

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D807/2006

CATCHWORDS

Building – cost plus contract – terms of agreement – credit of witnesses – whether cost of materials plus margin was to be inclusive of goods and services tax -whether agreed rate for labour was inclusive of goods and services tax – whether term can be implied that goods and services tax is to be added - recovery of money paid voluntarily – money paid upon the faith of misrepresentations of the amounts due – onus of proving amount actually due - calculation of amount due

APPLICANT	P.J Shopfitting Pty Ltd (ACN: 006 068 953)
RESPONDENT	Lashwood Pty Ltd (ACN: 006 524 894)
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	20-29 January 2009 and 13 February 2009
DATE OF ORDER	20 March 2009
CITATION	P.J. Shopfitting Pty Ltd v Lashwood Pty Ltd (Domestic Building) [2009] VCAT 452

ORDER

1. By 5 April 2009 the parties must file minutes of agreed orders to be made in accordance with the attached reasons.
2. In default of the filing of minutes as aforesaid, direct the Registrar to list this matter for hearing submissions as to the final orders to be made together with any application as to costs, as soon as practicable after 15 April 2009.
3. The costs of this proceeding are reserved for further argument.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant: Mr D. Pumpa of Counsel

For the Respondent Mr K. Oliver of Counsel

REASONS

Background

1. The Applicant is a builder. Its director is Mr Paul Jeffery.
2. The Respondent is a company controlled by Mr Targownik, who is a pharmacist. It is the owner of the land and building at the corner of Warrigal Road and High Street in Ashwood where Mr Targownik has operated a pharmacy since 1986. When he first commenced business at that address Mr Jeffery did the fit out of his pharmacy. Later, during the 1990s, Mr Jeffery did further work at the premises. The Respondent purchased the land in about 1999 and Mr Targownik subsequently decided to extend and redevelop the existing building.
3. Sometime in 2003 Mr Targownik approached Mr Jeffery and asked him to quote on the renovations and extensions to the building in accordance with plans prepared by an architect, Mr Lai. The work was substantial and involved, effectively, the demolition of the existing building save for the front wall, and the construction of a two storey building with the pharmacy to occupy the ground floor and two offices and a residential unit on the upper floor. At the time of this first approach Mr Jeffery said that he was too busy and it was not until the following year that an agreement was reached between them that the Applicant would do the work.

The agreement

4. Despite the substantial nature of the work to be undertaken, no written contract was ever entered into. Instead there was a conversation between Mr Jeffery and Mr Targownik and a subsequent letter written by Mr Jeffery setting out some of the matters they had agreed upon. In essence, it was a cost-plus contract.
5. According to Mr. Targownik the Applicant was to charge labour at \$55.00 per hour for three employees who were described as “the three boys”, namely, Mr Jeffery’s son, Carl Jeffery, a Mr Phillip McGibney and a Mr Darren Thiele. In addition, materials and other suppliers would be charged at cost, plus 8%.
6. According to Mr Jeffery, the arrangement was that all labour used on the site would be charged at the rate of \$55.00 per hour plus Goods and Services Tax (“GST”) and all suppliers and materials would be charged at cost price, including the GST charged by the supplier, plus 8% plus a further 10% for GST on top of that. This would have meant that no credit was to be given to the Respondent for the input credit that the Applicant would receive for the GST the supplier had charged. In effect, GST was to be charged twice and the Applicant was to retain the benefit of the input credit for the GST charged to it by the Supplier. According to Mr Jeffery, this was in order to compensate it for his time and that of his daughter in

supervising and administering the job. Mr Targownik denies that any such arrangement was ever agreed upon or discussed.

7. Apart from the conversations they had there is the letter from Mr Jeffery which is dated 22 October 2004. The most relevant part of that letter is the third paragraph which reads as follows:

“Your labour content on this job is a fixed price. There will be no overtime charges, you will pay the same hourly rate regardless of when it is worked. Material and supplies will incur 8% surcharge, as we normally purchase our goods well below this 8%. This will give you a saving of between 2% and 22%”.

The work

8. Work commenced on site in March 2005 and invoices were periodically rendered to the Respondent by the Applicant. Each such invoice was a single line: “Supply good and services as requested” and a price was then stated. Attached to the invoice was a list of figures setting out various sums for the supply of materials, each such sum being accompanied by two or three words of description. The supplies were then totalled and a mark up of 8% of the total was added to it. A lump sum figure was then given for labour, without any break down of how the figure was arrived at, and that was added onto the figure for materials and suppliers. The GST of 10% of the total was added giving the amount of the accompanying invoice.
9. No documentation supporting any of the figures claimed for suppliers or materials was ever provided with these invoices. Mr Targownik telephoned Mr Jeffery more than once (it is unclear how often) and asked him for copies of the invoices. Mr Jeffery refused to supply them, suggesting that if Mr Targownik did not trust him he would stop work.
10. According to Mr Targownik, on one such occasion Mr Jeffery said to him: “Don’t you trust me George?” to which Mr Targownik replied: “Of course I do Paul ... so these invoice prices do not include GST from the suppliers, you have subtracted the GST?” to which Mr Jeffery replied: “That’s right”.
11. Mr Jeffery acknowledges that a similar conversation took place although he denies that he ever said that the invoiced prices did not include GST. Mr Jeffery agreed that he said to Mr Targownik that if he didn’t trust him that he would stop work and go to another job.

Termination

12. In June 2006, when work seems to have reached somewhere between the lock up and fixing stages, Mr Targownik received some invoices from the Applicant from which he was able to see that he was being charged the goods and services tax that had been charged by the suppliers. On 20 June 2006, Mr Targownik complained to Mr Carl Jeffery about the over charge, following which the Applicant’s workers left the site. On that same day the Respondent’s solicitors wrote to the Applicant complaining about the double charge and demanding reimbursement. In response, the Applicant’s

solicitor wrote a letter of reply demanding payment of what was claimed to be the outstanding invoices, totalling \$99,807.36 and threatening legal proceedings.

The issues

13. The following are the issues in the case.
 - (a) Whether the materials and suppliers the Applicant has charged for were used on the job and what they cost.
 - (b) Whether it was a term of the agreement that the Applicant was to receive the input GST on materials and suppliers in addition to the 8% mark up;
 - (c) Whether the labour cost of \$55.00 per hour was inclusive of GST or whether GST was to be added on;
 - (d) Whether a cabinetmaker, Mr Boyle, should be treated a supplier so that his services would be charged at cost plus 8% or whether he should be treated as a worker and charged at the rate of \$55.00 per hour, whether with or without GST.

Hearing

14. The matter came before me for hearing on 20 January 2009 and proceeded for eight days. I heard final submissions on 13 February 2009. Mr D. Pumpa of Counsel appeared on behalf of the Applicant and Mr K. Oliver of Counsel appeared on behalf of the Respondent.
15. The principal witness for the Applicant was Mr Paul Jeffery. Also called were his son, Carl Jeffery, who was the foreman on the job, and three workmen namely , Darren Thiele, Phil McGibney and Kenneth Boyle. A quantity surveyor, Mr Norman Faifer was also called on the alternate claim for a quantum meruit.
16. For the Respondent I heard from Mr Targownik and a quantity surveyor, Mr Neville Cambridge.
17. I have serious reservations as to the reliability of the evidence of Mr Paul Jeffery for the following reasons.
 - (a) He was very dogmatic in the witness box, refusing to concede matters that he ought to have conceded. For example, it is quite clear that Mr Targownik had paid the plumber and because of Mr Jeffery's long standing association with the plumber he must have known that the plumber had been paid. He nevertheless refused to concede the fact and denied that the plumber had told him that he had been paid. In view of their connection I find that difficult to believe.
 - (b) He tended to make very general statements and then, when pressed for particulars he was usually unable to provide them. He spoke disparagingly of the plans in quite pejorative terms but although severely critical of them in a general sense he was quite unable to

particularise what it was that was wrong with them. Ultimately it turned out that they were simply town planning drawings.

- (c) He exaggerated his own role in connection with the plans and was unable to produce anything of substance to justify the many hours he claimed to have spent on them.
- (d) Sometimes when asked a question he would speak at length about various matters, often having little connection with the question he had been asked. Sometimes he would change course and speak about something else half way through. Often his answers were quite unresponsive to the question that he had been asked. A lot of time was wasted in this way.
- (e) He gave no satisfactory explanation as to why he had not provided copies of the invoices to Mr Targownik when the very nature of the contractual arrangement between them would have required that to be done. In the absence of some other credible explanation I must find that he did not want Mr Targownik to see the invoices for some reason.
- (f) His suggestion that Mr Targownik interfered with tradesmen turned out to be baseless. When Mr Targownik attempted to obtain some information from an electrician (in the end, this was the only particular of interference alleged) it met with a surprisingly aggressive response from Mr Jeffery in the form of a letter of 15 February 2006 in which he threatened to walk off the job.
- (g) A number of items were charged by the Applicant that plainly should not have been. Mr Jeffery still maintains that some of these, such as scaffolding, an electric drill and a nail gun, are proper charges when they clearly are not. The lawnmower was so obviously inappropriate that it is difficult to accept Mr Jeffery's suggestion that that was a "simple mistake" on his part. Also, on 21 February he drafted a letter to the Respondent's solicitors, saying, inter alia: "...we also checked the material content on all invoices, all the materials listed are correct...". Either this statement is false or he checked and missed the lawnmower, which seems unlikely. When that letter was put to him in cross-examination he said that it was sent in error and refused to comment on it, yet it is exhibited to his own witness statement. His explanation as to the water tank was not credible in view of the documents in his own handwriting that were tendered, yet he persisted with it.
- (h) He insisted that the job became "pear shaped" from within a week of the job starting and that it was "a dog's breakfast" without substantiating these allegations. Although there was some extra work was undertaken that is common in a building project and I can see nothing in the evidence to indicate that the job merited these descriptions.

- (i) He complained about late payment of invoices yet, save for the first invoice which was paid more than 7 days afterwards, the rest appeared to have been paid within time. He then asserted in the witness box that his invoices were to be paid immediately notwithstanding that, in his own witness statement and on the invoices themselves, 7 days was stated for payment. When asked whether there had been a change in the payment arrangements he denied that there had been and said that immediate payment had always been the agreement. This is quite contrary to all the documents and I do not believe him.
- (j) He produced a photocopy of what was said to be a record of hours that he and his daughter spent on the project. The entries on this record coincide with the dates on the invoices and each entry comprises a very large number of hours. His evidence was that these hours had been recorded on small pieces of paper that were kept around the office and then discarded after the hours were entered into the alleged record at the time of the invoice. There was no explanation given as to why these hours, if genuine, were not entered into some contemporaneous record at the time they were worked instead of being written on scraps of paper that could be easily lost. If the record that was produced was genuine, why were the hours not entered directly into that? The document has an evenness of set out and presentation that is consistent with the entries having all been written at the same time but it is difficult to draw any conclusions from the appearance of a photocopy. Mr Jeffery was asked for the original of the document during cross examination and said that he had given the original to his solicitors. His solicitor was in the hearing room at the time. The original of this document was called for on more than one occasion but it was never produced. Later in cross-examination he said that he assumed that the original of the document was in the boxes that he gave to his solicitors. The failure of both Mr Jeffery and his daughter to give a credible explanation about these matters or as to how these very large numbers of hours were spent on this job leads me to doubt that this is a genuine contemporaneous record of hours that they spent on the job.
- (k) In seeking to justify his hours he insisted that the deliveries by truck to the site were done either by himself or by Mr Boyle because, he said, the Timber supplier's trucks "could not get into that site". When a photograph of the back lane adjacent to the site was produced with a large concrete pumping truck in it, together with an invoice from the timber supplier dated 16/09/05 which stated that the timber was to be delivered to the site, he denied that it had been delivered and insisted that it had been picked up by the Applicant's truck. I find that difficult to believe. Another timber invoice referred to him, dated 24/02/06, which also stated that delivery would be to the site "...behind Pharmacy Car Park Warrigal and High Street, Ashburton", which is the position of

the lane, would suggest that deliveries could have been made via the lane and probably were.

- (l) He acknowledged that, in about November 2005, he told Mr McGibney to falsely describe his labour as “materials” in his invoices. When asked why he did it, he said that it was because Mr McGibney had been working on the site for more than three months and there was a government regulation in regard to that. Since both Mr McGibney and Mr Jeffery knew that the invoices were really for labour and not materials, the only purpose that could have been served by falsifying the invoices would have been to mislead someone else into believing that they were for materials and not labour, apparently to avoid the consequences of the “government regulation” that he referred to. He did not suggest that he saw anything wrong with it and said that he did it on the advice of his accountant..
 - (m) An order was made that witnesses be excluded from the hearing until called upon to give their evidence. Notwithstanding the making of that order, Mr Jeffery, who was under cross-examination, rang Mr Boyle and discussed an issue in the case with him before Mr Boyle was called.
18. Of the other witnesses called on behalf of the Applicant, Mr Carl Jeffery was unco-operative and quite aggressive. He did not produce his diaries although requested to do so. He argued with counsel and often would not answer questions directly. I do not regard him as a reliable witness.
 19. By contrast I think Mr McGibney, Mr Thiele and Mr Boyle were truthful witnesses, albeit their witness statements were in almost identical terms. The value of Mr Faifer’s evidence was limited by the accuracy of the instructions upon which it was based and, in the end, the case is not decided as a quantum meruit claim because I find that there was an express contract between the parties, albeit there is a dispute as to what its terms are.
 20. I found Mr Targownik to be a credible witness. He answered questions directly without apparent embellishment and made concessions where warranted. He admitted that he had lied to Carl Jeffery when he told him that the bank required copies of the invoices. He said that he did this in order to get copies of the invoices to make sure he was not being charged the goods and services tax. That is understandable and although perhaps one ought not to tell lies, Mr Jeffery senior was refusing to provide the documents and threatening to walk off the job. That would have left Mr Targownik in a difficult position. In any case, his concerns turned out to be warranted.
 21. Mr Targownik also acknowledged having lied in a letter to Mr Jeffery when he said that he was happy with the way things were going when he clearly was not. This followed the quite bullying letter from Mr Jeffery when he again threatened to walk off the job. It was clearly most important to Mr Targownik that he did not do so.

What was the agreement?

22. I find that the agreement between the parties was that the labour of “the three boys”, that is, Mr Carl Jeffery, Mr McGibney and Mr Thiele would be charged at \$55.00 per hour and that this rate applied to them only. They were described in Mr McGibney’s evidence as “the team” and they were the on site workers. Mr Targownik’s evidence, which I accept, was that the rate was agreed for those three named employees only. I find that other suppliers and materials were to be charged at cost plus 8%. I also find that nothing was said by either Mr Jeffery or Mr Targownik about GST. There is also nothing about it in the letter. I conclude that the parties did not expressly agree about whether or not GST would be charged in addition to these amounts.

Input tax credits

23. I do not accept Mr Jeffery’s evidence that there was a specific conversation to the effect that he and his daughter would be compensated by means of the input tax credit on materials and suppliers. It is such an unusual arrangement that one would have expected to find it in the letter of 22 October 2004 which Mr Jeffery wrote to record at least some of what had been agreed to. It is not there.
24. Mr Jeffery agreed that Mr Targownik had questioned him about the GST and claims that he told him that it went to pay him and his daughter. Yet he agrees that Mr Targownik later asked him the same thing three or four times. If retention of the input GST had been the agreement “from day one” (to use Mr Jeffery’s words) it seems unlikely that Mr Jeffery would have questioned him about it, and if he had told Mr Targownik what he claims to have told him and if the matter had been “put to bed” (again, Mr Jeffery’s words) it seems unlikely that Mr Targownik would have raised it again with him on three or four other occasions.
25. This alleged agreement is not mentioned in any of the correspondence that passed between the parties right up to the hearing nor is it in any of the pleadings. This is significant because the double charging of GST was the very thing the Respondent’s solicitors raised right at the beginning of the dispute that caused the Applicant’s workmen to walk off the site. Had there been an express agreement that the Applicant was to retain it, one would expect that to have been alleged by the Applicant’s solicitors from the beginning in response to this claim. It would have been a complete answer, but it was not raised. The first time this alleged agreement is asserted is in Mr Paul Jeffery’s witness statement. Finally, Mr Targownik denies it and I prefer his evidence to that of Mr Jeffery whom I do not consider to be a reliable witness.
26. I think that the proper interpretation of the term “cost” in the contract in regard to materials and suppliers, is that it means the net cost to the Applicant. There was no agreement that the Applicant was to retain the

benefit of the GST inputs. Since the Applicant gets those back, it is not part of the “cost” that it is entitled to on-charge.

Goods and Services tax Charged by the Applicant

27. The next question is, what was to be the position with respect to GST on the amounts charged by the Applicant for suppliers and materials and on the amounts charged by it for labour? Mr Oliver submitted that, when one purchases goods and services, one is normally given an all-in figure which includes goods and services tax. That approach is consistent with the literature that he passed up at the time of submissions. However this is an agreement for the construction of a substantial commercial development, not the retail purchase of goods and services. I have to consider how that agreement should be interpreted and whether, in the absence of any contractual provision, any term with respect to GST should be implied.

Goods and Services Tax on amounts paid for Suppliers and Materials

28. Looking first at the question of materials and suppliers, if an officious bystander who overheard their conversation were to have said to Mr Jeffery and Mr Targownik at the time of their discussion: “What about goods and services tax on the materials and suppliers?” it seems to me that they would have both agreed at once that that was to be added because, if the materials were charged by the Applicant to the Respondent at cost plus 8%, and if that amount was inclusive of GST, the Applicant would make a loss. That is because the supplier’s invoice would be passed on minus the input GST of 10% and then only 8% would be added on for the agreed margin. This was not the outcome that the parties contemplated. Indeed, on Mr Targownik’s own evidence the arrangement was that the Applicant was to make 8% profit on materials and suppliers. It could only do that if GST were added to the cost plus 8%.
29. By agreeing that the Applicant was to receive 8% profit on suppliers and materials, the proper interpretation of their agreement is that GST was to be added. An alternative analysis is that, in order to achieve the agreed outcome and the business efficacy the parties intended their agreement to have, it is necessary to imply into the contract a term that, in regard to materials and suppliers, the amount to be charged is to be cost plus 8% plus GST. Whichever analysis is preferred, the Applicant is to receive a profit of 8% on materials and suppliers and to achieve that, GST must be added.

Goods and Services Tax on the Labour

30. With the fixed labour charge of \$55 per hour, nothing was said about goods and services tax. All Mr Targownik was told was that he would be charged \$55 per hour for labour. He was not told that it would be \$55 per hour plus GST.
31. It is not possible to imply into the agreement a term that GST was to be added because it is not necessary to do that in order to give business efficacy to the agreement. There is no evidence as to why the figure of \$55

was chosen but it is quite possible on the evidence it was arrived at by adding GST to a labour figure of \$50 an hour. In any case, the figure agreed to was \$55, not \$55 plus GST.

32. Where it is agreed that labour will be charged at \$55 per hour, unless the circumstances indicate a contrary intention, that is the rate that is to be paid. If the party providing the labour wants GST to be paid as well he should include that in the agreement. That was not done here.

The work of K.J. Boyle Pty Ltd

33. In regard to the work carried out by K J Boyle Pty Ltd I find that he was not one of three named employees to whom the agreed rate of \$55.00 per hour applied and that he is therefore a supplier to be charged at cost plus 8%. I note that this is consistent with the way the work and materials provided by K J Boyle Pty Ltd were charged to the Respondent in the Applicant's earlier invoices. Mr Jeffery's explanation of those earlier charges changed. At first, in one of his witness statements, he suggested that it was "...as a further saving to Lashwood.". Later he suggested that it was a mistake. On the invoice dated 30 September 2005 which appears to have been charged on Invoice 1727 on the cost-plus basis he later wrote the words: "Re Book Labour @ 55 per hr = \$1430 less credit", indicating that, some time after 10 August, when Invoice 1727 had been prepared, he changed his mind about how Mr Boyle's accounts should be charged. He denied that, and said that this had gone in "by accident". If that were so, it would have been very careless. Since I prefer Mr Targownik's evidence I do not accept Mr Jeffery's explanation.

Were the hours worked and were the materials and suppliers charged for supplied ? The calculation of the amount due

34. In determining whether the amounts claimed were actually attributable to this job I am entirely reliant upon the invoices that the Applicant discovered and the evidence given about them. As to the latter, Mr Jeffery was not a reliable witness and in some cases I do not believe his evidence.
35. Mr Oliver has done an exhaustive analysis of all of the items included in the Applicant's invoices and the amounts that it claims and both sides have provided schedules seeking to reconcile the various figures. These exercises were carried out with the aid of the invoices and also the documentation produced by the Applicant to justify the amounts claimed in them. Since every amount has been called into question I need to consider all items and I will do so in the order in which they were invoiced. Since I have adopted the same approach as Mr Oliver most of my figures are the same as his, although in some cases my calculations have produced a slightly different figure.
36. Before embarking upon this task it is important to bear in mind the nature of the exercise. Insofar as the unpaid invoices are concerned, the onus of

proof lies upon the Applicant. It has to prove that the amounts that it claims are owed to it by the Respondent.

37. Insofar as the Respondent is asserting an overpayment of earlier invoices or claiming that it paid money that it should not have, the position is quite different. Money paid voluntarily is generally not recoverable. However money not paid voluntarily or money paid by mistake is recoverable in an action for restitution on the ground of unjust enrichment. In this case, the onus of proving an entitlement to recover such a sum lies upon the Respondent. If it can show that it paid any particular sum because of a misrepresentation by the Applicant or that it otherwise made the payment in the mistaken belief that it was due under the contract when in fact or in law it was not so due, then the money is recoverable (see *Halsbury: Laws of Australia* para. 370-665 and the cases there cited).
38. In the present case it is clear on the evidence that the payments made by the Respondent were made in response to invoices rendered to it by the Respondent. I am satisfied that it paid the amount of each invoice in the belief, held by its director Mr Targownik, that the amount claimed by the Applicant was the amount properly due in accordance with the contract. Without those invoice and the representations made by Mr Jeffery in response to Mr Targownik's enquiry about the GST, Mr Targownik would not have held that belief and would not have caused the payment to have been made. It is equally clear that in every instance, the amount claimed by the Applicant was excessive.
39. However it is also clear that, in each case, a sum of money equivalent to most of the invoice amount would have been due in accordance with the contract if an invoice had been rendered for that sum. The agreement was to pay within seven days of the rendering of an invoice. Who then bears the onus of proving the correct amount? Because of the unsatisfactory nature of the evidence, that is an important question.
40. It is not disputed that the payments were made. The Respondent bears the onus of proving the mistake but that onus has been discharged in this case. The cause of action in restitution is therefore established, subject to any available defence. A defence to such a claim is that the money was due anyway (see *Halsbury Laws of Australia* para. 370-680) and that seems to be the Applicant's position. Insofar as the Applicant relies upon that defence the onus of establishing it is on the Applicant. Therefore the onus of proving what is actually due lies upon the Applicant, not the Respondent.

What is actually due?

41. I will deal first with the materials and suppliers, including Mr Boyle. I will then consider the labour.

Invoice 1677 – amount justified for materials and suppliers \$2,988.09

42. The items are justified on this invoice are: Building surveyor: \$2,399.60 and Photocopying: \$126.00. The building surveyor's fee is made up of three

amounts, some of which did not attract goods and services tax. When all goods and services tax is deducted the above figures are arrived at. When an 8% margin is added onto those figures and then 10% GST is added to that, the amount justified on this invoice becomes \$2,988.09.

43. The claim for labour of \$765.00 is not justified. It is apparent from the evidence that this was a claim for Mr Jeffery's alleged time in obtaining the permit and copying the plans. His evidence as to how much time he spent is most unsatisfactory which is unsurprising since he kept no proper record of it. More significantly, it was not a term of the contract that he should be allowed for this time. The agreement was that labour would be paid at the contract rate for three named employees and that otherwise the Applicant was to receive the cost of materials and external suppliers plus an 8% margin. It is clear from the letter referred to that obtaining the permits was part of the task undertaken in consideration of that.
44. Mr Pumpa argued that, if I were to find that it was not a term of the contract that Mr Jeffery's time in this regard was to be paid for I should nonetheless allow a fair and reasonable sum in quasi-contract or unjust enrichment. Apart from the impossibility of assessing from the evidence just what it was that Mr Jeffery did and how long he took to do it, I do not believe that I can imply a contractual promise to pay a reasonable sum for this work since the parties have turned their minds as to what ought to be paid and have reached agreement as to that. There is also nothing unjust in holding the Applicant to its bargain.

Invoice 1697 – amount justified for materials and suppliers \$18,497.14

45. One of the materials claimed on this invoice was a motor mower which Mr Jeffery acknowledged should not have been charged. I am concerned that this found its way into an invoice and that it was paid by the Respondent. The invoice from Bunnings Warehouse where the mower was purchased bears the signature of Mr Jeffery indicating that he was the person who purchased it. It is the only item on the invoice and the description of the goods is clearly printed "Mower 4 Stroke Victor". Yet written on the document in Mr Jeffery's handwriting are the words "Warrigal Road". In the list that accompanied the invoice that was sent to the Respondent the mower is described as "materials" when it clearly was not. According to the evidence it was Mr Jeffery who went through the invoices and told his daughter what to put in the list and how it should be described. According to his daughter, when an invoice came in Mr Jeffery would write on it what it was for and she would then enter that into a book. The book would then be used to prepare the invoice to the Respondent.
46. Mr Jeffery said that the charging of the mower was a "simple mistake" and that the invoice for it had been "in the wrong pile". Yet he chose to write "Warrigal Road" on it, indicating a decision, at or about the time the document was received, to charge what was clearly an inappropriate invoice to that job. He also chose to describe it in the list that he provided to Mr

Targownik as “materials” without saying what the materials were. Moreover, the mower was purchased more than a month before work started on site so it is difficult to see how it would be in any “pile” of invoices. If it was a genuine mistake, as to which I have some doubt, it was a reckless one. It was also something that could not have been detected by the Respondent because of Mr Jeffery’s refusal to provide copies of the invoices.

47. There is a claim in this invoice for \$653.40 for drawings said to have been prepared by Ace Drafting. According to the invoice itself, the plans charged for were the design of a new house. When that was put to Mr Jeffery he insisted that the reference to the “new house” was a reference to the caretaker’s flat on the upper floor. Considering the size of the caretaker’s flat compared with the rest of the development that seems an unlikely explanation and I do not believe it. He acknowledged that he had not discovered these plans and said that they were for the Applicant’s own use but could not say what the plans were used for. When asked to produce them he said that he could not find them. Later in his evidence he said that he had not looked for them. Then he said that he had contacted one of the people at Ace Drafting “to see what he could find”. No such plans have been produced. There is no reference in any of the building permits to plans prepared by this drafting service. I am not satisfied that these plans relate to this project and I am concerned about Mr Jeffery’s insistence that they do.
48. There is a claim for plumbing supplies in this invoice of \$81.55. No invoices have been produced and the suggestion is that the supplies came from “stock”. Mr Jeffery was unable to say what the “supplies” were or how the figure claimed had been arrived at. If these alleged materials were supplied to this job there ought to have been some record of them somewhere. There is none. In view of the highly suspect nature of a number of the claims I am not satisfied that these materials were supplied.
49. There is a claim for \$1,096.00 with respect to “Bluescope Steel”. The description in the list given to the Respondent at the time the invoice was sent gives that name but no clue as to what this item was. I granted Mr Oliver leave to re-open his case for the purpose of calling the office manager of Bluescope Steel, one Leonie Tippert. She said that the item in question was a galvanised iron grey water tank of 1,877 litres capacity. She produced a number of documents including a drawing prepared by Mr Jeffery of the water tank that he had faxed to Bluescope Steel. The page containing this drawing is headed with Mr Jeffery’s name and his telephone and fax numbers. Above the drawing of the tank, in his handwriting, are the words “for grey water. Fits under deck”, the word “grey” being underlined. The dimensions of the tank are then given. It is oblong in shape, 3 metres long and 1.2 metres wide and 600-700 centimetres high. An outlet pipe is shown at the top of one end and at the other end a pipe is shown at the bottom of the tank accompanied by the words “to pump”. Underneath the drawing he has written the words “price” and the words “in galve”, which

presumably means galvanised iron. The bottom of the document contains the Applicant's name and fax number, indicating that it was sent by facsimile.

50. Mr Jeffery was recalled in order to answer this evidence. He swore that the tank was used to receive grey water and run off from the job. He said that the words "fits under deck" were there because he intended to build a deck over it to protect it from getting damaged. When asked whereabouts on the site it was, he replied: "wherever it was needed". This answer is similar in nature to many answers that he gave in cross examination when pressed for details of the very general allegations that he regularly made. He was unable to point out the tank in any of the numerous photographs taken during construction nor he was able to provide a satisfactory explanation as to why he would write the words "to pump" on the drainpipe at the bottom when he said that the tank was simply drained into the sewer.
51. He claimed that the tank was used when they were disconnecting the plumbing from the sink and to receive water from the roof. He provided no explanation as to why the stormwater from the roof could not have been simply run into the stormwater drains as before and why a tank of 1,877 litres capacity would be required to drain a hand basin, which was the only item apart from pipes that he identified as draining into it. When asked to account for what had happened to the tank he said that it had been thrown into the rubbish.
52. I do not believe this evidence. As he acknowledged, a pump is required in a grey water system to pump the grey water out because it cannot be stored. Hence the words "to pump" reinforce what his own handwritten words suggest, that is, that the tank was intended to be installed below a deck and be used as part of a grey water system. When I asked him about the deck that he said was to have been constructed over it did not appear that any such deck had ever been constructed. There is no satisfactory explanation for the words "fits under deck" that he wrote on the order. I am not satisfied that this item was used on the job and, again, it is a matter of great concern that Mr Jeffery insisted that it was.
53. The remaining items were all charged inclusive of input GST which was not in accordance with the agreement. I have checked each of these claims against the invoice and I agree with Mr Oliver's re-calculations. The amounts justified for these, recalculated, are as follows:

Gyprock: \$290.98; Amberley: \$367.74; Ideal: \$118.80; Pro Act Building Surveyor: \$1,274.72; Plan Printing: \$42.68; Dandy Bolts \$5.79; Bunnings \$58.41; Smorgon Steel: \$126.17; Green Dolphin: \$196.02; Paint: \$103.59; RSEA Safety Equipment: \$478.63; Ram locks: \$78.13; Delta Seel: \$365.90; Bunnings: \$624.54; Bellbird timber: 153.96; Bart excavations: \$9,504.00; Signwriter: \$59.40; Amerind: \$274.22; Timber fabrications: \$1,521.67; K.J. Boyle Pty Ltd (Materials and Labour): \$2,541.26; Photocopying (*unbilled, but proven in Exhibit "K"*): \$9.73.

Invoice 1704 – amount justified for materials and suppliers \$6,942.57

54. The sole problem with the materials part of this invoice is the inclusion of the input GST in the amounts charged. When re-calculated in accordance with the agreement, the amounts become:

Lincoln: \$472.82; Mel Steel: \$78.76; Bunnings: \$61.22; Mel Steel: \$128.24; Boss: \$374.75; Keena Fencing: \$457.38; Melsteel: \$202.08; Robot: \$391.42; Amerind: \$440.05; G.L. Snow \$3,445.20; Tip Fees: \$85.54; Pro Act: \$582.12; K.J. Boyle Pty Ltd: \$137.21; Basin (*unbilled, but proven in Exhibit “K”*) \$85.92.

Invoice 1705 – amount justified for materials and suppliers \$19,618.94

55. When re-calculated in accordance with the agreement, the amounts become: Bellbird: \$92.25; Bourne: \$151.20; Supagas: \$180.16; Concreter: \$19,008; JDV: \$84.74; Bourne: (*unbilled, but proven in Exhibit “K”*) \$102.60.

Invoice 1706 – amount justified for materials and suppliers \$13,320.08

56. The claim of concern on this invoice is that relating to the electrician, Mr McKee. This was for the wiring of a shipping container which the Applicant converted to a portable site office. After its workers left the site the Applicant removed the site office which it still retains as a piece of plant and equipment. I am not satisfied that this is expenditure properly chargeable to the Respondent. Rather, it is the creation of a piece of capital equipment belonging to the Applicant.

57. Items 13, 14, 16 and 18 are amounts said to have come from stock. It seems extraordinary that there were no records kept to prove these items or the amounts claimed. However, I think it is more likely than not that the first three items were supplied because there is a description of what those items were. In the absence of some evidence I have no way of knowing whether or not the amounts claimed with respect to them are fair and reasonable but they appeared in the list supplied to the Respondent and it has paid for them without raising any query. In the absence of some evidence that they were not actually supplied I cannot find that there was any misrepresentation in regard to those items. The Respondent’s payment for them should therefore be treated as voluntary and should not be disturbed. The fourth item, number 18, in the Invoice it is described only as “materials”. In cross-examination Mr Jeffery said that it was steel. Despite my concerns about the unreliability of his evidence and the absence of any corroborating evidence to support what he now asserts, I accept that it was steel used on the job in the absence of evidence to the contrary. In view of the way all these items have been charged it is more probable than not that the figures for each “stock” items include input GST. When re-calculated in accordance with the agreement, the amounts become:

Amerind: \$228.14; Melsteel: \$4,151.76; JDV: \$87.41; Rapid Aluminium: \$593.77; Bellbird: \$556.88; Bunnings: \$514.27; Melbourne Skips:

\$324.00; Hardware (Materials) \$8.00; Austral Bricks: \$4,189.32; Paints: \$232.74; Timber: \$88.64; K.J. Boyle (Materials & Labour): \$1,323.49; Melamine: \$114.48; White edge tape: \$28.08; Flooring: \$138.24; Bunnings: \$189.57; Steel from stock: \$540.49; Supercheap: (unbilled) \$10.80.

Invoice 1709 – amount justified for materials and suppliers \$23,024.93

58. When re-calculated in accordance with the agreement, the amounts become:
Concreter: \$11,880.00; Moorland Hire: \$630.00; Melsteel: \$57.45; Keena: \$124.74; Timber Fabrications: \$9,370.11; Tip Fees: \$193.64; Fuel: \$129.82; BDS: \$180.69; K.J. Boyle (Materials & Labour): \$458.48.

Invoice 1712 – amount justified for materials and suppliers \$29,341.20

59. The claim of concern on this invoice is that relating to the cost of purchasing scaffolding. Although purchased for use on the job it is a piece of building equipment that has been retained by the Applicant. Mr Jeffery said that to hire scaffolding would have been more expensive. Whether or not that is the case is not to the point. In general, an owner is entitled to expect that the builder will provide his own tools in order to do the work he has contracted to do. There might be some instances where it is reasonable to hire equipment and claim the cost but I do not need to consider that on this item because it is not a hiring cost. The Applicant has claimed for the hire of other scaffolding and the Respondent has paid for it. In this instance it is not a hiring cost but the purchase of a piece of capital equipment belonging to the Applicant that it took with it when its workmen left the site and has retained. I am not satisfied that this is expenditure properly chargeable to the Respondent.
60. There is also an invoice for Bellbird which has been duplicated and so will not be allowed. I will allow the amount for tiles for the same reason I have allowed other amounts without invoices where the nature of the claim was identified in the Applicant's invoice, but the input GST will be deducted.
61. When re-calculated in accordance with the agreement, the other amounts become:
Timber fabrications: \$451.44; Moorland Hire: \$1,314.64; Robot Trading: \$1,176.19; Lincoln Sentry: \$472.82; Melbourne Crane Skips: \$1,387.81; Concreter: \$22,572.00; Timber Fabrication: \$430.06; Tiles: \$38.01; Bunnings: \$153.49; Work Safe Equipment: \$156.19; K.J. Boyle Pty Ltd: \$249.48; K.J. Boyle Pty Ltd: \$939.07.

Invoice 1716 – amount justified for materials and suppliers \$9,549.09

62. When re-calculated in accordance with the agreement, the amounts become:
Tip fees: \$59.40; Melbourne Skips: \$469.79; Timber Fabrications: \$3,326.00; Asbestos Removal: \$2,631.42; Andrew McNee: \$902.88; Melsteel: \$507.79; K.J. Boyle Pty Ltd: \$149.69; King Scaffolding (*unbilled but proven*): \$1,502.12.

Invoice 1721 – amount justified for materials and suppliers \$9,918.67

63. The first item claimed is “Materials”. There is no evidence as to what that was or how the amount claimed was arrived at. In view of the unsatisfactory nature of the Applicants claims for payment I am not prepared to assume that it relates to the project. When re-calculated in accordance with the agreement, the other amounts become:

Bunnings: \$318.34; Melbourne Crane Skips: \$907.20; Bricklayers: \$8,316.00; Austral Bricks: \$151.41; Bellbird: \$125.93; K.J. Boyle Pty Ltd: \$99.79.

Invoice 1722 – amount justified for materials and suppliers \$16,175.85

64. This invoice includes a claim for the purchase of scaffolding. Again, although purchased for use on the job it is a piece of capital equipment that has been removed from the site and retained by the Applicant. It is disallowed for the reasons already given. There is also a claim for a framing gun. That is a tool purchased for the Applicant’s use and was retained by it and the claim is rejected for the same reason. Item 18 is an amount claimed for “hardware” without any evidence of purchase, or what it was or how the amount claimed is calculated. That is also not allowed. When re-calculated in accordance with the agreement, the other amounts become:

Timber Fabrications: \$1,568.16; Hardware: \$62.64; Hardware: \$24.73; Bunnings: \$69.66; JDV Engineering: \$166.32; Moorland Hire: \$ 1,029.64; Bunnings: \$156.99; Timber Fabrications: \$6,525.92; Melbourne Skips: \$453.60; Leading Edge: \$46.33; Bunnings: \$463.36; Australian Pennant supplies: \$275.40; Timber Fabrications: \$ 1,568.16; Bellbird: \$1,129.78; Bunnings: \$256.60; JDV Engineering: \$20.38; K.J. Boyle Pty Ltd: \$1,559.84; K.J. Boyle Pty Ltd: \$798.34.

Invoice 1723 – amount justified for materials and suppliers \$19,636.74

65. There are two Bellbird invoices in this invoice already claimed which I will ignore. When the other amounts are re-calculated in accordance with the agreement, the other amounts become:

Moorland Hire: \$521.55; Moorland Hire: \$443.59; Moorland Hire: \$578.57; Bellbird Timber: \$506.80; Bricklayers: \$415.80; Bunnings: \$8.63; Heights Staircases: \$2,732.40; Timber Fabrications: \$2,281.67; Timber Fabrications: \$2,156.93; Building Surveyor: \$1,808.14; Nobel Park Glass: \$2,661.12; Plasterers: \$2,256.01; Australian Pennant: \$111.24; Rapid Aluminium: \$71.55; Bellbird \$508.60; Bellbird \$89.90; Smart: \$50.43; Bunnings: \$26.93; Bunnings \$13.50; Moorland Hire: \$421.75; Moorland Hire: \$387.31; Bunnings \$12.21; Bunnings \$58.74; Bunnings \$27.68; Melbourne Skips: \$140.40; K.J. Boyle Pty Ltd: \$1,347.19.

Invoice 1727 – amount justified for materials and suppliers \$20,404.69

66. This invoice includes a claim for the purchase of a rotary hammer drill purchased and retained by the Applicant. Like other similar items it is not

properly chargeable to the Respondent. Again, Mr Jeffery attempted to justify the charge, this time on the ground that tools wear out. That is so, but it is not for an owner to pay for the replacement of the builder's worn tools. When the other amounts are re-calculated in accordance with the agreement, the other amounts become:

Melbourne Crane Skips: \$421.20; Bellbird: \$603.98; Bunnings: \$977.20; Roller door: \$1,115.65; JDV: \$104.54; Safety equipment: \$269.65; Pro Act: \$811.93; Adaptors: \$257.00; Screws: \$12.96; Insulation: \$48.60; Lights: \$66.96; Plumber: \$11,880.00; Austemp: \$2,530.00; K.J. Boyle Pty Ltd: \$1,305.02.

Invoice 1731 – amount justified for materials and suppliers \$46,837.67

67. When the claims are re-calculated in accordance with the agreement, the amounts become:

Lecky's: \$ 1,659.64; Timber Fabrications: \$784.08; Melbourne Crane Skips: \$939.60; Noble Park Glass: \$788.47; Quality Painting: \$1,176.12; Pro Act: \$149.02; Blue Chip Communications: \$1,451.14; Top Trade: \$26,136.00; Electrician: \$11,253.60; Austemp: \$2,500.00.

Invoice 1732 – amount justified for materials and suppliers \$17,941.84

68. When the claims are re-calculated in accordance with the agreement, the amounts become:

Bunnings: \$1,242.17; Melbourne Crane Skips: \$2,818.80; Hardware: \$71.29; Keena fencing: \$119.75; Signwriter: \$902.88; Melsteel: \$163.23; G.& L. Snow: \$1,722.60; Moorland Hire: \$1,640.68; Electrician: \$4,963.46; K.J. Boyle Pty Ltd: \$1,517.08; K.J. Boyle Pty Ltd: \$1,235.52; K.J. Boyle Pty Ltd: \$1,544.40.

Invoice 1733 – amount justified for materials and suppliers \$15,081.01

69. When the claims are re-calculated in accordance with the agreement, the amounts become:

Timber Fabrications: \$1,045.82; Moorland Hire: \$ 5,983.31; Bellbird: \$70.80; Leck's Electrical: \$18.48; Blue Chip Communications: \$112.86; Bunnings: \$326.74; Trevor Barnes: \$974.16; Melbourne Crane Skips: \$3,348.00; Sink and Tap: \$345.60; K.J. Boyle Pty Ltd: \$1,440.28; K.J. Boyle Pty Ltd: \$1,295.74.

Invoice 1734 – amount justified for materials and suppliers \$20,074.37

70. When the claims are re-calculated in accordance with the agreement, the amounts become:

DRM Plumbing: \$11,880.00; Mulgrave Bricklayers: \$1,188.00; Melbourne Crane Skips: \$507.60; Pro Act: \$386.02; Boss Plastering: \$2,341.11; Timber Fabrication: \$211.96; Melsteel: \$1,994.78; Fixings: \$135.70; Bunnings: \$169.03; JDY Bolts: \$41.31; Plastic Rest ends: \$71.28; Lincoln Sentry: \$196.92; Flick Mixer: \$70.21; K.J. Boyle Pty Ltd: \$880.45.

Invoice 1736 – amount justified for materials and suppliers - Nil

71. This invoice is for the supply and installation of cabinets made by Mr Boyle. On his evidence I am satisfied that the cost of these cabinets has already been charged on the other invoices rendered by K.J. Boyle Pty Ltd. I do not accept Mr Jeffery's assertion that "there would have been" another invoice from that company for the cabinets. No such invoice has been produced.

Invoice 1737 – amount justified for materials and suppliers \$44,905.73

72. There is a claim on this invoice for the supply of "materials" without any identification of what was supplied or evidence as to how the amount claimed is calculated. That item is disallowed. When the other claims are re-calculated in accordance with the agreement, the amounts become:

Melbourne Skips: \$183.60; AGI Windows: \$10,355.60; Boss Palsterboard: \$1,471.10; Bart Gutteridge: \$30,153.60; Bunnings: \$730.89; Keena Fencing: \$ 119.75; Moorland Hire: \$368.40; K.J. Boyle Pty Ltd: \$605.64; K.J. Boyle Pty Ltd: \$138.88; K.J. Boyle Pty Ltd: \$605.64; K.J. Boyle Pty Ltd: \$138.88; Boss Plaster: \$53.75.

Invoice 1739 – amount justified for materials and suppliers \$14,782.72

73. There is a claim on this invoice for the supply of "materials" without any identification of what was supplied or evidence as to how the amount claimed is calculated. That item is disallowed. When the other claims are re-calculated in accordance with the agreement, the amounts become:

Better Rentals:\$65.87; Timber fabrications: \$9,130.97; Melsteel: \$4,278.26; Bunnings: \$190.68; Melbourne Skips: \$140.40; K.J. Boyle Pty Ltd: \$976.54.

Invoice 1742 – amount justified for materials and suppliers \$7,683.33

74. When the claims are re-calculated in accordance with the agreement, the amounts become:

Melbourne Skips: \$183.60; Timber fabrications: \$7,000.77; K.J. Boyle Pty Ltd: \$498.96.

Invoice 1745 – amount justified for materials and suppliers \$10,445.76

75. There is a claim on this invoice for the supply of "Hardware" without any identification of what was supplied or evidence as to how the amount claimed is calculated. That item is disallowed. When the other claims are re-calculated in accordance with the agreement, the amounts become:

Austral Bricks: \$ 2,860.22; Moorland Hire: \$98.65; Better Rentals:\$2,237.74; Bunnings: \$62.64; Bellbird Bricklaying: \$2,367.00; JDV: \$195.13; Electrician: \$2,615.38.

Invoice 1747 – amount justified for materials and suppliers \$6,388.10

76. When the claims are re-calculated in accordance with the agreement, the amounts become:

King Scaffolding: \$130.68; Melbourne Skips: \$421.20; Top Trade: \$1,582.41; Bunnings: \$404.54; Bellbird Bricklaying: \$669.91; Timber Fabrications: \$784.08; Better Rentals: \$2,376.00; Hardware: \$19.28.

Invoice 1748 – amount justified for materials and suppliers \$10,172.10

77. There is a claim on this invoice for “Bennetts” without any identification of what was supplied or evidence as to how the amount claimed is calculated. That item is disallowed. When the other claims are re-calculated in accordance with the agreement, the amounts become:

Austral Bricks: \$454.30; Brick Cutting: \$89.10; Bellbird Bricklaying: \$5,861.59; Blue cChip Telephones: \$130.68; Pro Act: \$3,636.43.

Invoice 1750 – amount justified for materials and suppliers \$7,124.11

78. When the claims are re-calculated in accordance with the agreement, the amounts become:

Heritage Pressure Cleaning: \$712.80; KGM Brick Cleaning: \$648.00; United Energy: \$361.47; Access Entry: \$4,603.50; K.J. Boyle Pty Ltd: \$212.06; K.J. Boyle Pty Ltd: \$586.28.

Invoice 1751 – amount justified for materials and suppliers \$8,587.25

79. When the claims are re-calculated in accordance with the agreement, the amounts become:

Rapid Aluminium: \$672.47; Melbourne Skips: \$577.80; ABC Handrails: \$411.64; Boss Plaster: \$1,307.70; Bellbird: \$1,810.98; Hardware: \$96.39; Melsteel: \$354.97; Keena Fencing: \$119.75; Electrician: \$1,793.88; Bunnings: \$271.00; K.J. Boyle Pty Ltd: \$1,044.25.

Invoice 1755 – amount justified for materials and suppliers \$7,125.72

80. When the claims are re-calculated in accordance with the agreement, the amounts become:

Agi Windows: \$6,177.60; Bellbird: \$458.56; Hardware: \$144.21; Breakaway Concrete: \$345.35.

Invoice 1756 – amount justified for materials and suppliers \$20,090.19

81. When the claims are re-calculated in accordance with the agreement, the amounts become:

Australian Pennant: \$32.40; Hardware: \$116.14; Moorland Hire: \$3,385.88; King Scaffolding: \$5,051.61; Melbourne Skips: \$140.40; ABC: \$430.65; Timber Fabrications: \$9,016.09; Better Rentals: \$974.16; Bellbird: \$594.00; K.J. Boyle Pty Ltd: \$358.78.

Invoice 1758 – amount justified for materials and suppliers \$14,712.06

82. When the claims are re-calculated in accordance with the agreement, the amounts become:

Farris Matti: \$5,940.00; Austemp: \$4,704.48; JDV: \$193.35; Noble Park Glass: \$3,706.56; Moorland Hire: \$167.67.

Invoice 1759 – amount justified for materials and suppliers \$16,463.08

83. When the claims are re-calculated in accordance with the agreement, the amounts become:

Moorland Hire: \$516.70; Farris Matti: \$10,652.44; Hardware: \$85.59; Melbourne Skips: \$1,139.41; Bunnings: \$700.25; King Scaffolding: \$1,125.45; Bellbird: \$392.04; Waterproofing: \$712.80; Moorland Hire: \$1,138.40.

Invoice 1762 – amount justified for materials and suppliers \$16,497.17

84. When the claims are re-calculated in accordance with the agreement, the amounts become:

Moorland Hire: \$2,452.32; Melbourne Skips: \$1,265.60; Bunnings: \$12.81; ABC: \$267.30; King Scaffolding: \$313.63; Amerind: \$174.83; DRM: \$11,880.00; MFB: \$130.68.

Invoice 1763 – amount justified for materials and suppliers \$30,395.73

85. When the claims are re-calculated in accordance with the agreement, the amounts become:

AGI: \$7,484.40; Exel-Seal: \$1,316.66; Top Trade: \$21,978.00; Austemp Pty Ltd; (Credit) - \$383.33.

Invoice 1769 – amount justified for materials and suppliers \$10,368.50

86. There is a claim on this invoice for Lecky's for \$4,791.61 but the only invoice produced is for a pre-GST charge of \$2,102.40. In view of the unjustified nature of some of the charges that have been made, that is all that should be allowed. When the claims are re-calculated in accordance with the agreement, the amounts become:

Monash Glass: \$1,165.16; Keys cut: \$9.72; Pro Act: \$1,110.53; Andrew McNee: \$4,451.44; Flooring Supplies: \$192.21; MD Tiling: \$356.40; Lecky's: \$2,497.65; William Russell Doors: \$585.39.

Invoice 1770 – amount justified for materials and suppliers \$2,726.99

87. When the claims are re-calculated in accordance with the agreement, the amounts become:

Hardware: \$722.43; Moorland Hire: \$241.46; Melbourne Skips: \$594.00; Bunnings: \$423.74; Bennett's: \$243.00; JDV: \$118.60; Bellbird: \$313.63; Action Aluminium: \$70.13.

Invoice 1772 – amount justified for materials and suppliers \$13,587.90

88. When the claims are re-calculated in accordance with the agreement, the amounts become:

King Scaffolding: \$1,375.70; Moorland Hire: \$1,960.77; Keena Fencing: \$219.78; Melbourne Skips: \$891.00; Hardware: \$73.33; Bart Gutteridge: \$9,468.36; Vanderhurk: \$498.96

Invoice 1773 – amount justified for materials and suppliers \$48,698.42

89. The charge on this invoice with respect to Austemp for the air conditioning requires some explanation. The invoice annexed to Mr Jeffery's witness statement is for \$13,774.5 after allowing for an earlier payment of \$9,386.00. That earlier payment figure is the total of the four GST inclusive amounts previously claimed for Austemp on the Respondent's Invoices no. 1730, 1731 and 1758. Each of those payments included GST paid to Austemp. It does not take into account the credit deducted on the Respondent's Invoice 1763. The pre-GST amount of this invoice is therefore \$13,774.50, from which input GST must be deducted. The amount to be claimed before margin and GST is therefore \$12,522.27. When the further invoice at page 84 of the Respondent's Tribunal Book is added, the claim before margin and GST is \$15,322.27, which I note is the same figure Mr Oliver calculated. Adding the 8% margin and 10% GST brings the figure to be claimed to \$18,202.86.

90. Mr Oliver has not allowed a margin on this charge and I cannot find anything in my notes to suggest that there should not be the agreed 8% margin added. However the parties will have the opportunity to make submissions as to all these calculations so if an error has been made in this instance it can be corrected.

91. On that basis, when the claims are re-calculated in accordance with the agreement, the amounts become:

IMT Corporate: \$28,523.88; Lecky's \$1,971.68; Austemp \$18,202.86.

Invoice 1776 – amount justified for materials and suppliers \$17,802.07

92. There is a charge on this invoice for \$198.37 for "PJ Materials" with no detail or evidence as to what it was for, or how the amount claimed has been calculated. Due to the suspect nature of a number of the claims this claim will not be allowed in these circumstances. When the other claims are re-calculated in accordance with the agreement, the amounts become:

Bunnings: \$348.78; Action Aluminium: \$94.36; Bellbird: \$704.42; Trevor Barnes: \$356.40; Melbourne Skips: \$594.00; JDV Engineering: \$18.98; Boss Plaster: \$313.45; Hardware: \$36.78; Moorland Hire: \$598.00; South East Air Conditioning: \$320.76; Drew Wadsworth: \$1,639.44; DRM Plumbing: \$11,523.60; K.J. Boyle Pty Ltd: \$483.36; K.J. Boyle Pty Ltd: \$769.74.

Invoice 1790 – amount justified for materials and suppliers \$4,262.54

93. This was for a single charge for the suspended ceiling supplied by M & T Corporate Services Pty Ltd. When the margin and GST are added to the pre-GST figure of \$3,588.00, the amount allowed becomes \$4,262.54.

Remaining amount not invoiced – amount justified \$6.72

94. Invoices were tendered by the Applicant (Exhibit “K”) for materials said to have been supplied that were not invoiced. Nearly all of these have been taken up in the above figures but one for JDV Engineering (13/12/05) seems to have been missed. When the margin and GST are added to the pre-GST figure the amount allowed becomes \$6.72.

The labour

95. Copies of the invoices from Carl Jeffery, Mr Thiele and Mr McGibney were produced. In nearly every instance these were photocopies. In many of them, the site address at which the employee had worked was not stated. In others, most notably those of Mr Carl Jeffery, there were obvious deletions of what appears to have been the site address. This makes the task of assessing the proper charge for labour very difficult, particularly in view of the failure of Mr Carl Jeffery to produce his diaries. However I could see no evidence of any charges for the entries where the site address had been obliterated and so I will take the invoices at face value.

96. I accept Mr Oliver’s assessment of the hours worked except as follows:

- (a) In Invoice 42 I will allow the 2 ½ hours claimed for the steel beam factory, increasing the allowance for that invoice to 5 ½ hours. Steel beams were required for the project and there is no reason to disbelieve that these hours related to that. I do not allow the time in the factory because that is said to relate to the container which was the Applicant’s own project that should not have been charged to the respondent. I think the hourly rate must have been intended to be applied to work done for the job by the three named employees, regardless of where it was performed.
- (b) Three invoices appearing in the Applicant’s Tribunal Book for June 2005 have been omitted, namely:
 - at p. 167 PM Shopfitting Invoice No. 136 being 16 hrs
 - at p. 168 Carl Jeffery Invoice No. 54 being 40 hrs
 - at p. 169 Darren Thiele Invoice No. 66 being 40 hrs.
- (c) The amount to be allowed on PM Shopfitting’s Invoice 142 (TB p.209) should be \$1,980 and not \$2,200.
- (d) A further invoice appearing in the Applicant’s Tribunal Book for 29 January 2006 has been omitted, namely, PM Shopfitting Invoice No. 171, which was for 38 hours.

97. Since I find that the Applicant's workmen walked off the job in response to the Respondent's complaint that it had been overcharged and since I have found that the Respondent's complaint was justified, there is no basis for allowing any charge after they ceased work. Since they left on 20 June 2006, there are the following deductions to make from the invoices produced:

Workman	Inv. no.	Hours claimed	pre 21 June	Deduction
Mr McGibney	200	40	16	24
Mr Jeffery	4	40	0	40
Mr Thiele	11	42	18	<u>24</u>
Total deduction				88

98. There is a double charge in Mr Jeffery's invoices 81 and 84, both of which claim for 1st and 2nd February 2006. There are 16 hours claimed in each case for those days and all the days before and after have been charged for. There is therefore a further 16 hours to be deducted.

99. I do not accept Mr Pumpa's submission that I should assume that Mr Carl Jeffery's Invoice 4 must have been intended to refer to work carried out between 8 and 14 June that is, before Invoice 3. In the first place, all of his other invoices were in numerical order and there was no explanation in the evidence that I can recall as to why this one would be out of order. Secondly, Invoice 3 covers the period up to 20 June when he walked off the site. It is clear from Mr Carl Jeffery's evidence that he charged for time after 20 June to pack up tools and move off the site and there is no invoice other than Invoice 4 for any work after 20 June. Finally it is possible that he did not work in that week. The weekend of 10-12 June appears to have been the Queen's Birthday long weekend that year. I cannot infer that he would have worked in that week.

100. Mr Oliver added up the hours claimed and arrived at a figure of 5,201. From this should be deducted half an hour on Carl Jeffery's Invoice 42, a further 8 hours on his Invoice 47, a further 16 hours on the double charge referred to and 88 hours for time after they left the site. This reduces the claim to 5,088.5 hours. Adding the Invoices that Mr Oliver omitted, the figure to be allowed becomes 5,222.5. When multiplied by the agreed rate which, with GST, is \$55 per hour, the labour charge is \$287,237.50.

Payments

101. The following payments have been made by the Respondent:

To the Applicant:	\$896,369.74
To DRM Roofing and Plumbing:	10,670.00
To Pro Act Building Surveyors:	<u>1,518.00</u>
Total payments:	<u>\$908,557.74</u>

Conclusion

102. The amount due to the Applicant for labour, suppliers and materials is therefore:

Suppliers and Materials, with margin and GST: \$602,179.07

Labour (inclusive of GST): \$287,237.50

Total for labour, materials and suppliers: \$889,416.57

103. Since the Respondent has already paid to the Applicant and to its suppliers \$908,557.74, there is, on these figures, a refund due to the Respondent of \$19,141.17.

Order to be made

104. In view of the tortuous nature of the exercise involved in arriving at this conclusion I think it is appropriate to give the parties the opportunity to check these calculations for any arithmetical errors and submit minutes of the orders to be made consistent with these reasons. If no agreement can be reached I will hear submissions as to the orders to be made. Obviously, I will not allow any further evidence to be led because the hearing is concluded. This is simply an opportunity to correct any obvious errors in the figures. At the same time, I will also deal with any applications for costs.

SENIOR MEMBER R. WALKER