in the sum of \$1536, addressed to the builder. There is no reference in the document to any products or any reference to 7 or 9 Page Street. It is impossible to say, from the invoice itself, what the payment receipt is for. In my view the document is manifestly inadequate as evidence of the provisional sum item claimed by the builder. I disallow the claim, \$1536.

188 The builder also claims a sum of \$748 for fixtures apparently purchased from 'Elite Appliances'. The supporting document produced by the builder appears to be a screenshot of a document referencing payment made to Elite Appliances on 9 March 2015 in the sum of \$748. The document provides no details as to what the payment was for, and as such, I consider the document to be inadequate as evidence of the provisional sum item claimed. I disallow the claim, \$748.

189 Accordingly, I deduct a total of \$2284 in respect of the claimed cost for bathroom fixtures, allocated as \$1142 in respect of 7 Page Street and \$1142 in respect of 9 Page Street.

Plasterwork

190 The PS spreadsheet identifies a claim of \$17,545 for 9 Page Street, and \$19,338 for 7 Page Street, in respect of plaster works.

191 Having viewed invoices provided to the builder,¹⁰ some of which include detailed summary of works carried out, I am satisfied that the sums claimed are the costs incurred by the builder for plaster works carried out to 7 Page Street and 9 Page Street. The builder confirms payment has been made, and the documents produced by the builder¹¹ support his evidence in this regard.

192 I am satisfied on the evidence that the builder is entitled to the claimed sums.

Parquetry

193 The owners have queried some of the charges claimed by the builder related to the supply and installation of parquetry flooring as set out in the PS spreadsheet.

194 I am satisfied, on invoices produced by the builder,¹² that the claimed supply cost of the parquetry boards, \$11,770 for 9 Page Street and \$11,970 for 7 Page Street, is verified.

195 However, the claimed cost of carpentry labour, \$10,626 for 9 Page Street and \$8943 for 7 Page Street, is not adequately verified by documentary evidence. The builder references the carpentry invoices and timesheets which I have briefly discussed above in respect of the carpentry labour charge for installation of doors. As noted above, the records do not satisfactorily delineate charges for 7 and 9 Page Street from other building projects. Nor do they satisfactorily identify the carpentry works involved. As such I cannot be satisfied as to the actual cost expended on carpentry labour to lay the parquetry floors.

196 However, the total sum claimed to have been incurred by the builder for the parquetry floors to 7 Page Street and 9 Page Street, \$61,112.46, is slightly lower than the total provisional allowance in the contracts, \$61,950. If I were to deduct the carpentry sums claimed, on the basis that satisfactory documentary evidence is lacking, the result would be a total sum significantly less than the provisional allowances in the contract. In my view this would be unfair having regard to the fact that there is no dispute that the parquetry floors were supplied and laid.

¹⁰ Supplementary Tribunal Book pages 498 to 513.

¹¹ The documents are identified in the PS spreadsheet under the heading 'Cornice'.

¹² 'Vandar Trading' invoice at page 470 3A and Page 594 of the Supplementary Tribunal Book.

197 Accordingly, I think it fair to allow the sums claimed for parquetry floors as set out in the PS spreadsheet.

Metalwork

198 The PS spreadsheet identifies a cost of metalwork to 9 Page Street in the sum of \$6652. The builder has produced an invoice addressed to it from 'Rays Fenceworx' dated 28 July 2015 for the sum claimed. The invoice notes the charge is for a deposit for fence and gate work in respect of 9 Page Street. There being no dispute as to the provision of the gate/fence to 9 Page Street, I am satisfied that the builder was entitled to claim the sum.

External works

199 The PS spreadsheet identifies various charges for external works to 7 Page Street and 9 Page Street, with references to various invoices from subcontractors to the builder. Having viewed the invoices, and having heard evidence from Mr Just, I am satisfied that the builder initially incurred liability to pay the sums identified in the invoices, and that the works in question are external works carried out at 7 Page Street and 9 Page Street.

200 In respect of one invoice, the invoice for \$18,396 from 'Lachie Anderson Landscaping Pty Ltd' dated 17 February 2016, the builder claims a portion of it, \$3735.50 that has not yet been paid, as a *residual liability* sum. Mr Just says that the sub-contractor, Lachie Anderson Landscaping Pty Ltd, has agreed that it will not require payment of the balance owing unless and until the builder is paid by the owners. On this evidence, I am not satisfied that the builder has indeed retained a liability to pay the balance owing to the subcontractor.

201 Accordingly, I find that the builder is not entitled to maintain its claim in respect of the sum not paid to the subcontractor, \$3735.50. I allocate this reduction as \$1867.75 for each of 7 Page Street and 9 Page Street. This is not a finding that the builder was not entitled to claim the sum at the time the liability was initially incurred. It is a finding that the builder is *now* not entitled to maintain the *residual liability* portion of the claim.

Water feature 7 Page Street

202 The PS spreadsheet identifies a claim of \$9263.10 in respect of works carried out for the installation of the water feature at 7 Page Street. I accept the evidence of Mr Just that the works carried out included excavation, pouring of concrete, installation of pipe work, waterproofing and some paving works, and that works remaining to be done included some paving works and electrical works. Photographs produced by the builder support this evidence.

203 The builder has produced a number of invoices from subcontractors as verification of the cost the builder claims to have incurred, \$9263.10, in respect of the works carried out. The invoices are identified in the PS spreadsheet. Having viewed the invoices, I accept that all but one of them

verify the charges of subcontractors in respect of the water feature works carried out.

- 204 The one exception is the invoice of ‘Kartaway’ addressed to the builder dated 31 December 2015 in a total sum of \$3569.93 (inclusive of GST). The invoice identifies five separate charges of \$582.72 (excluding GST) for the cost of skip bins, and two further charges totalling \$341.81 (not including GST) for permit fees.
- 205 In the PS spreadsheet, the builder claims a portion of this invoice, \$1346.89, as the cost of skip bins required to cart away soil excavated as part of the construction of the water feature.
- 206 Although the Kartaway invoice references 7 Page Street, there is nothing in the invoice to identify that any of the charges relate to the removal of soil or any other works related to the water feature.
- 207 I am not satisfied that the Kartaway invoice satisfactorily evidences the cost claimed by the builder for the removal of soil related to the construction of the water feature. Accordingly, I find that the builder was not entitled to claim \$1346.89 as part of the provisional cost of this item of work.

SUMMARY - PROVISIONAL SUMS OVERRUN

- 208 At the end of the PS spreadsheet, the builder identifies the total provisional sum overrun cost for each of 7 Page Street and 9 Page Street. Although the builder’s allocation in this regard is largely an exercise in hindsight, I am satisfied that it is a reasonable starting point from which to assess the builder’s entitlement to claim provisional sum overrun cost as at 7 March 2016 when the builder had issued its last invoice.

7 Page Street

- 209 For 7 Page Street, the PS spreadsheet nominates a provisional sum overrun cost of \$66,250, plus \$9938 on top of this sum as a builder’s margin of 15%, making a total of \$76,188.
- 210 As discussed above, I have found that the builder had no entitlement to charge a builder’s margin. Taking into account the further deductions as discussed above, I find the provisional sum overrun cost for 7 Page Street, as at 7 March 2016, was \$47,187.86, calculated as follows:

Claimed amount		\$76,188
Subtract		
-	builder’s margin charge	\$9,938
-	doors carpentry	\$6,930
-	door furniture	\$3,166.45
-	stair balustrade	\$5,497.80

	fireplace hearth/step	\$979	
-	bathroom fixtures	\$1,142	
-	Water feature	<u>\$1,346.89</u>	<u>\$29,000.14</u>
	Balance		\$47,187.86

211 I will later in these reasons assess damages with reference to adjusted contract sums. For the purpose of calculating the adjusted contract sum for 7 Page Street, a further deduction of \$32,356.45 will be made in respect of the 3 items of work, discussed above, in respect of which I have found the builder can no longer maintain the *residual liability* claim. Those three items are:

-	stone/bench tops	\$20,022.20
-	internal doors	\$10,466.50
-	external works	\$1,867.75
	Total	\$32,356.45

212 After making this further deduction, allowance of **\$14,831.41** will be made when calculating the adjusted contract sum.

9 Page Street

213 For 9 Page Street, the PS spreadsheet nominates a provisional sum overrun cost of \$115,872, plus \$17,381 on top of this sum as a builder's margin of 15%, making a total of \$133,253.

214 As discussed, I have found that the builder had no entitlement to charge a builder's margin. Taking into account other deductions, as discussed above, I find the provisional sum overrun cost for 9 Page Street, as at 7 March 2016, was \$107,627.68, calculated as follows:

Claimed amount			\$133,253
Subtract			
-	builder's margin charge	\$17,381	
-	doors carpentry	\$6,930	
-	door furniture	\$172.32	
-	bathroom fixtures	\$1,142	<u>\$25,625.32</u>
	Balance		\$107,627.68

215 For the purpose of calculating the adjusted contract sum for 9 Page Street, a further deduction of \$1867.75 will be made for the external works, discussed above, in respect of which I have found the builder can no longer maintain a *residual liability* claim. After making this further deduction, **\$105,759.93** will be allowed as the provisional sum overrun allowance when calculating the adjusted contract sum for 9 Page Street.

VARIATION WORKS

216 Clause 12 in the contracts makes a number of provisions in respect of variations to the contract price, including:

- clause 12.1 which provides that when the owner wishes to vary the plans or specifications for the works, the owner will give to the builder a written notice describing the variation requested;
- clause 12.2 provides that if the builder reasonably believes that the requested variation will not require an amendment to any permit, and will not cause any delay in reaching completion of the contract works, and will not add any more than 2% to the original contract price, then the builder may at its discretion but without obligation, carry out the variation;
- clause 12.3 provides that if the builder reasonably believes that variation works will necessitate an amendment to any permit, or will cause delay in completion of the contract works, or will add more than 2% to the original contract price, then the builder will provide written notice to the owner stating that it refuses or is unable to carry out the variation works, and the reason, OR alternatively stating:
 - that the builder will carry out the works,
 - the requirement, if any, for a variation to a permit,
 - the reasonable estimate of any delay to completion of the works that will be caused by the variation works
 - the cost of the variation works, and the effect of such cost on the contract price;
- clause 12.4 provides that the builder is not to commence any variation requested by the owner unless:
 - the owner has given the builder a signed written request for the variation, such written request attached to the builder's notice under clause 12.3 above, OR
 - the builder reasonably believes that the variation requested by the owner will not require amendment to a permit, and will not cause any delay to completion of the works, and will not add more than 2% to the original contract price;¹³
- clause 12.8 provides that the owner will pay:
 - the agreed variation price, or
 - if the variation falls within clause 12.2 and no price has been agreed for the cost of the variation, the documented cost of carrying out the variation plus 15% of that cost for the Builder's margin;

¹³ clause 12.4.

- clause 12.9 provides that all of the provisions under clause 12 in respect of variations do not apply to any Prime Cost items or Provisional Sums.
- 217 Pursuant to order of the Tribunal,¹⁴ the builder produced a schedule setting out all alleged variation works to 7 Page Street and 9 Page Street (“**the variations schedule**”). The variations schedule sets out 20 items of variation works, and the charge claimed by the builder for each item. The total cost claimed by the builder for variation works, when the builder issued the last invoice 17, was \$113,197. That sum includes a 15% builder’s margin allowance, a sum of \$14,764.
- 218 There are no written variation notices confirming the parties’ agreement to the carrying out of variation works or the agreed price for any such works. Although the owners say that there was no agreement reached as to the cost of numerous variation works, in this proceeding the owners challenge only two variation charges made by the builder. First, they challenge one item of variation works, namely the addition of a pantry door in 7 Page Street, saying the builder is not entitled to charge for this item because the extra pantry door was never actually provided. Second, they say the builder had no entitlement to charge a builder’s margin on the cost of any of the variation works.

Pantry door 7 Page Street

- 219 The variation sum claimed by the builder for this item of work is \$1906.50.
- 220 There is no dispute that the addition of a pantry door constituted variation extra works at the request of the owners. The construction plans did not provide for such a door.
- 221 As discussed above, at the time the builder ceased all works most of the internal doors to 7 Page Street had been removed and taken off site to be ‘two pack’ painted. The pantry door was one of these doors. Like the other doors, it was never returned to site. The owners say that because they never received the pantry door, the builder has no entitlement to charge for it.
- 222 The builder says that, as with the other doors, the pantry door would have been re-hung had the contract not ended. In addition, the builder says that the variation works consisted of more than the mere supply of a door. The pantry opening, which in the original plans did not allow for a door, had to be reworked to include architraves and jam to accommodate the new door. The builder says the variation charge includes all of the works required. The builder says the cost of the door, on its own, would be around \$400. The rest of the variation charge was for the associated works to turn the pantry opening into a door opening.
- 223 In my view it is fair that the owners pay the cost of this variation, save for the cost of the door itself which was, ultimately, never supplied. Although

¹⁴ order made 3 November 2016.

they never got the door, the owners obtained the benefit of the associated works, that is the creation of the door opening and the carpentry housing for the door. I accept the builder's evidence, not challenged, that \$400 is a reasonable allowance for the door itself. Accordingly, I allow \$1506.50 for this item of variation works in place of the \$1906.50 claimed by the builder.

Builder's margin on variations

- 224 As discussed above, I find the evidence unclear as to what was discussed by Mr Just and Alex, at the time the parties entered the contracts, in respect of a builder's margin charge on provisional sum overruns and variation works. As such I turned to the express terms in the contracts.
- 225 The owners submit that the terms of the contracts preclude the charging of a builder's margin on the cost of variation works.
- 226 Clause 12.8 in the contracts makes provision for payment in respect of variation works at the agreed variation price or, where no price has been agreed, *the documented cost of carrying out the variation plus 15% of that cost for the builder's margin.*
- 227 The owners say that no agreement was reached with the builder in respect of the extra cost of variation works. The builder says that the cost of variation works was discussed with Alex. There are no variation notices or other documents confirming agreement to the cost of variation extra works.
- 228 In any event, even if there was no prior agreement on the cost of variation works, I am satisfied that, pursuant to clause 12.8 in the contracts, the builder is entitled to charge the documented cost of carrying out the works plus a 15% builder's margin. Save for the one item of work, the pantry door to 7 Page Street discussed above, the owners do not challenge the documented cost of variation works items. As such, I accept the cost as documented by the builder in the variations schedule, save that I make a deduction of \$400 in respect of the pantry door to 7 Page Street as discussed above.
- 229 As to allocating the total variation allowance between 7 Page Street and 9 Page Street, I accept, as a starting point, the allocation applied by the builder as set out at the end of the PS spreadsheet, namely \$45,880 (inclusive of builder's margin) allocated to 7 Page Street and \$67,261 (inclusive of builder's margin) allocated to 9 Page Street. The total of the two allocated figures is \$113,141. For no apparent reason, this figure is \$56 less than the total allocation of \$113,197 as set out in the variations schedule. In my view the variations schedule is likely to be more accurate as it recites all the individual variation charges claimed by the builder. For convenience, I will allocate the "missing" \$56 in the PS spreadsheet to 7 Page Street. After deducting \$400 as discussed above in respect of the pantry door variation to 7 Page Street, the result is an allocation of allowable variation extra charges as follows:
- **\$45,536** (inclusive of builder's margin) allocated to 7 Page Street

- \$67,261 (inclusive of builder's margin) allocated to 9 Page Street.

STATUS OF WORKS, CLAIMS AND PAYMENTS AS AT 7 MARCH 2016

230 In summary, as at 7 March 2016:

- a) The works at 7 Page Street had not reached *fixing* stage.
- b) The works at 9 Page Street were close to, but had not reached completion. Outstanding items of work included:
 - plumbing connection to dishwasher;
 - gas connection to the barbecue in the alfresco area;
 - a range of minor works including paint touch-ups, gap filling and caulking and minor adjustments to door/window fittings;
 - alteration to two bedroom windows as required by the building works notice issued by the RBS on 21 December 2015;
 - engineer certification of the retaining wall foundations as required by the building notice issued by the RBS on 21 December 2015.
- c) The builder's invoiced claims for payment totalled \$2,343,520. This sum was made up of:
 - all contract stage payments up to including *completion* for 9 Page Street, \$1,075,000;
 - contract stage payments up to and including *fixing* stage for 7 Page Street, \$954,000;
 - \$314,520 for variations and provisional sums overrun. Of this sum, \$201,323 was allocated to provisional sum overrun cost and \$113,197 was allocated to variation extra works.
- d) The owners had made payments (including the payment of \$107,500 made on 7 March 2016) totalling \$2,129,130, leaving \$214,390 as the unpaid balance on all invoices issued. This unpaid balance, \$214,390, includes a builder's margin charge of \$19,520 (the so-called 'discount offer') on provisional sums overrun.

231 As discussed above, I find that the builder had no entitlement to charge a builder's margin on provisional sums overrun. Taking this into account, together with other deductions as discussed above, I find that the builder was entitled, as at 7 March 2016, to claim a total sum of \$267,612.54 as the extra cost of variations and provisional sums overrun, calculated as follows:

- variation extra works in a total sum of \$112,797 (\$45,536 allocated to 7 Page Street and \$67,261 allocated to 9 Page Street); and
- provisional sum overrun cost in a total sum of \$154,815.54 (\$47,187.86 allocated to 7 Page Street and \$107,627.68 allocated to 9 Page Street).

SUSPENSION AND TERMINATION

232 On the evening of 7 March 2016, Alex sent an email to his/the owners' lawyer with an attached copy of the Occupancy Permit issued for 9 Page Street. The builder was copied in on the email. In the email Alex states:

Please see attached, occupancy permit (OP) issued by the building surveyor, until now I have not been advised on when the conditions to the permit will be rectified.

Since final payment for property 9 Page St has now been paid, could you write a builder to request for prove of OP conditions been met.

Builder should surrender all keys and remotes to the property and no access to the property is permitted unless authorised by the owners.

As either of the conditions set out in the agreement dated on 12 November 2016,

1. OP issued for 9 Page Street on the 21st of Dec and full completion is pending and was suppose to be 14th of Dec 2015
2. OP for 7 Page St hasn't been met, the agreed date was 18 Dec 2016, builder have now stop all works on site.

All conditions regarding progress payment have been met, in fact, as OP conditions on 9 Page St is yet to be finalised, we have overpaid the builder.

Base on the facts of above we would consider the builder liable of \$2500 per week penalty per house and since the jobs have not stopped on site, the amount of penalty is escalating.

On number of occasions we have request for the builder to provide revised completion date, we have not received any follow-up, which is a breach of the building contract.

As I do not have a current address for the builder to service the notice, this is the formal notice of cancellation and initiation of liquidated damage claim or otherwise survey the notice to the builder)

233 The builder submits that by the above email the owners revoked the builder's contractual license to access the properties to carry out works, and purported to terminate the contracts.

234 I do not accept the submission.

235 I accept the evidence of Alex, given during the hearing, that he was unsure of the status of the contracts at the time he sent the email to his lawyer, and he was seeking advice from his lawyer.

236 In my view the email, at most, constitutes Alex's view as to the entitlement of the owners to terminate the contracts and pursue damages for delay. The notification is addressed to Alex's lawyer for consideration, and the builder is copied in on the email so that the builder is aware of Alex's views and the fact that Alex is consulting his lawyer.

237 The builder did not consider the contracts to have been terminated. On 10 March 2016, the builder suspended the building works by formal notice of suspension (“**the suspension notice**”) delivered to Alex. On the same day, the builder sent a further letter to Alex marked “*Without Prejudice*”. There is no dispute that privilege has been waived in respect of the letter and it is admissible in evidence before me. The suspension notice, which Mr Just says was delivered to Alex’s address at around 5.00 to 5:30 pm on 10 March 2016, provides:

Dear Mr Zhang

Re: 7 & 9 Page Street, Balwyn North

NOTICE OF SUSPENSION UNDER CLAUSE 16 OF THE CONTRACTS

I refer to the two Master Builders contracts dated 29 April 2014 which you have executed in relation to the above projects (**Contracts**) and to my emails dated 18 January 2016 attaching claim #13, my email dated 29 February attaching claims #14 & #16, and my email of 4 March 2016 attaching claim #17 and summary of outstanding amounts totalling \$321,890, of which \$214,390 remains, as it has been for some months, outstanding.

Clause 11.9 and Item 12 of the Appendix to the Contracts provides for payment of invoices within 7 days.

In breach of the Contracts you have failed to make payment of the amount outstanding in respect of these claims within the time required by the Contracts or at all.

Should you fail to make payment of the amount outstanding within 14 Days of the date of this letter I reserve the right to exercise any rights available to me under the Contracts.

I also reserve any right to commence proceedings at VCAT to recover all amounts due. This letter will be produced to the Tribunal on the question of costs.

Further, pursuant to clause 16 of the contracts, I hereby give you notice that I have suspended all works at the properties pending payment of outstanding amounts.

Yours Sincerely

Steve Just

Director

238 In the letter of 10 March 2016, the builder says:

Re: 7 & 9 Page Street, Balwyn North

I refer to the two Master Builders contracts dated 29 April 2014 which you have executed in relation to the above projects (**Contracts**) and to our recent correspondence, in particular your email of 7 March 2016 in which you appear to instruct your solicitor to serve a notice of termination and commence proceedings for a liquidated damages sum.

As I am not in receipt of any such notice or claim and, in any event, there is no basis for you to terminate the Contracts, the Contracts remain on foot.

As to your claim that you are entitled to liquidated damages for delay, item 17 of the Appendix to the Contracts clearly provides that no liquidated damages are payable under the Contracts.

In my email to you dated 12 November 2015 I set out the substance of the discussion on site on 11 November 2015 regarding liquidated damages. I made it clear during that discussion and in my email that any agreement that I would pay liquidated damages was conditional on you making payment of all outstanding sums by set dates (as set out in my email of 12 November 2015).

You failed to make payments in accordance with that agreement.

As such I am not liable to pay liquidated damages in accordance with the agreement reached on 11 November 2015 or under the Contracts. Further, given that under the Contracts we agreed that the liquidated damages amount would be \$Nil, I am not liable to pay you any general damages for delay.

Notwithstanding that position, in my email to you of 4 March 2016 I agreed to reduce my margin on some of the Provisional Sum to 50% and to allow you 3 weeks liquidated damages on 9 Page Street.

In the interests of bringing this to a prompt close I am prepared to continue to make those allowances. However, if the outstanding amounts are not paid within 7 days I will reissue that claim without those allowances and proceed to issue proceedings at VCAT.

I also refer to my notice of suspension under clause 16 of the contracts. No further works will be carried out on either site until you have made payment of the amount outstanding.

I look forward to receiving payment.

- 239 Contrary to what the builder says in the above letter, the builder's email of 12 November 2015 does *not* state that the agreement to pay liquidated damages was conditional upon the owners making payment of all outstanding sums by set dates.
- 240 Nor did the owners fail to make payments pursuant to the November 2015 agreement. As discussed earlier in these reasons, on 16 November 2015 the owners made the payments referenced in the builder's email of 12 November 2015, namely a payment of \$50,000, and a further payment of \$265,000 for the 7 Page Street *fixing* stage claim.
- 241 On 10 March 2016, the owners' lawyers sent an email to the builder. Mr Just confirmed in evidence that this email was received by him *after* he had sent the above-mentioned letter and the suspension notice to Alex. The owners' lawyers' email, amongst other things:

- asserts the due completion date for works under the terms of the 9 Page Street contract as being 4 May 2015, and under the terms of the 7 Page Street contract as being 4 July 2015;
- asserts the obligation of the builder to meet the requirements of the RBS, in respect of 9 Page Street, as first set out in the Building Notice and the Building Order which were both issued by the RBS on 21 December 2015,
- asserts the owners' entitlement to liquidated damages in accordance with the November 2015 agreement, and
- suggests that the builder immediately resume works to avoid increases in the sum of liquidated damages.

242 The email concludes as follows:

PLEASE TAKE NOTICE that if within fourteen (14) days of the date of this letter you do not:

- pay the liquidated damages accrued to date of \$67,500; and
- provide proof of your compliance with the order and the notice for 9 Page Street [the Building Notice in the Building Order issued by the RBS on 21 December 2015], or perform all necessary work to comply with same; and
- resume works for 7 Page Street; and
- do all things necessary to achieve issuance of the occupancy permit [for 7 Page Street] within twenty-one (21) days of resumption

the attached letters are notice of our clients' intention to terminate the Contracts in accordance with clause 21 of the Contract as of the date of this letter.

We will also initiate legal proceedings to recover any outstanding liquidated damages, plus any difference in the actual sale price of 9 Page Street and the market value achievable had the Order and the Notice been complied with, plus our clients' legal costs on an indemnity basis, plus interest.

243 Attached to the email are two notices, one in respect of 9 Page Street and the other in respect of 7 Page Street, each dated 10 March 2016, addressed to the builder. Each notice is headed "**NOTICE OF TERMINATION OF CONTRACT**". Each notice cites the relevant contract and an alleged due date under the contracts for completion of works. Each notice then states:

3. By reason that the Works have not been completed within 1½ times the period they were to have been completed by, and by the reason that the increased time was due to unreasonable delay by You, notwithstanding variations requested by the Owners, and failure to comply with Your Obligations under the Contract and under Section 8 of the Domestic Building Contracts Act 1995 ("DBCA"), which could not have been foreseen by You on the date the Contract was made, YOU

ARE HEREBY GIVEN NOTICE that the Contract is terminated pursuant to section 41 of the DBCA.

4. You should immediately return to the Owners all documents and items, including without limitation all keys and access passes to the Property, and remove all plant, equipment and other items belonging to You from the Property

244 It is difficult, if possible at all, to comprehend exactly what the owners' lawyers intended to convey in their letter of 10 March 2016. The builder is put on notice that if certain things are not done within 14 days, then "*the attached letters are notice of our clients' intention to terminate the Contracts in accordance with clause 21 of the Contract as of the date of this letter*". It does not make grammatical sense.

245 Clause 21 in the contracts sets out the owners' entitlement, pursuant to section 41 of the Act, to terminate the contract if the works are not completed within 1½ times the contemplated period and the reason for the increased time was something that could not have been reasonably foreseen by the builder when the contract was entered.

246 It appears to me that, by the email of 10 March 2016 and the attached notices, the owners' lawyers may have intended to convey that if the demands were not met by the builder within 14 days (which is problematical in itself as one of the demands was to obtain an occupancy permit for 7 Page Street within 21 days of the resumption of works), then the owners intended to terminate the contracts, partly in reliance on section 41 of the Act, in accordance with the attached notices. It appears to me that this may have been the intention, but it is by no means clear.

247 I find that the owners had no entitlement to terminate the contracts in March or April 2016 by reason of clause 21 in the contracts or section 41 of the Act. As discussed above, I have found that, pursuant to the November 2015 agreement, the due date for completion of the contract works was extended to 14 December 2015 for 9 Page Street, and to 15 February 2016 for 7 Page Street. As such, any entitlement to terminate the contracts pursuant to section 21 in the contracts, or section 41 of the Act, had not arisen.

248 I do not accept that the email of 10 March 2016 constitutes a purported termination of the contracts by the owners. The email is poorly drafted. Its lack of clarity is such that I am unable to reach any firm conclusion as to the notification conveyed by the email or intended to be conveyed.

249 The builder's lawyers entered the fray with a response letter to the owners' lawyers dated 16 March 2016. By the letter, the builder:

- disputes that the owners are entitled to terminate the contracts in reliance on section 41 of the Act;
- asserts that, because the contracts provide for '\$Nil' for liquidated damages, the owners have no entitlement to either liquidated damages or general damages for delay;

- asserts that if an agreement was reached in November 2015 as to liquidated damages, which is not admitted, then the agreement was subject to the owner making payment of amounts then owing by particular dates;
- asserts that the owners failed to make payments by due dates;
- demands that the owners immediately make the payments owing as set out in the Suspension Notice;
- requests, pursuant to clause 11.3 in the contracts, that the owners provide written or other reasonable evidence within 14 days “*of the owners’ ability to pay the balances payable and will become payable under the Contracts*”.

250 Clause 11.3 in the contracts provides:

The Builder may at any time until the Works have reached Completion, request the Owner to provide written or other reasonable evidence of capacity to pay the balance of the Contract Price or any variation notwithstanding the fact that the Owner has previously provided such evidence to the Builder under the Contract, and the owner will, within 14 days of any request, provide evidence of such capacity to pay.

251 On 31 March 2016, the owners’ lawyers sent a letter by email to the builder’s lawyers. Although the letter is headed “*Without Prejudice*”, there is no dispute that if privilege attaches to the letter, the privilege has been waived and the letter is admissible evidence before me. Attached to the email was a ‘defects list’ prepared by the owners setting out items of work which they considered were required at 9 Page Street. The list includes the incomplete items of work discussed earlier in these reasons.

252 The letter sets out a lengthy list of alleged breaches of the contracts on the part of the builder, including:

- retaining the final stage claim payment made by the owners for 9 Page Street when the works were not finally completed;
- claiming a builder’s margin on the cost of variation works;
- suspension of the works without valid reason.

253 The letter also addresses the builder’s request, contained in the builder’s lawyers’ above-mentioned letter of 16 March 2016, for evidence as to the owners’ ability to pay sums payable under the contracts. Attached to the email, as evidence of the owners’ ability to pay, was a copy of a Westpac ‘Premium Options Home Loan’ statement in the name of Alex. The statement indicates available funds as at 2 March 2016 in the sum of \$660,767.

254 The builder submits that the home loan statement is inadequate evidence of the owners’ capacity to pay sums payable under the contracts, principally because the statement is in the name of Alex rather than the owners.

- 255 I do not accept the submission.
- 256 I accept the evidence given by Alex that the home loan account was the relevant account for the contracts. That is, it was the account from which payments were made in respect of the 7 Page Street contract and the 9 Page Street contract. I accept that it was appropriate and convenient that the account was in Alex's name because Alex, as agent for his parents, was managing the role of the 'owners' under the contracts. I accept Alex's evidence that his parents could, and did when requested by Alex, transfer money into the home loan account when required.
- 257 I accept the evidence of Alex's father, Mr Zhang, that Alex controlled the financial affairs of Mr Zhang and his wife, including the transfer of funds between various accounts as and when required. It is clear from the evidence of Mr Zhang and Alex's mother, Ling He, that Alex controlled his parents' financial affairs and that his parents placed full trust in him in this regard.
- 258 It is apparent to me from the evidence of Mr Just and Alex that Mr Just was well aware of Alex's control of the building project, including the finances, on behalf of his parents.
- 259 In my view, the provision of the home loan statement was an appropriate and adequate response to the builder's request for evidence of the owners' capacity to pay.
- 260 The owners' lawyers' letter of 31 March 2016 concludes with the assertion that, by reason of the builder's breaches of the contracts, the owners are entitled to terminate the contracts "*and will do so in seven (7) days unless Oakmont [the builder] agrees to remedy its breaches and resume and complete the works as soon as possible*".
- 261 On 4 April 2016, Mr Luke Blackwood of 'Inspector Hawkeye', a building consultant engaged by the owners, inspected 9 Page Street and provided a written report as to incomplete works and rectification works required to bring the 9 Page Street works to satisfactory completion. The items identified in the Hawkeye report are minor items, similar to the items recorded by the builder following his inspection with the owners on 2 March 2016, although greater in number. The report notes that the barbecue and sink to the alfresco area needed to be connected and commissioned, as does the dishwasher in the kitchen, and a number of laminate shelves in the cabinetry were not yet installed.
- 262 By email dated 6 April 2016, the owners' lawyers forwarded a copy of the Hawkeye report to the builder's lawyers, and put a resolution proposal to the builder's lawyers. The email is marked "*Without Prejudice*" but there is no dispute that privilege is waived and the letter is admissible as evidence before me. The proposal included numerous provisions, one of which was the requirement for the builder to recommence works immediately and to

attend to the items set out in the Hawkeye report. Other provisions proposed extended completion dates and new liquidated damages provisions.

263 One of the provisions in the resolution proposal provides that “*the parties are to communicate directly in order to resolve and settle the agreed costs for variations and provisional sums*”. Having regard to the fact that the builder’s payment claims in respect of variations and provisional sums were at the centre of the dispute between the parties, it seems rather pointless to make an offer of settlement that includes a requirement that the parties communicate to resolve and settle those payment claims.

264 The letter concludes as follows:

Our clients are willing to entertain this final offer to your client on the basis that it is accepted no later than this Thursday, 7 April 2016...

In the event that your client is not agreeable than **PLEASE TAKE NOTICE**, the Contracts are considered to be ended, your clients license to be on the premises is revoked, and all keys, remotes and access passes must be returned to our client immediately.

We await your response by no later than 4 PM on 7 April 2016 as this is now an urgent matter.

Our clients reserve all their rights.

265 On 7 April 2016, Mr Just attended the site and took photographs recording the status of the works, in particular at 7 Page Street.

266 On 7 April 2016 the builder’s lawyers sent a letter to the owners’ lawyers in response to the owners’ lawyers’ letter of 31 March 2016. By the letter, the builder:

- asserts that the owners’ notice of intention to terminate the contracts is unjustified and, in any event, not in compliance with the formalities prescribed in the contracts;
- asserts that the owners’ failure to pay the sums owing to the builder, as set out in the suspension notice, constitutes a substantial breach of the contracts on the part of the owners and a valid reason for the builder to suspend the works;
- asserts that the owners have taken possession of 9 Page Street, and that by doing so they have substantially breached the 9 Page Street contract;
- asserts the entitlement of the builder, under clause 12.2 in the contract, to charge a 15% margin on the extra cost of variation works

[Notably, the letter does not address the builder’s margin charge applied to provisional sums overrun].

267 I do not accept that, as at 7 April 2016, the owners had, in breach of the 9 Page Street contract, taken possession of the works. I accept the evidence of Alex that:

- the owners were eager for the 9 Page Street works to be completed as soon as practicable as they wished to sell the property as soon as practicable;
- the owners commenced a marketing campaign for the sale of 9 Page Street toward the end of February 2016. As part of this campaign, hire furniture was moved into 9 Page Street and ‘open for inspection’ times were being arranged by the selling agent. The furniture was hired for a period of 6 weeks;
- the builder had no objection to the marketing campaign and the owners use of the property including the hire furniture and open for inspection days; and
- in mid-April 2016, when the furniture hire contract came to an end, the hire furniture was removed and the marketing campaign ceased.

268 As I understand it, Mr Just does not contest the above evidence. And in my view, the builder’s acquiescence to the owners’ use of the property for the marketing campaign is confirmed in an email from Mr Just to Alex dated 29 February 2016. That email accompanied the builder’s provision of invoice 15. In the email, Mr Just says, amongst other things “*Hi Alex, Hope the open went well on Saturday*”. Mr Just confirmed in evidence that his reference to ‘*the open*’ in this email is a reference to an ‘open for inspection’ that was planned for 9 Page Street that Saturday.

269 On the evidence before me, I do not accept that the owners had, as at 7 April 2016, taken possession of 9 Page Street or otherwise revoked the licence granted to the builder, under the 9 Page Street contract, to free and uninterrupted access to and occupation of the land as the builder reasonably required to enable it to comply with its obligations under the contract.¹⁵

270 On 8 April 2016 the builder’s lawyers sent a letter to the owners’ lawyers whereby, amongst other things:

- they respond in detail to the owners’ allegations, as set out in the above-mentioned owners’ lawyer’s letter of 31 March 2016, as to the builder’s alleged breaches of contract. The alleged breaches are denied;
- they re-assert that the owners have no entitlement to terminate the contracts when they were in substantial breach of the contracts themselves;
- they assert that delays to the works were caused by the variations to the works requested by the owners, and that the builder had provided adequate notice of the delays;
- they assert that the owners had not provided sufficient evidence of their capacity to pay the contracts price, and they demanded that the owners produce further documents including tax returns and statements from the owners’ accountant as to their assets and liabilities and income.

¹⁵ clause 7.2 in the contract provides the granting of the license.

- 271 As discussed above, I have found that the home loan bank statement provided to the builder's lawyer was an appropriate and adequate response to the builder's request for evidence of the owners' capacity to pay the contracts price. In my view the builder's request for the further documents was unwarranted.
- 272 On 12 April 2016 the owners' lawyers sent a lengthy letter by email (8 pages) to the builder's lawyer whereby, amongst other things, they:
- assert that the owners' "*notices of intention to terminate the Contracts*" [this is a reference to the above discussed two notices dated 10 March 2016 attached to the owners' lawyers' email of 10 March] were valid;
 - deny that the owners are in breach of the contracts;
 - assert that the builder is not entitled to payment of various of its claims/invoices because the works had not reached fixing stage at 7 Page Street, and the works had not been completed at 9 Page Street;
 - reference the marketing campaign in respect of 9 Page Street and deny the allegation that the owners had breached the 9 Page Street contract by taking 'possession' of 9 Page Street;
 - re-assert that the builder was not entitled to issue the suspension notice;
 - dispute that the delays to the works had been caused by the owners, and dispute that the builder had provided notice of delays pursuant to the requirements in the contracts;
 - reiterate the assertion that the builder had no entitlement to charge a builder's margin on provisional sums overrun and variation works;
 - assert the obligation of the builder to meet the requirements of the RBS as set out in the Building Order and the Building Notice issued by the RBS on 21 December 2015.
- 273 By letter to the owners' lawyers dated 13 April 2016, the builder's lawyers re-asserted that the owners had no entitlement to terminate the contracts, and they called upon the owners to withdraw the purported notices of termination.
- 274 On 14 April 2016, the owners' lawyers sent an email to the builder's lawyers wherein they state, amongst other things:
- For the reasons given in our letters of 31 March, 6 April and 12 April, we advise that pursuant to the Notices of Termination served on your client on or about 10 March 2016, the Contracts are now terminated. Our clients revoke your clients license to be on the Properties, and all keys, remotes and access passes must be returned to our client immediately...
- 275 The builder did not return the keys to 7 Page Street, and on about 26 April 2016, the owners engaged a locksmith to change the locks at 7 Page Street at a cost of \$231.

- 276 By letter from the builder's lawyers to the owners' lawyers dated 29 April 2016, the builder, amongst other things:
- asserted that the owners' purported termination of the contracts amounted to a repudiation of the contracts; and
 - gave notice that the builder accepted the owner's repudiation, and terminated the contracts.

FINDING ON TERMINATION OF THE CONTRACTS

- 277 At the time the builder suspended the building works, 10 March 2016, the contract works in each of the contracts were not complete. At 7 Page Street the works, as discussed above, had not reached fixing stage. At 9 Page Street the works, as discussed above, were close to, but not yet, completed.
- 278 I note that the suspension notice expressly referenced both 7 and 9 Page Street, and that the notice concludes with the statement: "... *I hereby give you notice that I have suspended all works at the properties pending payment of outstanding amounts*" [underlining added].
- 279 In my view, the builder's suspension of works, that is the works under each of the contracts, demanding full payment of the sum outstanding on invoices, \$214,390, constitutes a repudiation of the contracts on the part of the builder.
- 280 The alleged outstanding sum, \$214,390, assumes an entitlement on the part of the builder to claim payment in a total sum of \$314,520 for variations and provisional sums overrun. As discussed above, I have found that the builder's entitlement in this regard was, as at 7 March 2016, only \$267,612.54. The builder had no entitlement to demand payment of \$214,390, and no entitlement to suspend the works by reason of non-payment of the sum demanded.
- 281 And in my view, the builder's persistent pursuit of a builder's margin charge on provisional sums overrun is a telling factor. As discussed above, I have found that the builder had no entitlement to charge such margin. The contracts do not provide for such entitlement, and it is clear from the evidence that, at the time the parties entered the contract, there had been a discussion between Mr Just and Alex to the effect that there was to be no such charge.
- 282 In my view, the builder's demand for payment of \$214,390, and the suspension of the works until such sum was paid, demonstrates an intention on the part of the builder to perform the contracts only in a manner inconsistent with its obligations and entitlements under the contracts. That is, a repudiation of each of the contracts by the builder.
- 283 I find that the owners were entitled to accept the builder's repudiation of each of the contracts, and to terminate the contracts, and that they did so by the above-mentioned letter of 14 April 2016.

DELAY

- 284 As noted earlier, the owners bring various claims for damages related to delay in completion of the works.
- 285 The builder says that the works under each of the contracts were delayed for various reasons including the large number of variations to the works carried out at the request of the owners, and the time taken by the owners to finalise selections in respect of various provisional sum items.
- 286 Each of the parties called expert witnesses who gave opinion evidence and produced reports, founded on differing theoretical modelling, as to delays in the construction programs for 7 and 9 Page Street.
- 287 Mr Senogles, called by the builder, adopted a time – impact analysis model. His analysis used, as a starting point, a simple baseline construction program prepared by the builder at around the time of, or shortly before, the commencement of works. With the aid of the builder’s site diary, various invoices and the witness statement of Mr Just, Mr Senogles then constructed further construction programs at various time intervals. In this sense, his modelling on alleged delay is prospective rather than retrospective.
- 288 Mr Andrews, called by the owners, is critical of Mr Senogles’ modelling primarily because it relies on what Mr Andrews considers to be insufficient and unreliable sources such as Mr Just’s witness statement and the builder’s incomplete site diary.
- 289 Mr Andrews used alternative modelling. Rather than the prospective approach of assessing delay and then analysing the effect on the critical path of construction looking forwards, Mr Andrews starts with the works ‘as constructed’ and creates, retrospectively, the critical path of construction.
- 290 Although I do not doubt the experience and earnestness of Mr Senogles and Mr Andrews, in my view their conclusions emerge from the somewhat artificial realm of theoretical modelling, and are of no real use to me.
- 291 The limited value of the evidence of Mr Senogles and Mr Andrews is also partly due to the fact that, as discussed earlier, I have found that, as part of the November 2015 agreement, the due date for completion of the contract works was amended to 14 December 2015 for 9 Page Street, and 15 February 2016 for 7 Page Street.
- 292 The agreement to extend the completion dates means, in effect, that it is only delay arising from causes *after* that agreement that might be taken to impact on the parties’ rights and obligations under the contracts.
- 293 The issue is whether there is satisfactory reason/s to allow any extension to the agreed completion dates. In my view there is no satisfactory reason.
- 294 The contracts provide the mechanism by which the builder might claim, and be granted, an extension of time for the completion of works. Clause 15.1 in

each of the contracts sets out causes of delay in respect of which the builder may be entitled to an extension of time. Those causes include:

- the general unavailability of materials necessary to carry out the works;
- any act, default or omission on the part of the owners... including the failure of the owners to provide to the builder information requested by the builder in respect of provisional sum items of work;
- any obstruction, interference or hindrance with the carrying out of the works caused by the owners;
- any other cause beyond the reasonable control of the builder.

295 Clause 15.1 goes on to state that in the event of such delay:

the Builder will within a reasonable time advise the Owner of the cause and the reasonable estimated length of the delay and the Builder will be entitled to a fair and reasonable extension of time for Completion of the Works;

AND/OR

the Builder may, within fourteen days (14) Days of becoming aware that Completion of the works will be delayed, notify the Owner in writing of the delay stating the cause and the reasonable estimated length of the delay

296 Clause 15.2 then provides:

If the Owner does not notify the Builder in writing and reject or dispute the cause of the delay and/or the estimated length of the delay within fourteen (14) days after receipt of the Builder's notice under clause 15.1, the Completion Date under the Contract will be automatically extended by the delay period stated in the said notice...

297 Clause 15.3 goes on to provide:

If the Owner serves a written notice upon the Builder disputing or rejecting the estimated length of the delay stated in the Builder's notice, the Builder is still entitled to a fair and reasonable extension of time for Completion of the Works.

298 The builder submits¹⁶ that extensions of time for completion of the works is warranted for delays in respect of:

- the stonework to 7 Page Street;
- the parquetry at 9 Page Street; and
- the pool fencing/lattice at 9 Page Street

Stonework 7 Page Street

299 The builder says that the material for the stone bench tops was selected early in the progress of works, in around March 2015, and set aside by the supplier, Adriatic Stone (“**Adriatic**”). The builder says that the quantity of

¹⁶ builder's closing written submissions, schedule paragraphs 33 – 49.

the benchtop material set aside by Adriatic was based on drawings approved by Alex on behalf of the owners.

- 300 The builder says that Alex subsequently made a number of amendments to the drawings, increasing the amount of stone required. Mr Just says that he provided the amended drawings/templates to Adriatic on 12 November 2015, and that he expected there would be a lag time of between 15 – 22 days for delivery of the stonework for installation. He says that Adriatic informed him on 10 December 2015 that it had insufficient stone for all the stoneworks at 7 Page Street, and Adriatic would need further time to source the additional stone. Mr Just says that Alex did not approve the acquisition of further stone until 14 January 2016.
- 301 The builder claims an entitlement to 54 days extension of time, based on the Mr Senogle’s modelling. As noted above, I find Mr Senogles evidence to be of no real use to me. But that, in itself, does not count out an extension of time.
- 302 It is not in dispute that there was a delay in the supply of the stonework from Adriatic.
- 303 Alex says that the final drawings in respect of stonework was approved and provided to the builder a considerable time, some months, prior to November 2015. The owners say that if the builder did not provide the drawings to Adriatic until 12 November 2015, that is a delay attributable to the builder, not the owners.
- 304 It appears that Adriatic acquired the requisite extra stone by 22 December 2015. I draw this conclusion from Adriatic’s invoice to the builder dated 22 December 2015¹⁷ which makes reference to additional slabs of Carrara stone.
- 305 Email correspondence between the builder and Adriatic¹⁸ indicates that on 14 January 2016, Alex inspected the additional Carrara stone and confirmed directly to Adriatic his approval of it. The builder blames Alex for the delay between Adriatic’s acquisition of the stone, and Alex’s inspection and approval of it. Alex disputes this. He says he inspected the stone in a timely manner following a request to do so.
- 306 If the builder was concerned that the delay to stonework, beyond its control, would delay the completion of the contract works, the builder might well have issued a written notice of the type contemplated under clause 15 in the contract. But the builder did not do this.
- 307 All up, the evidence as to the delay in the stonework is equivocal. I am not satisfied, on the evidence before me, that the cause for delay in the stonework was of a type specified under clause 15.1 in the contract. That is, I am not satisfied on the evidence that the delay was caused by the owners’

¹⁷ Tribunal Book p 461

¹⁸ Tribunal Book p 459

acts or omissions, or was otherwise a cause beyond the control of the builder.

308 And in any event, whatever the cause of the delay in the stonework, I am not satisfied that such delay justifies an extension to the due date for completion of works. The due date for completion was, pursuant to the November 2015 agreement, extended to 15 February 2016. There is no satisfactory explanation as to why the stonework delay prevented the builder from achieving completion by the due date.

Parquetry 9 Page Street

309 Mr Just says that the parquetry boards for flooring in 9 Page Street were of poor quality such that a high percentage of them could not be used. He says the poor quality boards were obtained from a supplier nominated by Alex, namely 'Vandar Trading Pty Ltd'.

310 Once all the boards were installed, a sub-contractor was engaged to sand, stain and polish the boards. Mr Just says that the sub-contractor, whom he recalls was named 'Mario', was also nominated by Alex.

311 Mario attended in around November 2015 and began sanding the floor, but soon advised Mr Just that he could not complete the works because some of the parquetry boards were coming loose and showing signs of 'drumminess'.

312 The builder's carpenters thereafter investigated the boards and found some had become loose from insufficient glue, while others were drummy due to the poor quality of the timber which was cupping/twisting. The problematic boards were removed and replaced with new boards. Mr Just says that approximately 100 boards, out of a total of around 3000, were replaced. He says these works took proximally 7 to 9 days.

313 The builder submits it was delayed in finishing the parquetry flooring because of the poor quality boards supplied by the supplier nominated by the owners. It says the delay was beyond its control and is therefore entitled to an extension of time. The builder seeks an extension of 26 working days, based on Mr Senogles modelling.

314 Again, as noted above, I find Mr Senogles evidence to be of no real use to me, but that does not mean there should be no extension of time.

315 I accept the evidence of Mr Just that the quality of the parquetry boards caused some delay in finishing the flooring works. But I do not accept the builder's submission that I should find that the owners are responsible for the delay, and that as such, the builder is entitled to an extension of time.

316 Mr Just gave evidence that, instead of accepting the parquetry supplier nominated by the applicants, he should have stuck with a supplier he knew and trusted. It is a salient point. But the evidence is not that the builder was *compelled* to select the supplier nominated by the owners. It was a choice the builder made, albeit at the suggestion of the owners. As such, I am not

persuaded that the delay to the parquetry is just cause for an extension of time under clause 15 in the contract.

317 And, as with the stonework, if the builder was concerned that the works would be delayed for a reason beyond its control, the builder could have issued a notice under clause 15 in the contract. But the builder did not do so.

318 I am not satisfied, on the evidence, that the delay in the parquetry flooring justifies any extension of time to the due completion date.

Pool fencing/lattice 9 Page Street

319 Mr Just says that Alex instructed the builder to install lattice panels, to create some privacy, to boundary fencing. This is not disputed.

320 Mr Just says that when the RBS carried out a site inspection on around 15 February 2016, he directed alterations to the lattice - the installation of mesh - to ensure that the latticed fence was not a 'climbable' fence around the swimming pool.

321 Mr Just says that the mesh works took three days to complete, and it took a further two days to co-ordinate a further inspection by the RBS.

322 The builder submits that the fencing surrounding the pool would have been compliant, that is it would have been approved by the RBS, if the lattice had not been installed. The builder says that because the lattice works were a variation requested by the owners, they bear responsibility for the delay caused as a result of the direction of the RBS. The builder submits it is entitled to an extension of time of five days.

323 I do not accept the submission.

324 The variations schedule prepared by the builder, discussed earlier in these reasons, includes information as to when the lattice panel works were carried out. Some works were carried out between 24 October and 4 November 2015. Further works were carried out between 9 December and 11 December 2015. And then some further additional works were carried out between 4 January and 5 January 2016.

325 The builder is not claiming an extension of time for the lattice variation works carried out by 5 January 2016. The builder is claiming the extension of time for the delay resulting from the direction of the RBS on or about 15 February 2016. I do not accept that the owners are responsible for such delay.

326 The lattice variation works were part of the overall building works which would ultimately be inspected by the RBS. Had the builder contemplated that the lattice works would cause concern to the RBS, the builder could have included the remedial works, the installation of mesh, as part and parcel of the lattice installation works. Had the builder been unsure as to whether the lattice works would be compliant in the eyes of the RBS, the

builder could have sought the opinion of the RBS before the lattice works were installed.

- 327 In my view, the owners are not responsible for the builder's lack of knowledge in this regard.
- 328 I am not persuaded that the cause of the alleged delay falls within clause 15.1 in the contract. The owners request for the lattice variation works is not the cause of the claimed delay.
- 329 Nor do I consider the delay to have been beyond the reasonable control of the builder. In my view, the builder should have appreciated the reasonable likelihood that the alteration to the fencing around the pool would be a matter of concern to the RBS. Had the builder appreciated this, the builder could have sought clarification from the RBS before the works were commenced on 24 October 2016.
- 330 I find that the builder is not entitled to an extension of time in respect of the remedial works to the lattice panel fencing required as a result of the RBS direction on or about 15 February 2016.

Conclusion on delay

- 331 Under the November 2015 agreement, the agreed due dates for completion of the works were 14 December 2015 for 9 Page Street, and 15 February 2016 for 7 Page Street. For the above reasons, I find that the builder has no entitlement to an extension of these dates.

OWNERS ACTIONS AFTER THE TERMINATION OF THE CONTRACTS

7 Page Street

- 332 The owners completed construction of 7 Page Street as 'owner - builders'. The owners engaged 'B&J Chen Pty Ltd', at a cost of \$22,000, to provide project management services to assist in bringing the works to completion. The RBS issued an occupancy permit for 7 Page Street on 19 September 2016, and the construction of 7 Page Street was completed at around this time.
- 333 7 Page Street was quickly thereafter sold at auction on 8 October 2016 for a price of \$3,690,000, with settlement occurring on 3 November 2016.

9 Page Street

- 334 Following termination of the contracts, the owners attended to complete works at 9 Page Street, including:
- a) in early May 2016, the owners satisfied the Building Notice issued by the RBS on 21 December 2015 by arranging for the engineer to inspect and certify the foundations to the retaining wall. The cost of the engineer was \$330;

- b) in around mid-June the owners engaged 'SWAT Constructions' to alter the windows in two bedrooms as required by the Building Order issued by the RBS on 21 December 2015. The RBS confirmed cancellation of the Building Order on 16 June 2016;
- c) on around 1 September 2016, the owners arranged a plumber to complete the installation/commissioning of the dishwasher, and to complete the installation/commissioning of the sink and barbecue in the alfresco area. The plumber was, at that time, also engaged in a number of works at 7 Page Street.

335 There is little explanation as to why it took the owners more than four months, after termination of the contracts in April 2016, to carry out the minor scope of works required to bring the 9 Page Street to completion. As I understand it, the owners initial enthusiasm to sell 9 Page Street was tempered by the mediocre response to the marketing campaign in February/March 2016. And it was convenient to complete the installation/commissioning of the dishwasher and the barbecue in around early September 2016 when a plumber engaged by the owners was carrying out similar works at 7 Page Street.

336 There is also little evidence as to attempts to sell or lease 9 Page Street after it was completed. Alex says that the selling of 7 Page Street at auction on 8 October 2016, with settlement on 3 November 2016, relieved the financial pressure on the owners, such that they did not have to sell 9 Page Street quickly.

337 In mid-November 2016, the owners' daughter and her four children, residents of China, made a visit to Australia. She and her children, and the owners, moved into 9 Page Street until February 2017 when the owner's daughter and her children returned to China.

338 Mr Zhang says that he and his wife again lived at 9 Page Street for a few weeks in August 2017. As I understand it, the owners were generally open to offers to buy or lease the property, and in this regard the property was listed with a real estate agent, but no satisfactory offers were received. There was no further marketing campaign until shortly before the property was put to auction in early April 2018. 9 Page Street was sold at the auction.

DAMAGES

339 As discussed above, I find that the owners were entitled to accept the builder's repudiation of each of the contracts and terminate the contracts, as they did on 14 April 2016.

340 The owners are entitled to damages. The general rule with respect to damages for breach of contract is that where a party sustains a loss by reason of the breach, that party is, in so far as money can do it, to be placed in the situation he would have been had the contract been properly

performed. The general rule is subject to the qualification that it must be a reasonable course to adopt.¹⁹

- 341 In the case of a domestic building contract, assessment of damages include assessment of the reasonable cost, over and above the contract price (that is the adjusted contract price after allowances for provisional items expenditure and variations), to bring the contract works to completion in conformity with the scope of works prescribed under the contract, subject to the qualification that it is a reasonable course to adopt.
- 342 In my view it is appropriate that the damages be assessed separately in respect of the two contracts. That is, damages arising as a result of breach of the 9 Page Street contract be assessed separately from damages arising as a result of breach of the 7 Page Street contract. This does not mean that the circumstance of two side-by-side contracts involving the same parties is a circumstance that is ignored.
- 343 As part of the assessment of damages, I will include the payments made by the owners to the builder under each contract. As discussed earlier, the owners made payments in a total sum of \$2,129,130. Of this sum, \$1,075,000 is the stage payments up to and including *completion* stage for 9 Page Street (not including provisional sum overrun and variations), and \$954,000 as stage payments up to and including *fixing* stage for 7 Page Street (not including provisional sums overrun and variations).
- 344 This leaves a balance of \$100,130 as the sum paid by the owners towards provisional sums overrun and variations for 7 and 9 Page Street together. In my view, it is reasonable to allocate this sum in proportions which correspond to my previous findings as to allowed cost of provisional sums overrun and variations. As set out earlier in these reasons, for 7 Page Street I allow \$14,831.41 for provisional sums overrun and \$45,536 for variations works, a total of **\$60,366** (rounded off to the nearest dollar). For 9 Page Street, the allowances are \$105,759.93 for provisional sums overrun and \$67,261 for variations, a total of **\$173,021** (rounded off to the nearest dollar). These figures translate to a percentage allowances (rounded off to the nearest whole number) of 26% for 7 Page Street and 74% for 9 Page Street. Applying these percentages to \$100,130, I allow **\$26,034** as the sum paid by the owners for provisional sums overrun and variations for 7 Page Street, and I allow **\$74,096** as the sum paid by the owners for provisional sums overrun and variations for 9 Page Street.

9 PAGE STREET

345 I assess the adjusted contract price for 9 Page Street as follows:

- contract price nominated in the contract document	\$1,075,000
- plus variations and provisional sums overrun	<u>\$ 173,021</u>
total	<u>\$1,248,021</u>

¹⁹ Bellgrove v Eldridge (1954) 90 CLR 613.

346 I allow for payments made by the owners as follows:

- stage payments	\$1,075,000
- variations and provisional sums overrun allocation	<u>\$ 74,096</u>
total	<u>\$1,149,096</u>

347 Accordingly, I assess the unpaid contract balance for 9 Page Street as **\$98,925**.

Expenditure claimed by owners

348 The owners claim a number of items of expenditure incurred by them after the termination of the contract. I heard expert evidence from Mr Berkowitz (called by the owners) and Mr Garrard (called by the builder) in respect of these items.

Water and electricity

349 The owners claim \$1021.01 which they say is the cost of water and electricity charges for 9 Page Street paid by them during the period the builder was on site. Mr Berkowitz says that such utility charges are normally borne by a builder while the builder is in possession of the site. As the contract does not reference express any obligation on the builder in respect of such charges, I do not allow this claim.

Engineer certification of retaining wall footings

350 As discussed earlier, in May 2016 the owners obtained the engineer's certification in respect of the retaining wall footings as required pursuant to the building notice issued by the RBS on 21 December 2015. They claim the cost of such certification, \$330.

351 The contract quotation sets out a number of exclusions from the contract price, including '*Any costs associated with the building permit or inspections of the works*' and '*Any fees from Consultants, Architect, Engineer or Building Surveyor.*'

352 The owners submit that, despite the exclusion in the contract quotation, the builder should bear the cost because it could have been avoided had the builder arranged for inspection of the retaining wall footings at the appropriate time. That is, inspection of the retaining wall footings could have been arranged to coincide with one of the RBS' other inspections.

353 I do not accept the submission. There is no evidence before me that the retaining wall footings were exposed and capable of inspection on any particular date when the surveyor was inspecting the works. On the evidence before me, I am not satisfied that the fee in respect of the retaining wall footings, whether an engineer certification fee and/or a survey inspection fee, was an expense to be borne by the owners under the contract. I do not allow this claim.

Windows rectification pursuant to RBS requirement

354 As noted earlier, in around mid-June 2016 the owners arranged for ‘SWAT Constructions’ to alter the windows in two bedrooms as required by the building order issued by the RBS on 21 December 2015. They claim \$1996.50 as the cost of such works.

355 I am not satisfied that the builder should bear this cost. The construction drawing in respect of these windows²⁰ clearly illustrates the windows as fixed. However, an explanatory note under the illustration makes reference to ‘awning window’, thus raising an ambiguity between the window drawing and the notation.

356 In my view, in the circumstance where the builder has followed the construction drawing provided by the owners, the builder should not be liable for the cost of altering the windows as required by the RBS, merely because the builder did not pick up the ambiguity raised by the notation in the drawing.

357 I do not allow this claim.

Installation of barbecue, sink and bulkhead in the alfresco area

358 There is no dispute that the builder had not installed the barbecue and sink in the alfresco area. Mr Berkowitz and Mr Garrard agree that the cost incurred by the owners to attend these works, \$220, should be allowed. I allow \$220.

359 Mr Berkowitz and Mr Garrard also agree that the construction of a bulkhead over the alfresco rangehood falls within the contract scope of works, and as such the owners should be compensated for the cost of such works incurred by them. The work was carried out by ‘MAD Plaster Design’, who also carried out similar works to 7 Page Street. MAD Plaster Design’ provided only one invoice for all the works in a sum of \$1468.50.²¹ Mr Berkowitz and Mr Garrard agree that it is fair that half the sum of this invoice, \$734.25, be allocated to the bulkhead construction at 9 Page Street. I allow \$734.25 for this item.

360 Accordingly, I allow a total of **\$954** (rounded off to the nearest dollar) as the cost of contract works for 9 Page Street borne by the owners after termination of the contract.

Defective and incomplete works not rectified

361 Section 8 of the Act sets out mandatory warranties in relation to works under a domestic building contract. Each of the 7 Page Street and 9 Page Street contracts sets out these warranties under clause 10. The warranties include the following:

²⁰ Tribunal Book p 251, windows marked W 23, W 26 in the drawing.

²¹ invoice dated 7 September 2016 at Tribunal Book p 1654.

- (a) the builder warrants that the work will be carried out in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract;
- (b) the builder warrants that all materials to be supplied by the builder for use in the work will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new;
- (c) the builder warrants that the work will be carried out in accordance with, and will comply with, all laws and legal requirements including, without limiting the generality of this warranty, the **Building Act 1993** and the regulations made under that Act⁴;
- (d) the builder warrants that the work will be carried out with reasonable care and skill and will be completed by the date or within the period) specified by the contract;

362 The applicants say there remains a number of unfinished works and some defective works at 9 Page Street. The applicants claim, as damages, \$54,598.10 as the cost to complete and rectify the works as assessed by their expert witness Mr Ryan. They say that this represents the reasonable cost to bring the works to conformity as prescribed under the contract.

363 In respect of these matters, I heard evidence from Mr Ryan, and expert evidence from Mr Lorich and Mr Garrard. I inspected the alleged incomplete and defective works with Mr Lorich and Mr Ryan at the view of 9 Page Street on day nine of the hearing.

364 The owners have sold 9 Page Street. At the time of the sale, the owners had not attended to rectification of any of the defects and deficiencies identified by Mr Ryan. The owners say that it remains appropriate, as part of the assessment of their damages arising from the builder's breach of contract, to include the reasonable cost to bring the defective/deficient works to contract conformity as prescribed by Mr Ryan. If I do not accept that damages should be allowed on this basis, the owners submit that, in the alternative, it is appropriate to award damages for the diminution in the value of 9 Page Street by reason of the alleged defective/deficient works, and they say the diminution in value should be assessed as the same amount, \$54,598.10.

365 In my view, the sale of 9 Page Street does not, of itself, displace the general principle as to assessment of the owners' damages arising from the builder's breach of contract. However, it may well be that the sale of the property is a circumstance that may make the usual method of assessment of damage an unreasonable course to adopt. In my view it is appropriate to make the assessment having regard to the various alleged items of defective/deficient work, which I do below.

Miscellaneous minor incomplete works

366 The experts agree that the following items may be classified as minor items requiring completion. They are items which would have been attended to by the builder had the builder fully performed the contract:

- a prominent drill hole in the front door just above the lock needs to be filled and made good;
- the rear garage door seal is to be sanded and stained;
- screws missing from rear garage door hinges;
- remove protection masking tape from the garage ceiling sensor;
- provide 2 remotes for garage door. One was provided, however the contract specifies 3. The experts agree on an allowance of \$120;
- paint/seal the top and bottom of rear garage door;
- alfresco stone caulking required at top of splashbacks;
- caulking required to expansion joints installed to 1st floor rendered foam cladding;
- caulking required to minor gaps at ground floor entrance porch mouldings/columns;
- fixing of loose downpipe clip;
- paint the unpainted downpipe at alfresco East End;
- remove excess tiles stored in the garage;
- external PowerPoint for water tank pump to be relocated on the correct side of the tank;
- clean and caulk floor tile junction at powder room;
- seal waste pipe penetrations in kitchen base cupboards;
- minor adjustments required to a few draws and doors to kitchen cabinetry;
- install missing shelves (3) to kitchen base cupboards;
- fill and repaint minor cracks/gaps in alfresco ceiling cornices;
- final commissioning of alarm and sprinkler to ensure correct operation;

- adjustment to front centre window sash which is sticking and ensure correct operation of opening mechanism;
- clean marks on window in bedroom 3 and bedroom 4;
- fill and paint minor gaps/cracks to ensuite cornice;
- install missing screws to powder room door hinges;
- repair minor damage to 2nd ensuite door jamb at hinge area;
- install missing light cover to butler's pantry range hood;
- the skirting below the gas fire requires repainting to achieve a consistent finish;
- remove paint marks on the black metal surround at the underside of the firebox wall;
- realign and paint ceiling access panel in the bedroom 3;
- align and fix air-conditioning grilles in master bedroom.

367 The experts agree that the following rectifications to minor defective works are required:

- re-align letterbox metal cover plate which is crooked;
- remove moisture from entrance gate intercom and ensure correct functioning, including the functioning of the connected front gate release;
- downpipes on first floor to be extended over flashing onto the metal roof with spreaders installed;
- southside air-conditioning condensation pipe to be extended into box gutter;
- adjustment of a misaligned master bedroom double doors, and any necessary touch-up repainting.

368 It is impossible to say whether all or any of the above items may have had a bearing on the sale price of the property. In my view, they all contribute to the general appearance and condition of the property and I think it reasonable that there be an allowance for damages, measured in the usual way, that is the reasonable cost to attend to their completion/rectification.

369 Mr Ryan allows a sum of \$3451.60, excluding allowances for contingency builder's margin and GST, as the cost to complete and rectify all of the above minor items. Mr Garrard allows a sum of \$2496.75, excluding allowances for contingency, builder's margin and GST. I think it reasonable to assess damages as the midpoint between the two assessments. On this

basis I allow \$2974, not including allowances for contingency, builder's margin and GST.

- 370 Mr Ryan says that, in addition to the above items, there are minor scuff marks on the garage wall and minor chips to the render at the rear garage door which constitute defective works. Mr Lorich says that, having regard to the age of the property, these items should be considered as reasonable wear and tear rather than defective works. Having viewed the items, I agree with Mr Lorich.

Articulation in rendered cladding

- 371 The cladding to the ground level of the building is rendered brickwork. There is no dispute that the number of articulation joints in the render is not compliant with the construction drawings. That is, there are areas where prescribed articulation joints are missing. Mr Ryan says that, all up, 12 prescribed articulation joints are missing. Further, where articulation joints have been installed, they are not fully formed. That is, they do not continue right through the render.
- 372 Despite these deficiencies in respect of the articulation joints, the rendered cladding is showing no signs of distress, save for a very minor crack at the location of one partially formed articulation joint at the north-east corner of the property. Mr Ryan says that, without the prescribed articulation joints, the render may suffer movement cracking in the future. Mr Ryan says that because a colour match with the existing render will not be practically possible, the rectification works will effectively require the re-rendering of the whole of the ground level rendered areas, installing articulation joints as required. Mr Ryan estimates the cost of such works as \$8333, not including builder's margin and GST
- 373 Mr Lorich says the render will likely not suffer any significant cracking in the future because the building is constructed on a class "M" site and the ground floor clay bricks are less volatile to movement than other forms of masonry. He says that no further articulation joints are required, however the partially formed articulation joints that have been installed should be properly fully formed. Mr Lorich agrees that matching the existing render is problematic. However, he says that rather than wholesale re-rendering, it would be preferable to apply a coloured membrane topcoat to the ground floor render. This would resolve any colour mismatch difficulties and provide the added benefit of topcoat membrane protection.
- 374 Mr Ryan agrees that the application of a topcoat membrane is a good solution to the problem of matching the render colour. Adopting this, in lieu of wholesale re-rendering, Mr Ryan's cost assessment is reduced to \$6633, not including allowances for contingency, builder's margin and GST. Mr Garrard's allowance is \$3880, not including allowances for contingency, builder's margin and GST.

375 I am not satisfied that it is reasonable to award damages for this item. The deficiencies in respect of the articulation joints have not diminished the appearance of the property. It is unknown whether the deficiencies will translate to a diminished appearance in the future. In my view, with no effect to the appearance of the property, and the property having now been sold, an allowance for damages in respect of this item would be an unjustified windfall to the owners. As such, in my view it is not reasonable to allow damages for this item.

Other render defects

376 Mr Ryan identifies the following defects in the render finish:

- render marks at front porch;
- render marks/cement spots at Northeast Corner;
- render stain alongside the left and right side walls of the front of the garage and the rear alfresco right side wall panel;
- a couple of areas where there are large gaps in the rendered cladding adjacent to ventilation grills;
- drill holes errantly drilled in the render adjacent to a downpipe.

377 Mr Lorich agrees that the gaps in the rendered cladding adjacent to the ventilation grills, and the errantly drilled drill holes, constitute defective works. As to the various render marks/stains, Mr Lorich says these are not defects in the works, but rather fair wear and tear.

378 Having viewed the render, I agree with Mr Ryan and find that the blemishes in the render constitute defects in the works carried out by the builder. All of the items are noticeable and, in my view, diminish the general appearance and condition of the property such that I think it is reasonable that there be an allowance for damages, measured in the usual way, that is the reasonable cost to attend to their completion/rectification.

379 Excluding allowances for contingency, builder's margin and GST, Mr Ryan's cost estimate to rectify these works is \$4,403, and Mr Garrard's estimate is \$1,442.90. I think it fair to assess damages as the midpoint between these two estimates, namely \$2,923 (not including allowances for contingency, builder's margin and GST).

Alfresco/Pool paving

380 There is a very noticeable line of cracking in the marble paving in the rear alfresco area. Mr Ryan and Mr Lorich agree that it is movement cracking located at the junction between the alfresco reinforced concrete slab and the concrete paving around the adjacent swimming pool. There is no dispute

that it is defective work requiring rectification. As the crack is very noticeable and, in my view, diminishes the general appearance of the property, I think it is reasonable that there be an allowance for damages measured in the usual way, that is the reasonable cost to rectify the defect.

381 Mr Ryan says that rectification works include:

- provision of rubbish bin rubbish bin;
- remove pool fence/barrier and reinstall on completion of works;
- remove cracked paving tiles and clean concrete paving substrate;
- supply and install new paving tiles including grouting and sealing;
- install expansion joint;
- install flexible coloured caulking;
- clean floor tiles.

382 Excluding allowances for contingency, builder's margin and GST, Mr Ryan estimates the cost of rectification works as \$2914, whereas Mr Garrard allows \$1290. Again, I think it fair to assess damages as the midpoint between the estimates, that is \$2,102 (excluding allowances for contingency, builder's margin and GST).

383 I note for completeness that there is no dispute that the pool fence, at the location of the cracked alfresco pavers, has shifted slightly such that the pool gate no longer closes properly. As Mr Ryan says, this will be rectified when the fence is reinstated.

Garage floor slab

384 There are several noticeable chips, approximately 1 to 2 cm in width and depth, in the concrete garage floor. The floor has been painted with paving paint. The paint coverage is noticeably patchy. It appears that some areas of the floor may have had a thicker or extra coat of paint applied compared to other areas of the floor.

385 Noting that the chips in the floor have paint coverage, I am satisfied that the chips existed before the floor was painted.

386 Mr Ryan and Mr Lorich agree that the floor is not acceptable and requires rectification which will include filling the chip holes and repainting the floor.

387 Mr Ryan says it will be necessary to sand the entire floor to guard against the delamination of the new paint, fill the chips and then apply two coats of paving paint. He allows \$4476 for such works, excluding allowances for contingency, builder's margin and GST.

- 388 Mr Lorich says a thorough clean, rather than sanding the floor, is all that is required before the filling of the chip holes and repainting. But even with this reduced scope of works, Mr Lorich considers that Mr Ryan's rectification cost estimate is reasonable.
- 389 Mr Garrard's cost estimate to rectify the floor is considerably lower, at \$590 excluding allowances for contingency, builder's margin and GST. The scope of works Mr Gerard has costed is not clear. Having regard to Mr Lorich's evidence that Mr Ryan's cost estimate is reasonable, I allow damages for this item as the cost assessed by Mr Ryan, namely \$4,476, excluding allowances for contingency, builder's margin and GST.

Flue to alfresco range hood

- 390 Mr Ryan says that a flue should be fitted to the range hood in the alfresco barbecue area. Mr Lawrence says the contract made no allowance for installation of a flue. It appears that the contract may have allowed for a range hood that does not require a flue. Mr Ryan says that the range hood installed should have a flue fitted for safety reasons.
- 391 Mr Ryan's opinion that a flue is required may well be sound, however I am not satisfied on the evidence that the builder was contractually obligated to install a flue. Accordingly, I make no allowance for this item.

Telstra/Foxtel connection

- 392 The builder has installed wiring for Telstra and Foxtel connection, however the wiring has not been fitted off to phone, data and TV points. As the contract quotation expressly includes "*Structured Cabling throughout the home, including all phone & data points, Free-to-air TV points & Foxtel TV points*", in my view the builder's works are incomplete in that the wiring has not been finally connected to its usage points.
- 393 Excluding allowances for contingency, builder's margin and GST, Mr Ryan allows \$680 to complete these works, whereas Mr Gerard allows a \$525. I think it fair to assess damages as the midpoint between the estimates, namely \$602 (not including contingency, builder's margin and GST).

Miscellaneous rejected items

- 394 Mr Ryan referenced three more items of work which the owners allege as incomplete or defective.
- 395 The ensuite tiles were said to need final cleaning. This was not evident to me at the view, and I make no allowance for this item.
- 396 The owners say that an external weather proof power-point on the north side of the building is not functioning properly. At the view, the builder demonstrated that the power-point functions by use of an internal switch, and as such, I do not accept that this is an item of defective work.

397 The owners say that a feature aluminium angle in the master bedroom ensuite tiled niche is misaligned. At the view, the misalignment was not apparent to me from a normal viewpoint, and as such I do not accept that this is an item of defective work.

Conclusion - incomplete and defective works at 9 Page Street

398 In summary, I allow a total of \$13,077, not including allowances for contingency, builder's margin and GST, as damages in respect of the non-rectified items of incomplete and/or defective works at 9 Page Street:

- miscellaneous minor incomplete works	\$2974
- render defects	\$2923
- alfresco/pool paving	\$2102
- garage floor slab	\$4476
- Telstra/Foxtel connection	<u>\$602</u>
TOTAL	<u>\$13077</u>

399 As part of his overall cost estimate, Mr Ryan makes additional allowance for allowance for:

- supervision at \$110 per hour;
- across-the-board contingency allowance of 5%;
- across-the-board builder's margin of 35%;
- GST

400 Mr Lorich says that, having regard to the nature and scope of the works, he considers a 35% allowance for builder's margin is adequate, with no extra allowance for supervision or contingency. Having regard to the modest nature of the works that I have allowed, I agree with Mr Lorich.

401 In my view, it is reasonable that the assessment of damages includes a normal allowance for builder's margin and GST. After allowing, on the above assessed sum of \$13,077, a builder's margin of 35% and then GST at 10%, I reach a total of **\$19,419** as my assessment of damages in respect of non-rectified items of incomplete and defective works at 9 Page Street.

Delay damages 9 Page Street

402 The liquidated damages clause in the contract, clause 18, provides:

18.1 Owner's entitlement to liquidated damages

If the Builder fails to bring the Works to Completion by the Completion Date, the Builder will pay or allow to the Owner by way of pre-estimated and Liquidated Damages, a sum calculated at the rate stated in Item 17 of the Appendix for the period from the Completion Date until the Works reach Completion or until the owner takes Possession, whichever is the earlier.

18.2 *Liquidated damages may only be deducted from final payment*

The amount of any Liquidated Damages may be deducted by the Owner from the Final Payment only and any deficiency may be recovered by the Owner as a debt due to the owner by the Builder.

- 403 As discussed earlier in these reasons, at the time the parties entered the contract the item 17 in the Appendix provided for liquidated damages of 'Nil' dollars per week, and I have found that, pursuant to the November 2015 agreement, the liquidated damages sum was amended to \$2500 per week. I have also found that the due date for completion of the works was, pursuant to the November 2015 agreement, amended to 14 December 2015.
- 404 I have also found, as discussed earlier, that the builder has no entitlement to an extension of time for the completion of the works.
- 405 I have found, as discussed earlier in these reasons, that the owners' access to 9 Page Street in February and March 2016 for the purpose of a sales marketing campaign did not constitute taking possession of the works.
- 406 I have found that the owners terminated each of the contracts on 14 April 2016.
- 407 In my view, the owners took possession of the works at 9 Page Street and 7 Page Street upon the termination of the contracts on 14 April 2016. As such, in respect of 9 Page Street they are entitled to liquidated damages at the rate of \$2500 per week for the period 15 December 2015 to 14 April 2016 (17.28 weeks). I calculate that sum as **\$43,200**.
- 408 In addition to the contract entitlement to liquidated damages for delay, the owners claim an entitlement, at general law, to further damages for delay in the form of lost rent and/or in the form of increased interest burden on the loan obtained for the construction of the home.
- 409 Contract prescribed liquidated damages is a sum, agreed by the parties to a contract, to be paid in the event the building works are not completed by the due date, whereas delay damages at general law is the actual loss arising from a builder's failure to comply with the contractual requirement to complete building works by the due completion date. An owner is not entitled to both prescribed liquidated damages for delay, and general law damages for delay, for the same period of delay.
- 410 The question arises as to whether the owners have any entitlement to delay damages at general law for any period after 14 April 2016.
- 411 The fact that a contract includes a provision for liquidated damages for delay, that is, the parties have turned their mind to and reached agreement in respect of damages for late completion of the contract works, does not of itself necessarily mean that the parties have agreed that the liquidated damages entitlement is the only available entitlement in respect of delay damages. It is a matter of construing the contract. One starts with the presumption that neither party intends to abandon remedies available at

general law, and there must be clear words in the contract to rebut the presumption.²²

- 412 In my view, the language of clause 18 in the contract, set out above, does not lead to a conclusion that the parties agreed to abandon any entitlement to delay damages at general law. Clause 18 provides an entitlement to liquidated damages for a prescribed period, and makes provision as to how the entitlement is to be applied. But it does no more than that.
- 413 Set out earlier in these reasons are the emails of 12 November 2015 and 15 November 2015 which confirmed the November 2015 agreement. There are no words in those emails to suggest abandonment of any entitlement to delay damages at general law.
- 414 I am satisfied that the contract does not bar a claim by the owners for delay damages at general law for any period after 14 April 2016.
- 415 9 Page Street was very close to completion at the time the contract was terminated. The RBS had issued the occupancy permit on 21 December 2015, however the building notice (requiring engineer certification of retaining wall footings) and the building order (requiring alteration of two bedroom windows) were yet to be satisfied.
- 416 As I understand it, the owners claim delay damages for the period up to 16 June 2016, that being the date by which the owners had satisfied the building notice and the building order.
- 417 As discussed earlier, I find the builder is not liable for the cost incurred by the owners to satisfy the building notice and the building order issued by the RBS on 21 December 2015. If there was delay in carrying out these tasks, it is a delay not attributable to the builder.
- 418 In my view, the time it took for the owners to satisfy the building notice and the building order, and to carry out other works at 9 Page Street (installation of barbecue, sink and bulkhead in the alfresco area) is not attributable to delay caused by the builder. Rather, it reflects that tasks were carried out at times convenient to the owners.
- 419 I note also the evidence of Alex that, because of the underwhelming response to the sale marketing campaign for 9 Page Street in March/early April 2016, the owners took 9 Page Street off the market and concentrated their efforts on completing 7 Page Street, and putting it to sale, as soon as practicable. And, as discussed above, 9 Page Street was used for family accommodation.
- 420 On all the evidence, I find that the owners have failed to prove any loss or damage after 14 April 2016 caused by delay attributable to the builder. Accordingly, for 9 Page Street there is no further allowance for delay damages at general law.

²² Lord Diplock in *Gilbert Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 at 717-718

CONCLUSION 9 PAGE STREET

421 As discussed above, I assess the unpaid contract balance for 9 Page Street as \$98,925. Against this sum, I set off the following allowances, as assessed above, in favour of the owners:

- works carried out by the owners	\$ 954
- damages for remaining incomplete and defective works	\$19,419
- liquidated damages for delay	<u>\$43,200</u>
total	\$63,573

422 The result is an allowance in favour of the builder in the sum of **\$35,352**.

7 PAGE STREET

423 I assess the adjusted contract price for 7 Page Street as follows:

- contract price nominated in the contract document	\$1,060,000
- plus variations and provisional sums overrun	<u>\$ 60,366</u>
total	<u>\$1,120,366</u>

424 I allow for payments made by the owners as follows:

- stage payments	\$954,000
- variations and provisional sums overrun allocation	<u>\$ 26,034</u>
total	<u>\$980,034</u>

425 Accordingly, I assess the unpaid contract balance for 7 Page Street as **\$140,332**.

Cost to complete works at 7 Page Street

426 Mr Nguyen, of Northwind Quantity Surveyors, inspected 7 Page Street on 11 May 2016 and took a number of photographs. He produced a report dated 24 June 2016 in which he estimated the reasonable cost to complete the 7 Page Street contract works as \$291,367.

427 As the owners completed construction of 7 Page Street as owner-builders, they no longer rely on Mr Nguyen's estimate. They have produced invoices and other documents as evidence of the alleged actual cost they have incurred to complete the works.

428 Mr Berkowitz and Mr Garrard have inspected the documents produced by the owners, and with reference to Mr Nguyen's above-mentioned report, they have each provided an assessment as to the reasonable cost incurred by the owners to complete the 7 Page Street contract works. Their assessments are similar. Mr Berkowitz has assessed the cost at \$270,538.22. Mr Garrard assesses the cost at \$254,352.71. I heard evidence from them both in respect of the items of work, and the claimed cost, where their opinion differs.

429 To reach my finding as to the reasonable cost incurred by the owners to complete the 7 Page Street contract works, I will start with Mr Berkowitz's

assessment, and then make any deductions I consider warranted having regard to the evidence of Mr Berkowitz and Mr Garrard on the items where their opinion differs.

Water and electricity bills

430 Mr Berkowitz says that because a builder generally bears the cost of water and electricity, it is reasonable that the cost of water and electricity incurred by the owners during the period the works were being completed, claimed to be \$2107.61, be included as a reasonable expense. Mr Garrard makes no such allowance.

431 The evidence as to the cost incurred by the owners is unconvincing, with one water bill produced dating back to 13 October 2014. The 7 Page Street contract does not provide that the builder should bear such cost, and I am not satisfied that it is a cost that should ultimately be borne by the builder. Accordingly, I deduct \$2107.61.

Amended building permit

432 Mr Berkowitz allows the cost incurred by the owners, \$550, to obtain an amended building permit. There is no dispute that an amended building permit was required. Mr Garrard says that because the 7 Page Street contract (the contract quotation) expressly excludes fees charged by the RBS, this cost should not be allowed.

433 I do not agree with Mr Garrard. The provision in the 7 Page Street contract is not relevant. The cost of the amended building permit is a direct consequence of the termination of the contract. I allow the sum claimed, \$550.

RBS additional inspection fee

434 On 8 September 2016, the RBS invoiced the owners \$165 for “additional inspection fee”. There is no evidence as to why an additional inspection was required. Having regard to the date of the invoice, it is likely that the inspection was related to the issue of the occupancy permit. But with no evidence as to why an “additional” inspection was required, I am not satisfied that the cost of such inspection is an expense that should ultimately be borne by the builder. Accordingly, I deduct \$165.

Mirrors

435 Mr Berkowitz allows \$3480 as the evidenced cost for 10 mirrors. Mr Gerard says that, if any allowance should be made, it should be for approximately half that sum on the basis that one mirror is allowed for each bathroom/powder room.

436 The only reference to mirrors in the 7 Page Street contract is the notation ‘*Mirrors as shown*’ under the heading ‘*GLAZING*’ in the contract quotation. There are no mirrors noted in any of the construction drawings. This being the case, in my view the provision of mirrors does not fall within the scope

of the 7 Page Street contract works. As such no allowance should be made and I deduct \$3480.

Miele Appliances

- 437 The contract quotation specifies a number of Miele appliances at a total provisional allowance of \$11,000.
- 438 The owners have produced invoices totalling \$18,093 for various Miele appliances. Mr Berkowitz has simply allowed the provisional allowance, \$11,000, on the basis that any cost over and above the sum would in any event be borne by the owners.
- 439 Mr Garrard says that a number of the items purchased by the owners were not expressly provided for in the contract quotation, namely a coffee machine and two fridge/freezers. Mr Gerard has deducted the cost of these items, \$9737.40, from the total cost of appliances purchased by the owners, \$18,093, to come up with a figure of \$8355.60 which he says is the appropriate allowance.
- 440 I do not agree with Mr Garrard. The fact that the choice of appliances made by the owners differs from the items specified in the contract quotation is not the relevant issue. The provisional allowance under the contract for appliances is the relevant issue. The contract provides an allowance of \$11,000 for appliances. Clearly, any expense over this would always have been borne by the owners. For the purpose of assessing the reasonable cost of completing the *contract* works, as part of the overall assessment of damages, it is appropriate for this item to allow the provisional sum provided under the contract. That is what Mr Berkowitz has allowed. Accordingly, there is no deduction.

Painting

- 441 Mr Berkowitz allows the cost of the painting as set out in two invoices produced by the owners, \$4985.20 and \$4449.50.
- 442 Mr Garrard accepts that the rates charged by the painters as set out in the invoices is reasonable, however he thinks the charge overall is excessive having regard to the painting works that remained to be done. His assessment of the painting works remaining to be done is based on the photographs in Mr Nguyen's report.
- 443 The 7 Page Street contract provided for painting of the home. There is no evidence before me that the painting works now claimed by the owners are works outside the scope of the contract. Having regard to the fact that Mr Garrard also accept the rates charged by the painters as reasonable, I am not satisfied that there is sufficient reason to make any deduction. Accordingly, I make no deduction to Mr Berkowitz's assessment.

Tiling

444 The owner supplied a number of invoices from 'AOG Tiling' in respect of tiling works. Mr Garrard, having viewed one invoice for \$2200, queried whether Mr Berkowitz may have made an error in allowing for a further invoice in the sum of \$220. As the further invoice for \$220 was identified in evidence, I am satisfied that the \$220 allowance was not an error on the part of Mr Berkowitz. Accordingly, there is no deduction.

Letter box

445 Mr Berkowitz has allowed \$555 as the cost incurred by the owners to install a letter box at the front gate. He considers the allowance is reasonable and in keeping with the quality of the house.

446 Mr Garrard says there should be no allowance because there is no reference in any of the contract documents to the inclusion of a letterbox within the contract scope of works.

447 I agree with Mr Garrard. I find that the letterbox is outside the contract scope of works, and accordingly there should be a deduction of \$555.

Internal Doors

448 Mr Berkowitz allows \$8800, the sum of a 'SWAT Constructions' invoice which identifies the works carried out as '*hang internal doors, removed to be painted, re-fit and install handles and fittings and finish off skirting and architrave around cupboards*'.

449 Mr Garrard says that as the contract provides for pre-hung doors, the extra cost involved in removing doors to be painted and re-hung is not reasonable. He says an allowance of \$5760 would be reasonable for the scope of the door works under the contract.

450 As discussed earlier in these reasons, the door works were varied such that custom-made higher quality doors were to be provided in place of standard pre-hung doors. At the time of termination of the contract, the doors had been initially hung, and had been removed off site for painting.

451 For the purpose of assessment of damages, the cost to be allowed for the doors is the reasonable cost of the doors prescribed under the contract. The contract prescribed standard pre-hung doors. When the builder agreed to provide more expensive custom-made doors, the contract price was not varied. Rather, the cost of the doors was treated by the builder as a provisional sum item. (And as discussed earlier in these reasons when assessing provisional sum expenditure, I have not allowed the builder's claim for the doors because the doors were never returned to site).

452 I agree with Mr Garrard that allowance should be made for the cost of standard pre-hung doors as prescribed under the contract. I accept his allowance, \$5760, as reasonable in this regard. Accordingly, I make a deduction of \$3040 from Mr Berkowitz's allowance.

Custom lighting.

453 When giving evidence, Mr Garrard confirmed that the exclusion in his report of \$790 for custom lighting was an accidental error. Accordingly, there is no deduction from Mr Berkowitz's assessment in respect of the custom lighting.

Building report and warranty insurance

454 Pursuant to mandatory requirements under section 137 of the *Building Act* 1993, as owner-builders the owners were required to obtain, prior to selling 7 Page Street, a report on the completed works by a prescribed building practitioner and required insurance (commonly known as 'warranty insurance') in respect of the works completed by them. Mr Berkowitz has allowed the cost of the building report, \$695, and the cost of the warranty insurance, \$2130.70.

455 Mr Garrard says that these costs should be excluded because the builder was not obliged to meet any such costs under the 7 Page Street contract.

456 In my view, having regard to the status of the works as at the date of termination of the contract, and the owners' desire to complete the works at an affordable cost and as soon as practicable, the decision to complete the works as 'owner-builders' was a reasonable course to adopt.

457 If, instead of completing the works as owner-builders, the owners had entered a building contract with a new builder for the completion of the works, they would not have incurred the cost of the building report, but warranty insurance would still have been required and the cost of such insurance would no doubt have been included in the new builder's contract price.

458 In my view, the cost of the building report and the warranty insurance is similar to the cost of the amended building permit discussed above. That is, it is cost incurred as a direct consequence of the termination of the contract, and it is reasonable to allow it as part of the cost incurred by the owners to complete the contract works. Accordingly, I make no deduction to Mr Berkowitz's assessment.

Weather seal

459 Mr Berkowitz allows \$55.90 as the cost of a door/weather seal. I agree with Mr Garrard that, because the 7 Page Street contract makes no reference at all to such an item, it constitutes works outside the scope of the contract works, and as such no allowance should be made for it. Accordingly, I deduct \$55.90.

Canopy capping

460 Initially, Mr Garrard excluded this item. However, in evidence Mr Garrard conceded that allowance for the sum claimed, \$341, was reasonable. Accordingly, there is no deduction in respect of this item.

Repair to marble benchtop

- 461 Mr Berkowitz has allowed \$400 as the documented cost incurred by the owners to repair a damaged benchtop. Mr Garrard says the item should not be allowed because the date and cause of the damage is unknown.
- 462 The invoice for the repair cost is dated 1 September 2016. In the absence of evidence from any of the witnesses as to how and when the damage to the benchtop occurred, I am not satisfied that it is damage for which the builder is responsible. Accordingly, I deduct \$400.

Drainage inspection

- 463 An invoice dated 1 September 2016 from 'Wattle Glen Plumbing' for various plumbing works includes a sum of \$460 for a drainage inspection. I agree with Mr Garrard that, in the absence of any evidence as to why the inspection was necessary, it is unreasonable to assume it is related to any act or omission of the builder. I deduct \$460 from Mr Berkowitz's assessment in respect of this item.

Conclusion on the cost to complete works at 7 Page Street

- 464 I assess the reasonable cost incurred by the owners to complete the contract works at 7 Page Street as \$260,274.71, calculated as follows:

- Mr Berkowitz's assessment		\$270,538.22
less deductions:		
- water and electricity	\$2107.61	
- RBS additional inspection	\$ 165	
- mirrors	\$3480	
- letterbox	\$ 555	
- internal doors	\$3040	
- weather seal	\$ 55.90	
- damaged benchtop	\$ 400	
- drainage inspection	\$ 460	
total deductions		<u>\$10,263.51</u>
BALANCE		\$260,274.71

Delay damages 7 Page Street

- 465 The contract provision as to liquidated damages for 7 Page Street is similar to 9 Page Street. The due date for completion of the works for 7 Page Street was, pursuant to the November 2015 agreement, amended to 15 February 2016. As with 9 Page Street, the sum specified for liquidated damages was, by the November 2015 agreement, amended to \$2500 per week.

- 466 I have found that the builder has no entitlement to an extension of time for completion of the works at 7 Page Street.
- 467 The date of termination of the 7 Page Street contract was 14 April 2016. I find that the owners took possession of the works on this date.
- 468 Accordingly, I find that the owners are entitled to liquidated damages for the period 16 February 2016 to 14 April 2016 at the rate of \$2500 per week (8.3 weeks). I calculate that sum as \$20,750.
- 469 As with the claim for 9 Page Street, the owners also claim an entitlement, at general law, to further damages for delay in the form of lost rental and/or in the form of increased interest burden on finance.
- 470 As with 9 Page Street, I find that the contract does not bar a claim by the owners for delay damages at general law for any period after 14 April 2016. The issue is whether the owners have such loss and damage attributable to the builder's failure to complete the contract works by the due completion date. Unlike my finding in respect of 9 Page Street, I am satisfied that in respect of 7 Page Street the owners have such loss and damage.
- 471 In my view, the owners cannot claim delay damages at general law in respect of *both* lost rental and increased financial interest burden for the same period. Renting 7 Page Street would necessarily mean there would be no proceeds of sale to be applied to reducing the owners loan commitment and the consequential interest burden.²³
- 472 In any event, I find that, as at 14 April 2014, the owners did not intend to lease 7 Page Street. I make this finding on the evidence of Alex, referred to above, that the owners took 9 Page Street off the market and concentrated their efforts on completing 7 Page Street, and putting it to sale, as soon as practicable.
- 473 And I am satisfied that the owners did, in fact, complete 7 Page Street and put it to sale as soon as practicable.
- 474 As discussed earlier, the owners took on the task of completing the 7 Page Street works as 'owner-builders', and they engaged a supervisor to assist with the task.
- 475 A certificate of occupancy was issued on 19 September 2016. The owners nominate this date as the date of completion of the building works.²⁴ The completed home was promptly put on the market and sold at auction on 8 October 2016 for \$3,690,000 with settlement occurring on 3 November 2016.
- 476 There is no evidence before me as to whether, as an alternative to completing the 7 Page Street works as 'owner-builders', the owners considered entering a new building contract with a new builder to complete

²³ in closing oral submissions, the owners conceded they cannot claim both the interest burden and lost rental. It is one or the other.

²⁴ confirmed in paragraph 196 (b) of the owners Reply closing submissions.

the works. There is no evidence as to the contract price a new builder might have charged. There is no evidence as to the likelihood of the owners finding a suitable and willing new builder in a timely manner. There is no basis upon which I might find that an alternative course of action – entering a new building contract with a new builder to complete the works – would have resulted in an earlier completion date for the works.

- 477 As noted above in these reasons, I consider the owners’ decision to complete the works as ‘owner-builders’ a reasonable course to adopt.
- 478 Having regard to the scope of works carried out, and the management of those works, I am satisfied that the works were completed within a reasonable timeframe. I am also satisfied that 7 Page Street was sold, and the settlement proceeds received, as soon as reasonably practicable.
- 479 Alex’s evidence²⁵ is that:
- the owners borrowed \$2,781,815 from Westpac to partially fund the purchase of, and construction of the new homes on, 7 Page Street and 9 Page Street;
 - of the proceeds of sale from 7 Page Street, \$2,782,330.36 was used immediately to pay off the Westpac loan account;
- 480 In support of this evidence the owners produced a Westpac ‘*Investment Property Loan*’ statement²⁶ which shows:
- an opening balance, as at 1 July 2016, of \$2,675,815;
 - the balance, as at 7 September 2016, being 2,779,315;
 - the interest rate charge being 4.5% for the period 23 May 2016 to 22 August 2016, and 4.4% thereafter;
 - an interest charge of \$3015.36 on 3 November 2016, bringing the account balance to \$2,782,330.36; and
 - a deposit payment into the account on 3 November 2016 in the sum of \$2,782,330.36, noted as ‘*deposit of settlement proceeds*’, which reduces the account balance to zero.
- 481 I am satisfied that the construction loan would have been entirely paid off sooner, had the builder fully performed the 7 Page Street contract and completed the works by the due completion date.
- 482 The period between the date of completion of 7 Page Street, 19 September 2016, and the payment of settlement monies into loan account, 3 November 2016, is 45 days. Using this yardstick, I think it fair to say that had the builder completed the 7 Page Street works by the due completion date, 15 February 2016, the owners’ construction loan would have been entirely paid off about 45 days later, that is on about 31 March 2016.

²⁵ Alex witness statement paragraphs 123-124, Tribunal book pages 864 – 867

²⁶ Tribunal Book p 1498

- 483 I am satisfied that it was in the contemplation of the parties at the time the contract was entered that the owners might suffer loss in the form of interest payable on a loan financing the construction project in the event the builder failed to complete the works by the due completion date under the contract. In my view, for a project of this size such loss would ordinarily be in the contemplation of a builder whether the builder had actual knowledge that the owners had obtained finance to fund the construction project. In any event, as discussed earlier in these reasons, the contract was amended shortly after it was first signed. The original contract provided for monthly progress payments to the builder. The amended contract provided for progress payments to the builder in accordance with the payment schedule set out in section 40(2) of the Act. The amendment was required to meet the demands of Westpac which was providing finance for the project. The evidence of Mr Just does not address whether he knew of this reason for the amendment. It is most unlikely, in my view, that Mr Just would have agreed to the amendment without knowledge as to why the amendment was required.
- 484 I am satisfied that loss arising from late completion of the works, in the form of interest payable on a loan, was within the contemplation of the parties at the time the contract was entered.
- 485 In my view the owners are entitled to damages at general law measured as the interest incurred on the construction loan after 14 April 2016 until 3 November 2016 when sale proceeds were deposited into the account.
- 486 In his witness statement, Alec sets out the interest allegedly accrued since July 2015.²⁷ The interest incurred for all of April is noted as \$10,696.96. Half of that sum, as the allowance for April after 14 April 2016, is \$5348.48. The interest accruals noted for the remaining months until 3 November 2016 total \$72,741.87. The total interest claimed then, from 15 April 2016, is \$78,090.35.
- 487 Alex's witness statement references bank statements as alleged evidence of these interest accruals²⁸. However, the bank statements provided do not, in my view, satisfactorily evidence the claimed interest accrual. The bank statements referenced by Alex are the statements of a different account, a "*Classic Plus Account*" in the name of the owners, and although the statements show interest payments to another account, not all of those payments reference the above-mentioned *Investment Property Loan* account.
- 488 On the documents provided, I am not satisfied that the interest accrual for the period April 2016 to 3 November 2016, as set out in Alex's witness statement, is accurate.

²⁷ Alex witness statement paragraph 124, at Tribunal book p 866

²⁸ the bank statements are said to be found at Tribunal book pages 2793 – 2820

489 However, I am satisfied that the owners have incurred interest on the construction loan account for the period 15 April 2016 to 3 November 2016. Having regard to the information included in the above-mentioned *Investment Property Loan* account statement, and doing the best I can, I allow \$66,826 as the interest incurred on the construction loan account in the period 15 April 2016 to 3 November 2016. I calculate this as follows:

- a) interest on the first noted account balance \$2,675,815, at 4.5% per annum for the period 15 April 2016 to 22 August 2016, 129 days, \$42,556;
- plus
- b) interest on the same amount, \$2,675,815, at 4.4% per annum for the period 23 August 2016 to 6 September 2018, 15 days, \$4838;
- plus
- c) interest on the account balance as at 7 September 2016, \$2,779,315, at 4.4% per annum for the period 7 September 2016 to 3 November 2016, 58 days, \$19,432

TOTAL \$66,826

490 Alex says further that had the works been completed by the due date, the owners would have applied the remaining balance of the proceeds of sale of 7 Page Street to reducing the balance in a further loan account held by the owners, thus reducing the interest burden in that further loan account. Alex's witness statement references bank statements in respect of that other account²⁹. The statements appear to present the status of a Westpac "*Bank Bill Business Loan*" account in the names of the owners at six intervals in the period December 2015 to 9 November 2016. The closing balance in each of the statements is \$2,629,000. The alleged saving on interest for the period after 15 April to 2016 would have been around \$29,150.³⁰

491 The evidence is not sufficient for me to accept that the owners would have made the claimed saving on interest in this other *Bank Bill Business Loan* account. The statements provided do not confirm the interest accrual claimed. But more importantly, unlike the *Investment Property Loan* account statement discussed above, the *Bank Bill Business Loan* account statements show no deposit into the account on or after 3 November 2016 when the sale of 7 Page Street settled. For this reason, I am not satisfied that if 7 Page Street was completed and sold earlier, the owners would have applied some of the proceeds of sale to reducing the balance in this *Bank Bill Business Loan* account.

492 For the above reasons, I find that owners are entitled to further delay damages at general law in the sum of \$66,826 for the interest incurred on the construction loan for the building project after 14 April 2016.

²⁹ Tribunal book pages 1720 – 1726

³⁰ This approximate figure, \$29,150, is extrapolated from the figures presented in Alex's witness statement at Tribunal book page 867

Conclusion delay damages 7 Page Street

493 In conclusion, for delay damages in respect of 7 Page Street, I allow \$20,750 as contract prescribed liquidated damages, and I allow a further sum of \$66,826 as damages at general law. The total allowance is **\$87,576**

CONCLUSION 7 PAGE STREET

494 For 7 Page Street, I assess the damages in favour of the owners (not including any allowance for interest) as \$207,529, calculated as follows:

- reasonable cost incurred to complete works (rounded off to the nearest dollar)	\$260,275
- Delay damages	<u>\$ 87,576</u>
total	\$347,851
Less unpaid contract balance	<u>\$140,322</u>
balance	\$207,259

CONCLUSION

495 As set out above, I have assessed an allowance of \$35,352 in favour of the builder in respect of 9 Page Street, and I have assessed an allowance of \$207,529 in favour of the owners in respect of 7 Page Street. In my view it is appropriate that the sums be set off such that the net result is allowance in favour of the owners of \$172,177.

496 However, before making final orders, I consider it appropriate that the parties provide submissions on the question of interest, having regard to the findings set out in these reasons. I will order that the proceeding be listed before me for the purpose of hearing submissions on the question of interest. I will consider any request from the parties for the filing of written submissions in lieu of attendance at the further hearing.

SENIOR MEMBER M FARRELLY