VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP859/2015

CATCHWORDS

Domestic Building Contracts Act 1995 – building Contract to construct two units – verbal requests by Owners for variations - requirements of sections 37 and 38 of the Act not complied with - similar requirements in building Contract not complied - variations less than 2% of Contract price - whether Builder entitled to recover for work done carrying out variations - delays arising from carrying out variations - procedure in Contract for extending time not followed by Builder - whether Owners entitled to liquidated damages for delay - defects alleged – whether conduct of Builder amounted to a repudiation of the Contract - Owners taking control and site without prior notice - whether a repudiation by Owners - claimed by Builder for quantum meruit - how assessed - assessment of damages

APPLICANT	Paterson Constructions Pty Ltd (ACN 135 579 770)
RESPONDENTS	Peter Mann and Angela Mann
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	1 to 19 August. Submissions 10 October, 2016
DATE OF ORDER	12 December 2016
CITATION	Paterson Constructions Pty Ltd v Mann (Building and Property) [2016] VCAT 2100

ORDERS

1. Order that the Respondents to pay to the Applicant the sum of $660,526.41.
2. Order that any certificates relating to the solar panels that the Applicant installed in unit two of the subject premises that are in its possession or control be delivered to the Respondents' solicitors within 14 days of the date of this order.
3. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Mr A. Laird of Counsel
For the Respondent	Mr G. Hellyer of Counsel

REASONS

Background

1. The Applicant ("the Builder") is a builder. Its director is a Mr Paterson. The Respondents ("the Owners") are the owners of two semi-detached units ("the Units") that were constructed for them by the Builder on a block of land that they owned in Langtree Court, Blackburn. The front unit ("Unit one") is rented and they live in the rear unit ("Unit two").

2. The units were constructed pursuant to a domestic building contract ("the Contract") dated 4 March 2014. Work commenced on 10 March 2014 and proceeded until 22 April 2015 when the Owners purported to terminate the Contract by a letter from their solicitors. They changed the locks and excluded the Builder from the site.

3. In this proceeding, the Builder claims from the Owners the value of the work and materials it has supplied on a quantum meruit basis, or in the alternative, damages for breach of contract as well as delay damages. The basis of the Builder's claim in quantum meruit is said to be that:

   (a) by taking charge of the site and excluding the Builder, the Owners repudiated the Contract;

   (b) the Builder accepted the repudiation; and

   (c) the Contract being at an end, it is entitled to the value of the work that it has done and the materials that it has supplied.

4. Following the Owners taking possession of the site, the Builder's solicitors wrote to the Owners' solicitors insisting that the Contract remained on foot and demanding to be allowed to return to the site. The Owners' solicitors replied that the Contract was at an end. On 28 April 2015, by a further letter from its solicitors, the Builder purported to accept the alleged repudiation by the Owners and bring the Contract to an end.

5. The Owners have defended the proceeding, claiming that the Builder repudiated the Contract and that they were therefore entitled to determine it by accepting the repudiation which they claim to have done by excluding the Builder from the site. By their counterclaim, they seek damages for allegedly defective and incomplete work as well as liquidated damages for delay and other losses.

Hearing

6. The matter came before me for hearing on 1 August 2016 with 15 days allocated. Mr A. Laird of counsel appeared on behalf of the Builder and Mr G. Hellyer of counsel appeared on behalf of the Owners.

7. The case had originally been fixed for a 20 day hearing but, since it was apparent that the parties were not ready to proceed on the first day of the period for which it was originally listed, the hearing was put back a week until 1 August, which left only 15 days available out of the original 20 days allocated. In view of the large volume of material filed, the number of witnesses to be called and the very

lengthy witness statements filed for the principal witnesses, I was concerned whether there would be sufficient time for the hearing.

8. During his opening, Mr Laird produced a plan setting out how he thought the time could be used to ensure that the case finished within the time allotted but Mr Hellyer said that he did not believe that this plan was realistic.

9. I concluded that, if time were not wasted upon side issues, concerning which there was a great deal of material filed, and the parties concentrated on the matters that really needed to be decided, the time allotted might be adequate. However in an effort to avoid time being wasted, I directed that cross examination of any single witness would be limited to two days without leave.

10. The only cross-examination that exceeded that period was that of Mr Paterson and that of Mrs Mann. At Mr Hellyer's request I extended the time for the cross-examination of Mr Paterson several times and it eventually concluded on Monday afternoon at 4.20pm when Mr Hellyer said that he had no further questions. Mrs Mann's cross-examination was similarly extended until Mr Laird said that he had no further questions. By that time I had obtained an allocation of five further days from the listings registry so that the original 20 day period then became available.

11. The first day of the hearing was taken up by openings. The morning of the second day was taken up by an on-site inspection and the afternoon of the second day and the first part of the morning of the third day were taken up with the rest of Mr Hellyer's opening. The witnesses were then called.

Witnesses

12. There were 11 lay witnesses. For the Builder I heard evidence from Mr Paterson and the following further witnesses:

    (a) Jaemeel Knecht, the Builder's employee carpenter;

    (b) Stephen Haslam, the staircase maker;

    (c) Glenn Pettis, the building inspector who is an employee of the relevant Building Surveyor;

    (d) Michael Keavy, the electrician;

    (e) Nick Starchenko, a retired plasterer, who worked as a handyman on the site;

    (f) Tristan Bradbrook, the apprentice electrician who was on site for much of the construction period;

    (g) Mrs Julianne Barlow, the next door neighbour, concerning the pruning by the Owners of trees on her side of the fence line without her permission.

13. Mr Starchenko was too ill to attend the Tribunal premises and so his evidence was given by conference telephone. There was also a witness statement filed for the plasterer, Ekrem Gashi, but he was absent on holiday and unable to be contacted.

14. For the Owners I heard from the Owners themselves and from their friend, Mr Ettore Colombo.

15. There were 11 expert witnesses representing various disciplines. The general building experts were Mr Campbell for the Builder and Mr Lorich for the Owners. The engineers were Mr Blackwood for the Builder and Mr Gibney for the Owners. Evidence concerning the roof was given by Mr Coghlan for the Builder and Mr Quick for the Owners. Evidence concerning the heating and air conditioning was given by Mr Keir for the Builder and Mr Anderson for the Owners. Some evidence was also given by Mr O'Brien, the director of the company that installed the heating and cooling in the two units. In addition, the Builder called a quantity surveyor, Mr Pitney, and the Owners called a painting expert, Mr Thompson.

Credit of witnesses

16. There is a substantial difference between the accounts given by Mr Paterson and some of the Builder's other witnesses on the one side and the accounts of the same events given by the two Owners on the other. Much turns on who is to be believed and to this end I studied the principal witnesses carefully while they gave their evidence.

17. Mr Paterson appeared to give responsive answers to the questions that were put to him. His demeanour was reserved and his manner somewhat wooden but his evidence was internally consistent and generally accorded with the documents and with that of other witnesses called on behalf the Builder. He was not shaken in cross-examination. He appeared to be a quiet and unaggressive man. He had been willing to oblige the Owners in regard to the preparation and signing of a sham contract that they provided to their bank in order to obtain a larger loan. He admitted having done that. He impressed me as being a truthful witness.

18. The carpenter assisting Mr Paterson on the project was Mr Knecht. His evidence supported that of Mr Paterson. In particular, he gave evidence that:

    (a) the Owners were on-site virtually every day, often up to 3 times a day, and, while they were there, they would "hassle" Mr Paterson about whatever issue they were focused on at the time;

    (b) the Owners were effusive in their praise of Mr Paterson and his workmanship and the quality of the construction of the two units;

    (c) they made a lot of requests to the electrician on site, asking him to make many changes to the electrical items;

    (d) when Mr Paterson was on holidays they told him (Mr Knecht) that they were in control of the site and that he was to inform them of his movements.

    He supported the account given by the next-door neighbour, Mrs Barlow concerning Mr Mann's behaviour towards her at the time of the tree lopping incident. He said that, during a discussion with the Owners about a dumbwaiter that they were asked to install in the cellar, the Owners said: "Money's no issue,

just get it done". He was not shaken in cross-examination and I see no reason to doubt what he said.

19. Mr Starchenko is a retired plasterer who worked on the site from time to time as a handyman. He said that the Owners were on-site nearly every day and whenever he was on-site he spoke to them when they were there. He said that most of the time they came to the site twice a day or more. He described them as overbearing and controlling. A major issue in the case was whether it was Mr Paterson or the Owners who decided to make the cellar bigger than the size that was shown on the plans. Mr Starchenko said that the Owners told him that they were glad that they had made the cellar bigger. He confirmed Mr Paterson's evidence as to the delays caused by the Owners' kitchen supplier.

20. Mr Pettis was a building inspector involved in inspecting the work during and after construction. He said that the standard of construction of the units was generally high and that accorded with my own observation, subject to the findings as to defects made below. He confirmed Mr Paterson's evidence that a conditional occupancy permit could have been issued for Unit two in April 2015, subject to compliance with certain requirements.

21. Mr Keavy was the electrician engaged on the project although he was not often on-site. The electrical work was done on a day-to-day basis by his employee, Mr Bradbrook. Mr Keavy confirmed the frequency with which the Owners visited the site and the directions they gave on-site which he said normally came directly from them to himself or to Mr Bradbrook. He said that the Owners would often boast about the quality of the job. He said that because of the number of changes requested by the Owners, the electrical work cost more than the original quotation that he had given to the Builder.

22. Mr Bradbrook was the employee electrician who performed substantially all of the electrical work on the project. He said that the Owners were on-site at least once a day and often two or three times a day and they would talk to the contractors on-site. He said that they would often praise him and they would show him where they wanted items added or moved. He said that these verbal requests to make changes came almost always from the Owners directly. In his witness statement he detailed a number of specific changes that they asked him to make. He said that the Owners often praised the quality of the units and that he thought that the Owners talked about themselves a lot and "big-noted" themselves. He said that on one occasion when the Owners showed him a particular task that they wanted him to perform he told them that it would be a costly variation for a small amount of benefit but that he ended up doing the easiest of those items. He also complained that Mr Mann called him directly after hours.

23. Mr Haslam was the director of the company that provided the stairs in the two units. He said that there were quite a few changes on the project after he had quoted. The timber for the staircase was changed to spotted gum and the stairwell design was changed because, he said, the Owners change their minds and decided they wanted a landing on the staircase rather than winders and they

wanted to avoid the staircase protruding too far into one of the rooms. He said this required the Builder to alter the frame of the unit in order to suit the change in the design of the staircase. He said the cellar access went from being a straight stairwell or ladder to a tight spiral staircase which was a lot more work. He said that the installation of the stairs took longer, due to changes the Owners made. He described the Owners as being vocal about what they wanted and he had the impression that money was not an issue for them. He said that he heard the Owners talking about the installation of lining boards in the cellar. He said that, when Mr Paterson said they would be pine, they said "No, we want cedar lining boards". He said that the Owners would often "show-boat" about the cellar, saying how they were going to sit down there with friends and a barrel of wine at dinner parties.

24. Mr O'Brien was the contractor whose business installed the central heating and air-conditioning system. He was present during the concurrent evidence of the heating and air-conditioning experts, Mr Anderson and Mr Kier.

25. Mrs Barlow was the next-door neighbour who gave evidence concerning the behaviour of Mr Mann in regard to the cutting down of plants in her garden.

26. None of the Builder's witnesses was shaken in cross-examination and I have no reason to discount or disbelieve any of the evidence given by them. I thought that the version of facts given on behalf of the Builder was plausible and generally in accordance with the documentation.

27. On the other hand the Owners' case was, in effect, that the Builder carried out in excess of $200,000 worth of extra work without any request or instruction on their part and without them having any expectation that they would be called upon to pay for it. As will appear from the detailed discussion below, in view of the nature and extent of the variations and all of the surrounding circumstances, their version of these events is not credible. In addition, the evidence given in the witness box by both Owners, but particularly Mr Mann, departed substantially from their witness statements and the way the case was opened by counsel on their behalf.

28. Apart from the Owners themselves, the only lay witness called on their behalf was Mr Colombo. He said that he made occasional visits to the site but does not say what his observations were during these visits. He gave evidence as to a conversation at the Owners' existing house during which the idea of constructing a cellar was first raised but his account is much less detailed than that given by Mrs Mann. He said that, at a later meeting for drinks at the Owners' house, Mr Paterson said that he had made the cellar bigger than originally designed so that it would be big enough to put in a table for drinks in the cellar. That accords in part with the evidence of the Owners. There is no reason to doubt the truthfulness of Mr Colombo's evidence although it conflicts with that of some of the Builder's witnesses and I will have to decide whose recollection is more likely and whose version to accept.

29. Mr Mann presented in the witness box as having quite a forceful personality. As stated above, he was described by Mr Haslam as "show boating" and by Mr

Knecht as "big noting". His behaviour during the tree lopping episode was described by Mrs Barlow as being aggressive and overbearing.

30. Mrs Mann appeared to be an intelligent woman with a strong personality. The evidence of both of them, particularly that of Mr Mann, was severely shaken in cross-examination, largely concerning their dealings with their bank and also in regard to a second form of contract ("the Second Contract") that was prepared and signed by the parties which I find to have been a sham.

31. The Second Contract showed a contract price of $1,050,000 instead of $971,000 which was provided for in the Contract that they also executed. According to Mr Paterson's evidence, which I accept, this Second Contract was signed at the same time as the Contract. It was prepared for the purpose of allowing the Owners to borrow more money from their bank than was required for the construction, in order, according to Mr Paterson, to provide funds to do up their existing house for sale and for other purposes.

32. The Second Contract was referred to in Mr Paterson's witness statement but was only briefly mentioned in the Owners' witness statements, and neither of the Owners' witness statements made any mention of this higher price. However, in the course of his cross-examination, Mr Mann said that $1,050,000 was the real contract price and that the Second Contract was the real contract between the parties. That was not the way the case had been opened by the Owners' counsel, it was not the way in which their defence and counterclaim was framed and these matters were not put to Mr Paterson in cross-examination. Until this evidence was given by Mr Mann, it had always been contended on behalf of the Owners that the Contract was the real agreement between the parties and the real price was $971,000.

33. As Mr Mann's cross-examination proceeded, the account that he gave developed further and became more unlikely. His explanation for the existence of the Second Contract was that the Builder wanted to split the progress payments between the two units. That much was common ground, but he then said that the Contract contained exclusions that the Owners wanted to take out. He said that Mr Paterson then reworked the figures, taking out the exclusions and arrived at the price of $1,050,000 which Mr Mann said was the real contract price. He said that the additional $79,000 was to take account of "…extra charges in tiles or floorboards or anything like that.". He later said that fences, storage and landscaping were also now to be included in this real contract price.

34. Mrs Mann said that the correct contract price was $971,000 but suggested that the enlarged scope of works set out in the Second Contract was the work that the Builder was required to do for that sum. She was asked several times whether it was her contention that the true agreement was the Contract or the Second Contract but she repeatedly failed to give a direct answer. Instead, she said that there were two contracts and that Mr Paterson knew what the extra money was for.

35. Annexed to both the Contract and the Second Contract was a quotation from the Builder for the contractual sum, the first being a quotation for $971,000 and the

second being a quotation for $1,050,000. By its terms, each quotation served as the specification for the contract document to which it was annexed. The quotation for the higher figure differed from the earlier quotation by deleting a number of exclusions.

36. Mr Laird put it to each of the Owners that the purpose of the Second Contract was to enable them to mislead the Commonwealth Bank into believing that the real price for the construction was $1,050,000 so as to induce it to lend them more money than it would have done otherwise. It was in response to this suggestion that Mr Mann contended that the second price was the real one. He said that the price was increased to take account of matters that were no longer excluded from the scope of works and also to provide for any extra cost in regard to the tiling and the carpet.

37. The copy of this Second Contract discovered by the Owners shows it to be dated 14 March 2014 and they both swore that they signed it on that day. It also shows the policy numbers of the domestic building insurance, although those policies were not issued until 15 March 2014 and so the real date of this document in its present form cannot be 14 March 2014.

38. Further, the copy of the Second Contract in the Commonwealth Bank file that was produced by the bank on subpoena shows the Second Contract to be undated and it does not contain the policy numbers of the domestic building insurance. It was put to Mr Mann that he must have dated his copy of the Second Contract and altered it by inserting the particulars of the insurance after copying the document and providing the undated and unaltered copy to the bank. He was adamant that he had not done so and he asserted on a number of occasions that the handwriting of both the date and the policy numbers on the Owners' copy of the Second Contract was neither his nor that of his wife.

39. I do not believe this evidence. Since it was Mr Mann who provided the bank with a copy of the Second Contract, the Owners' copy could not have borne this date and details at the time that he copied it. Since it was in the Owners' possession afterwards, the additions can only have been made by the Owners or by someone having access to their papers. It was not suggested that there was any other person who had access to their papers who would have had any reason to make such changes.

40. In all the circumstances I prefer the evidence of Mr Paterson in regard to the Second Contract. The purpose of this false document was to mislead the Owners' bank into thinking that the real price for the construction of the two units was the higher sum so as to induce it to lend more money to the Owners than it might otherwise have done. It was prepared by the Builder at the request of the Owners.

41. Mr Paterson said that he signed it to accommodate the Owners. It was not referred to directly in the principal witness statements of the Owners but after it was referred to in Mr Paterson's witness statement the Owners then dealt with it in Mrs Mann's witness statement in reply, saying that they wanted the extra money in case the prime cost or provisional sum figures in the Contract were

exceeded. If they had wanted to borrow extra money from the bank they should have made an application for it and given truthful information to the bank. The existence of this document does no credit to any of the parties but I think that it reflects more on the credit of the Owners who requested its production.

42. In the Owners' written application to the Commonwealth Bank for the loan which was also produced by the bank on subpoena, it was stated that both units would be rented out and a rental figure for each unit is stated. This is despite the fact that the Owners' case was that the front unit was to be rented out and the rear unit was to be occupied by them as their retirement home. It was put to Mr Mann in cross-examination that this was another instance of him misleading the bank but he denied it. His answers about this appeared to be very evasive. He said at first : "We said definitely unit one was going to be rented out, and we were making our minds up that we were most probably – that we were going to have our dream home in unit two."(sic.) That is not how the loan application that the Owners made to the bank reads.

43. The Owners selected the tap-ware and sanitary fittings from a supplier, E&S Trading, at a considerably greater cost than the equivalent items that had been allowed for in the Contract. The Builder paid the price and claimed the extra cost as a variation. The Owners initially included the amount that the Builder paid to E&S Trading in their own counterclaim although this appears to have been a mistake and it was corrected in Mr Hellyer's opening. They denied liability to pay the additional cost to the Builder. Mr Mann said in cross-examination that he thought it was included. I find it hard to believe that he could sensibly have had that view. Under questioning he eventually acknowledged that he realised that there was an extra cost that would have to be paid but he said that if there was extra Mr Paterson would have told him about it. He then said that he thought that what he bought was "…covering what was in the Contract". In the end I am not sure what his position about this was.

44. In many instances Mr Mann did not answer questions in cross-examination directly and he often added gratuitous comments to his answers. He appeared to be reluctant to agree that the Builder had carried out a great deal of work that was not required by the Contract documents although he eventually acknowledged that such was the case. When asked whether he expected that the Builder would have been doing this extra work for nothing he said that Mr Paterson had not told him that there would be any extra charge. Mr Mann agreed that he never asked Mr Paterson what it would cost to do these things but he denied that he had ever asked Mr Paterson to do them in the first place. He said that Mr Paterson made suggestions which they agreed to, not knowing that any extra charge was involved. He said that sometimes Mr Paterson did things without telling them or only told them after he had started doing them. He said they were never told that there were any variations.

45. The answers given by Mrs Mann in cross-examination were very similar. Although she asserted that the kitchen in Unit two was to be her dream kitchen and although there were several drafts of the plans prepared for the Owners by

their Architect, she denied any involvement at all in the design of the kitchen for Unit 2 that is shown in the plans. She eventually acknowledged that her ideas on what she wanted in relation to the kitchen went into the Contract. She asserted that when she asked Mr Paterson to meet the cabinetmaker on numerous occasions he became quite aggressive to her on the subject yet there was no email or anything else in writing to corroborate this assertion.

46. In regard to the cellar, she gave an account of a very detailed discussion which she said took place in January 2014, well before the plans were finalized, about what the cellar was to contain. She said that there was to be sandstone walls, an elaborate spiral staircase and a perspex hatch. Although the emails containing those details did not appear until months afterwards she nonetheless asserted in cross-examination that she was 100% sure that it was all discussed in January. After initially not referring to the bluestone floor she then asserted that that was discussed in January as well. Neither Mr Mann nor Mr Colombo made those assertions.

47. There are numerous other instances in both Mr and Mrs Mann's evidence where the account given is unlikely to be true but it is unnecessary to refer to any more. Both of them were inclined to give evasive answers or, on occasions, a lengthy answer concerning matters about which they were not asked.

48. The scale of the work done by the Builder beyond the Contract scope of works was such that it is not credible that the Owners did not know that the various additional items were done at considerable cost. They were aware that Mr Paterson was a small builder who would not have been able to afford to do substantial building work for nothing.

49. Of the three principal witnesses I prefer the evidence of Mr Paterson. I believe him to be a truthful witness whereas Mr and Mrs Mann were unsatisfactory witnesses and I doubt the truth of much of what they said.

The expert witnesses

50. I see no reason to doubt or discount the evidence of any of the expert witnesses. Mr Laird suggested that Mr Lorich slipped into the role of a quasi-advocate for the Owners. I do not find that to be the case. Indeed, the most valuable of the experts' reports is Mr Lorich's first report. Being a report by a well respected and competent expert following an inspection that took place shortly after termination, that provides a snapshot of the building at that critical time.

The surplus funds

51. The sham Second Contract resulted in more money being paid to the Builder than the amounts that were actually due at each stage under the Contract and so, since the bank made all progress payments directly to the Builder, there was a surplus upon which the Owners could have drawn to meet a certain amount of extra work. In addition, they were selling their existing house which would have been expected to release more money. The Second Contract was entered into by

the Builder to accommodate the Owners' need for additional funds from the bank and there was nothing in writing recording what was to happen to this additional money. The evidence of the Owners in regard to this was contradictory and confused.

52. Mr Mann said that the real contract price was the higher sum of $1,050,000 but he then said that the Builder was required to carry out more work than the Second Contract specified. He suggested that there was a sum of money to be drawn upon to pay for any extras but did not say how the amount of that was to be calculated.

53. Mrs Mann gave a slightly different account. She contended that the original Contract recorded the correct price and the extra money was to cover work that had previously been excluded from the Contract. Again, she gave no clear or plausible explanation as to how this money was to be quantified, claimed or applied.

54. I accept Mr Paterson's evidence that the Owners told him that they needed the extra money for landscaping and fencing, interest on the construction loan and for work to be done on their existing house in order to prepare it for sale and that their intention was that it was to be received by them for that purpose. Not only is that credible and logical but it is also against the Builder's interest, in that it would have been more favourable to the Builder for Mr Paterson to contend that the real contract price was the higher sum. It then turned out that the bank would not pay the money to the Owners but paid it directly to the Builder.

55. Mr Paterson said that he asked the Owners how the progress payments would work, given that the amount of each stage payment by the bank was higher than the stage payment due under the Contract. He said that the Owners told him that he should apply the excess towards variations and that they would sort out the variations at the end of the job. He said that he specifically recalled Mr Mann saying words to the effect that "…there would be money in the kitty for variations".

56. I accept this evidence. It is plausible and it accords with what occurred. The higher amounts paid by the bank continued to be received by the Builder without objection by the Owners and there was no intermediate accounting between the parties as to the money received and the money expended on the variations that were carried out. Further, of the amounts received from the Bank, $54,221 was paid by the Builder to the Owners as the allowance for the cabinetry. The Builder also made substantial payments for the spa, the dumbwaiter and the extras for tap-ware the Owners had ordered, none of which was within the Contract. Again, there was no intermediate accounting for those payments.

The timeline

57. The parties first met in 2012. The Builder had constructed two units on its own behalf on other land approximately 100 m away from the Land and sold them. The Owners had visited the site where those two units were built during construction and further inspected one of the units at the time of sale. They liked the design and discussed the possibility of the Builder building two similar units for them on the Land. In late August Mr Paterson referred the Owners to an Architect, David Cooke of DCA designs ("the Architect") who had designed the two units the Builder had sold.

58. The Owners engaged the Architect to prepare plans and, following a number of drafts, town planning drawings were submitted to the City of Whitehorse ("the Council") on 8 March 2013. The plans were for two units somewhat similar to the units the Builder had built nearby. The intention was that the front unit would be rented and the rear unit would be occupied by the Owners as their home.

59. The planning process thereafter took a considerable time and some changes were requested by the Council. It was not until 22 November that a decision was made by the council to grant a planning permit with conditions. The permit was finally granted on 20 December. In the meantime, on 12 December, the Owners obtained a quote from a building surveyor Mr Pisotek ("the Buildings Surveyor") to act as building surveyor for the construction.

60. Although no Contractual relationship existed between the Builder and the Owners at this stage, it is apparent from the emails that Mr Paterson assisted the Owners during the planning process although the extent of that assistance is unclear. There was also some social contact between them and during a visit to the Owners' house for drinks in January 2014 it was suggested during the course of conversation that a cellar be constructed beneath Unit two.

61. Following up on that suggestion, Mr Paterson contacted the Architect and suggested that a cellar be incorporated into the design and that was done. Plans were amended to show a cellar below the kitchen and living area of Unit two which was to be 3 metres square, to be constructed out of core-filled concrete block work and to be accessed via a wooden trapdoor in the kitchen floor.

62. In her evidence Mrs Mann said that, in the discussion in January, Mr Paterson had told the Owners that the cellar would be lined with sandstone, have bluestone floor tiles, a spiral staircase and have a mechanical glass door set into the living room floor. As stated above, I do not believe this evidence.

63. A building permit was issued on 25 February 2014 and on 2 March a quote and a draft contract document were provided to the Owners. The quotation was to serve also as the specification for the job. The plans and the engineering drawings were already in the possession of the Owners and had been for some time.

64. On 4 March 2014 the Contract was signed. According to Mr Paterson's evidence, which I accept, the Second Contract was signed at the same time.

The extent of the Builder's retainer

65. By the terms of the Contract the Builder was required to construct the two units in accordance with the contractual documents. This comprised the principal Contract document, the architectural plans provided by the Architect, 16 pages of engineering designs and computations prepared by the engineer and the four-page quotation that had been provided by the Builder which was described in the Contract as being the specification.

66. Provisional sums were included in the Contract for the following:

The cellar	$31,000
Cabinetry	$50,000
Vergola	$40,000
Appliances	$16,000

The figure of $16,000 for appliances was a mistake by Mr Paterson. He had calculated and intended to insert a figure of $8,000. In cross-examination, Mrs Mann acknowledged that it was a mistake.

67. The following items were excluded from the scope of works:

Unit two roof storage;

Landscaping;

Boundary fencing.

68. The Owners contended in their evidence that the Builder had undertaken the task of attending to any town planning or permit issues and so was responsible for any delays arising in regard to those matters. In support of this contention, considerable evidence was given about the pre-contractual dealings between the parties. Certainly there are a number of emails that passed between the Owners, the Architect and the building surveyor and the Builder, indicating some involvement by the Builder but there was no contract or other form of retainer of the Builder at that stage and so there was no contractual obligation on the Builder to involve itself in any of these matters. Any assistance rendered by the Builder appears to have been given voluntarily in anticipation that it would get the job.

Construction

69. On 8 March 2014 the Owners and Mr Paterson attended the site for a ceremonial commencement of the excavation for the cellar. Mr Mann smashed a bottle of champagne over the bucket of the excavating machine and, while sitting at the controls of the machine, said to Mr Paterson that he thought that the size of the cellar, which had been marked out by Mr Paterson on the ground, was too small and should be increased. Mr Paterson's evidence in this regard is supported by an email that he sent to the building surveyor on that same day stating that the Owners wanted a bigger cellar.

70. The Owners contend that Mr Paterson dug the cellar bigger on his own initiative and without their authority. Although they are supported in that regard by the

evidence of Mr Colombo I think that is most unlikely to have occurred and it is also inconsistent with what they said to Mr Starchenko. Further, I prefer the evidence of Mr Paterson.

71. Construction commenced on 10 March on the front fence, which was the subject of a separate building permit. Work on the two units themselves did not commence until the 13 March when bored piers were drilled and footings were excavated and poured for both units.

72. The construction period was 290 days and so, if construction is taken to have commenced on 10 March, work was due to be completed by 25 December 2014 but it seems to be common ground that the contractual period expired on 17 December 2014.

73. During construction, payments were made by the bank on the footing that the Second Contract represented the true contract price. Accordingly, as each stage was invoiced, the Builder received more than was due under the Contract. On 16 March the Builder invoiced the Owners for the deposit which was paid on 20 March.

74. Base stage was paid for both units on 12 May and frame stage was paid on 8 July. Lock-up stage for Unit one was reached in early August and paid on 22 August. Lock-up stage for Unit two was reached on 4 November. Fixing stage for Unit one was paid on 12 November and for Unit two on 19 December.

75. Mr Paterson said that, throughout this period, the Owners were constantly on site up to three times a day, talking with him and with tradesmen, and they made numerous changes to the design, particularly in regard to the cellar.

Removal of cabinetry from the scope of works

76. In October, when construction was well advanced and while Mr Paterson was on holidays in Queensland, the Owners visited a kitchen retailer, the Kitchen Design Centre ("KDC") and engaged it to design the kitchens and cabinetry for the two units. When Mr Paterson returned from holiday the Owners told him what they had done. Following some discussion it was agreed to delete the cabinetry from the scope of works and that a credit of $54,221 would be allowed to the Owners with respect to the deletion.

77. The amount of this credit allowed for the deletion from the scope of works of the cabinetry, the glass splashbacks, the stone bench tops and the mirrors throughout both Units, all of which were taken out of the Contract.

78. The Owners gave a great deal of evidence about this matter. Mrs Mann complained that she had asked Mr Paterson on numerous occasions to meet the Builder's cabinet maker in order to be able to design her "dream kitchen". She complained that he kept putting her off, that she discovered shortly before he went on holidays that he did not have a cabinet maker and that she then believed that unless she engaged her own cabinet maker she would not be able to design her kitchen.

79. Mr Paterson said that the cabinetmaker is not engaged until the plaster has been done and he is able to take measurements. Mr Lorich said that cabinet makers will measure off the frame before the plaster has been hung in order to save time. Different builders might have different practices but nothing really turns on this argument because the removal of this work from the Contract and the granting of the credit was agreed upon. From that time the cabinetry became the responsibility of the Owners.

80. Moreover, the Contract plans prepared by the Architect showed the kitchen, including the locations of the sink, cook top and refrigerator, although no elevations were provided. Mrs Mann did not accept that this kitchen drawn in the plans was the kitchen that she was to receive, even though these were the Contract drawings, that this is what their Architect had designed and the Owners had had these plans for some months before the Contract was signed.

81. Mrs Mann acknowledged that there had been a number of versions of the plans before the final version was agreed upon. She said that at the time the Contract was signed she asked Mr Paterson to explain the plans to her and that he said that that was unnecessary, that the Owners should leave everything to him and sit back and enjoy the build. Mr Paterson denied that he said that but in any case, the layout of the kitchen is drawn clearly in the plans and I do not understand why Mrs Mann would have signed a contract for the Builder to construct a kitchen that she did not want, particularly when this was, she said, very important to her.

82. Further, although Mrs Mann claimed to be very concerned about not being able to meet with the Builder's cabinetmaker, there were no emails from her to that effect.

83. I do not believe that the Owners' wish to remove the cabinetry from the Contract was due to any inability to meet with a cabinetmaker. I think it is more likely that they decided they wanted something more elaborate than the kitchen shown in the Contract drawings and they were impressed by what KDC had to offer.

Other changes

84. Another substantial change that was made related to the front fence, which was constructed out of brick with timber infill panels instead of a picket fence in accordance with the plans. Mr Paterson said that the Builder was also instructed to construct a rear fence and a side fence and to raise the height of the other side fence using trellis. That work was done as well.

85. Some of the changes that were made required amendments to the planning permit and many changes required amendments to the drawings. Mr Paterson said that the Builder obtained quotations for amending the drawings from the Architect and the building surveyor but that the Owners did not instruct them to carry out the necessary work.

86. The construction period provided in the Contract ran out in December 2014. At that stage the cabinetry, which had been taken over by the Owners, had still not been completed.

87. The Builder now claims extensions of time with respect to delays caused, particularly in regard to delays in the supply and installation of the cabinetry, although no notices claiming an extension of time in accordance with the procedure set out in the Contract were given by the Builder during construction.

Completion of Unit one

88. A certificate of occupancy for Unit one was issued on 3 March 2015 and on 18 March 2015 the final payment with respect to Unit one was paid by the Owners.

89. At about the time of handover Mr Paterson informed the Owners that there was an amount in excess of $48,000 due to be paid for the extensive variations they had requested to Unit one. According to Mr Paterson, whose evidence I accept in this regard, Mrs Mann then said to him: "We'll see about that".

90. The relationship between the parties, which was already strained at that time, then worsened. In early March Mr Paterson moved the security fence so as to allow access to Unit one, which had been completed and handed over, and to secure Unit two, which was still incomplete. Mr Paterson put up a sign on the fence to say that the site was "closed" but according to Mr Paterson, work continued on Unit two.

The alleged suspension of work

91. The Owners contend that, following the handover of Unit one, the Builder suspended work. By a letter dated 20 March sent to the Builder's solicitors, the Owners' solicitors alleged that Mr Paterson had told the Owners that he would be unable to proceed with the kitchen fit out should payment for the variations in relation to Unit one not be paid. Since the kitchen had been taken out of the scope of works, this statement made no sense. In their respective witness statements, both Mr and Mrs Mann said that this allegation by their solicitors was incorrect and that in fact, Mr Paterson told them that he would not be able to proceed with the completion of Unit two unless the claim for the Unit one variations was paid.

92. Mr Paterson denied having made any such statement and no notice of suspension of works was given by the Builder. Mr Knecht said that he and Mr Paterson continued to work until they were locked out of the site. He described in his witness statement what he did during that period. Mr Pettis gave evidence that he inspected Unit two on 15 April 2015 and saw that work had been carried out in the time since his earlier inspection. Documents corroborating the fact that work was carried out have been included in the Tribunal book.

93. I find on the evidence that work continued on Unit two although Mr Paterson complained of the absence of instructions from the Owners in regard to some matters. I am not satisfied that it has been proven that the Builder suspended work. All that is proven is that the Builder moved the security fence and restricted access to the site as it was entitled to do under the Contract. However work continued on Unit two.

Certificate of occupancy for Unit two

94. On 18 March 2015 Mr Pettis carried out a "pre-final" inspection of Unit two. He found that the major construction issue still remaining to be completed was the cellar compliance, that is, the stairs and the hatch. The fall into the cellar staircase from the opening was greater than 1 metre and there were compliance issues with the balustrade and the handrail. The hatch also presented a tripping hazard. He said that he was informed by Mr Paterson that the Owners had still not decided upon the type of cellar hatch or the balustrading they wanted. The cellar floor had not been tiled and as-built drawings were also required because the work as varied was not in accordance with the permit drawings.

95. Mr Paterson sought a quotation from the Owners' Architect for its fee to prepare as-built drawings. A fee proposal was received on 1 April 2015 but the Owners did not accept it. No instructions were given to the Builder by the Owners with respect to the cellar hatch or the balustrading. In their letter to the Owners' solicitors dated 2 April 2016, the Builder's solicitors sought instructions as to both these matters. This letter provided three options for the balustrading, one of which was for the Owners to apply to the Building Commission for dispensation in regard to a balustrade. Despite these requests, no instructions were given.

Termination

96. The Owners purported to determine the Contract by a letter from their solicitor dated 16 April 2015. In this letter the solicitors made a number of allegations of breaches by the Builder of the Contract. These were that:

    (a) the work was due to be completed by 17 December 2014;

    (b) since the occupancy permit for Unit one was not issued until 3 March 2015, the Builder was late completing by 2 ½ months;

    (c) Unit two remained incomplete, amounting to a delay of approximately four months;

    (d) no claims for extension of time pursuant to Clause 15.1 of the Contract had been raised;

    (e) on or about 20 January 2015 the municipal building surveyor issued a show cause building notice dated 20 January 2015 in respect of the works;

    (f) on 9 April 2015 the municipal building surveyor issued a building order;

    (g) the final claim issued by the Builder with respect to Unit one did not comply with the requirements of Clause 10.4 of the Contract, there was no occupancy permit issued in respect of Unit one and the Builder had not issued a notice of completion;

    (h) Mr Paterson on behalf the Builder had informed the Owners that the Builder would not continue carrying out work until its claim for variations with respect to Unit one was paid;

    (i) by letter dated 10 March 2015 addressed to the Owners, the Builder had advised that, due to non-payment of the final claim dated 16 February 2015

in respect of Unit one, the Builder suspended the works "…wrongfully and in breach of the building Contract";

(j) on or about 17 March 2015 the Builder purported to raise an undated invoice claiming variations and/or extras in the sum of $48,844.92 in respect of Unit one in breach of Clauses 12 and 13 of the Contract and contrary to the requirements of sections 37 and 38 of the Act;

(k) the Builder had failed and neglected to provide "…relevant invoices, accounts and documents supporting the purported claim for variations in respect of Unit one", notwithstanding repeated requests;

(l) on or about 17 March 2015 Mrs Mann was advised by E & S Trading that it would not supply kitchen white goods until its trading account with the Builder was "regularized";

(m) on 19 March 2015 the relevant building surveyor issued an inspection notice identifying 10 items in respect of the works;

(n) the Builder has "…failed and neglected to pay the sum of $7,000 in respect of Dumbwaiters Australia's outstanding invoice in the sum of $16,300";

(o) the installation of the roof to the units was not carried out by a suitably qualified and licensed plumbing subcontractor.

97. The letter then continued as follows:

> "The breaches and/or other matters referred to above constitute a repudiation of the building contract on the part of Paterson Constructions, which repudiation is hereby accepted by our clients thereby bringing the building contract to an end at common-law.
>
> This determination of the building contract also operates to revoke the license granted by our clients to Paterson Constructions pursuant to Clause 7.2.1 of the building contract."

98. In order to decide whether the allegations made in the letter are justified the evidence as to all of these matters needs to be examined and the various disputes determined. I will then be able to deal with the critical issue of termination.

The variations

99. A major dispute in this case related to the variations claimed and whether these were requested by the Owners.

100. Mr Paterson said that Mr and Mrs Mann were constantly giving instructions about what they wanted and his evidence in this regard is supported by that of Mr Knecht and Mr Bradbrook. Mr Paterson said that, when variations were requested, he was told by Mr Mann not to worry about cost and to simply "do it". He said that Mr Mann assured him that they were "good for it" and that it would all be adjusted at the end.

101. A few of the Builder's claims are partially admitted, but each of the Owners stated categorically that, in every other case, they did not request a variation

or indeed any extra work. They said that Mr Paterson carried out any extra work on his own initiative and without any instructions from them. They said that in some cases he suggested something would be "a good idea" but they never requested him to do it and he never told them that, if it were done, there would be any extra cost to be paid by them. They said that, in some cases, they were not told of the change until the Builder had already done it or commenced doing it.

102. As will appear below, I accept that the Owners requested the extra work the Builder did, although none of the requests for that work were in writing. I also accept Mr Paterson's evidence that the arrangement they had was that there would be an adjustment at the end of the job with respect to the cost of the extra work.

103. Whether the extent of the Owners' requests for additional work was driven by an unrealistic assessment of what was involved or by an overly ambitious expectation of what they would receive for their existing house, which was to be sold, is impossible to say but I accept that they made many requests and that Mr Paterson attended to them. I do not accept the Owner's assertions that they were unaware that there would be any extra cost for all the changes they wanted or that they did not know that those costs would be substantial.

104. There were 11 variations claimed in regard to Unit one and 31 variations claimed in regard to Unit two. There were also claims with respect to the amounts by which the provisional sums were exceeded in regard to the cellar, the tiles and the carpet.

105. At the commencement of the hearing the only variation admitted by the Owners was the painting of the two front doors but Mr Hellyer conceded some other matters in his opening.

106. The Owners contend that they are not liable to pay any amount with respect to the claimed variations because the Builder has failed to comply with the provisions of sections 37 and 38 of the *Domestic Building Contracts Act* 1995 ("the Act").

107. Sections 37 and 38 of the act (where relevant) provide as follows:

"37. Variation of plans or specifications-by builder

(1) A builder who wishes to vary the plans or specifications set out in a major domestic building contract must give the building owner a notice that-

(a) describes the variation the builder wishes to make; and

(b) states why the builder wishes to make the variation; and

(c) states what effect the variation will have on the work as a whole being carried out under the contract and whether a variation to any permit will be required; and

(d) if the variation will result in any delays, states the builder's reasonable estimate as to how long those delays will be; and

(e) states the cost of the variation and the effect it will have on the contract price.

(2) A builder must not give effect to any variation unless-

(a) the building owner gives the builder a signed consent to the variation attached to a copy of the notice required by subsection (1); or

……

(3) A builder is not entitled to recover any money in respect of a variation unless-

(a) the builder-

(i) has complied with this section; and

(ii) can establish that the variation is made necessary by circumstances that could not have been reasonably foreseen by the builder at the time the bontract was entered into; or

(b) the Tribunal is satisfied-

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

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

(4) If subsection (3) applies, the builder is entitled to recover the cost of carrying out the variation plus a reasonable profit.

(5) This section does not apply to contractual terms dealing with prime cost items or provisional sums."

108. For section 37 to apply, the variation must be at the instigation of the Builder and I have not found that to be the case in regard to any of these variations. As will appear below, I do not believe the evidence of the Owners that Mr Paterson carried out any of this additional work on his own initiative and without their instructions. I prefer Mr Paterson's evidence that it was the Owners who requested the variation in each case. As a consequence, I am satisfied that the variations claimed occurred at the request of the Owners and so section 37 has no application.

109. Owner's variations are dealt with under section 38, which is as follows:

"**38. Variation of plans or specifications-by building owner**

(1) A building owner who wishes to vary the plans or specifications set out in a major domestic building contract must give the builder a notice outlining the variation the building owner wishes to make.

(2) If the builder reasonably believes the variation will not require a variation to any permit and will not cause any delay and will not add more than 2% to the original contract price stated in the contract, the builder may carry out the variation.

(3) In any other case, the builder must give the building owner either-

(a) a notice that-

(i) states what effect the variation will have on the work as a whole being carried out under the contract and whether a variation to any permit will be required; and

(ii) if the variation will result in any delays, states the builder's reasonable estimate as to how long those delays will be; and

(iii) states the cost of the variation and the effect it will have on the contract price; or

(b) a notice that states that the builder refuses, or is unable, to carry out the variation and that states the reason for the refusal or inability.

(4) The builder must comply with subsection (3) within a reasonable time of receiving a notice under subsection (1).

(5) A builder must not give effect to any variation asked for by a building owner unless-

(a) the building owner gives the builder a signed request for the variation attached to a copy of the notice required by subsection (3)(a); or

(b) subsection (2) applies.

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

(a) the builder has complied with this section; or

(b) the Tribunal is satisfied-

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

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

(7) If subsection (6) applies, the builder is entitled to recover the cost of carrying out the variation plus a reasonable profit.

……"

110. In order for a notice under section 38(3) to be attached to a signed request, it would have to be in writing but, apart from the difficulty of later proving that an oral notice had been given and what it contained, there would seem to be no reason in principle why a notice under s.38(1) could not be given orally (see *Sumic v. Muzaferovic* [20013] VCAT 1862).

111. The Owners gave no written notice outlining any of the changes that they wished to make to the plans and specifications of the Contract or for any of the other extra work the Builder did. Amended plans were never prepared until after the Owners locked the Builder off the site, at which time "as-built" plans were drawn by a designer engaged by the Owners.

112. It is apparent that the parties proceeded on a very informal basis. The Owners were granted free access to the site whenever they wanted to visit, they often

brought coffee to Mr Paterson and Mr Knecht, they invited them to attend their home for drinks and there was some limited socialising.

113. The formality or otherwise in which the parties conducted themselves is a factor to be considered (see *Bodnarcuk v Gibbs* [2008] VCAT 854 at para 107). The Owners said that, after the Contract documents were signed they put them in a drawer and never referred to them. Mr Paterson said that they asked for the variations orally and never sought a price in advance.

114. Mr Hellyer submitted that the Builder's failure to comply with the section deprived the Owners of the opportunity to make an assessment of the nature of the variation, the cost involved and whether it would result in any delays. That is certainly a serious consideration but in this instance the Owners informed the Builder on several occasions that money was not an issue and that the Builder should simply get on with the work and they would adjust it at the end of the job. They knew very well that they were asking for changes that would result in additional cost and in a number of instances they must have understood that the cost would be very significant indeed. They also knew that they had not received from the Builder a firm price or estimate as to the cost of the particular variation, how it would affect the completion date or the consequences of the variation on other work.

115. I am satisfied that Mr Paterson took them at their word and complied with their requests on the faith of what they told him. Some items were relatively minor but others involved considerable cost. The total cost of all variations was very large indeed. In these circumstances, it would be most unfair to the Builder not to allow him to recover a reasonable price for the additional work the Owners asked him to do and it would not be unfair to the Owners to allow it.

116. The evidence of the Builder's witnesses is quite clear that the Owners took an active interest in the construction and requested many variations. Most of the variations claimed would not have required an amendment to the building permit and would not have caused any delay to the work. Moreover, none of them added more than 2% to the original Contract price stated in the Contract. In such a case, where the Owners had requested the work, the Builder was able to carry out the variation, even though the Owners did not give it a signed request pursuant to subsection 5.

117. In any case, since the Owners requested the variations and have had the benefit of the work it would not be unfair to order them to pay that sum plus "a reasonable profit" as provided in subsection 7. In the present case, Mr Pitney has assessed a reasonable margin as being 20%.

118. The final claim for Unit one was made by the Builder on 16 February 2015 and although Mr Paterson informed the Owners on that day that he was preparing a claim for variations, there is nothing in writing that has been produced whereby the Owners disputed that they were liable to pay for variations for Unit one until their solicitor's letter of 11 March 2015 was received.

119. Because of the conclusion that I have reached on the termination issue the Builder's claim for recovery on a quantum meruit basis is established and it is entitled to an amount that reflects the value of the benefit that it has conferred upon the Owners, which I think is the fair and reasonable value of its work. The assessment that I have to make is not the builder's entitlement according to the Contract but rather, the reasonable value of the work and materials the Owners have requested and the value of the benefit they have received from the Builder.

120. Accordingly, it is unnecessary for me to determine whether section 38 or the equivalent provision in the Contract document applies. If I find that the work that was done was requested by the Owners, the Builder is entitled to its fair and reasonable value which might be quite different from the claim that it has made or what it might have been entitled to under the terms of the Contract. Consequently, in regard to each variation I only need to determine whether or not the work was requested and whether or not it has been included in the valuation that Mr Pitney has made.

Variations for Unit one

Variation 1.1 - changes made to the garage

121. Mr Paterson said that, in May 2014, the Owners requested him to lower the garage floor in order to decrease the incline of the driveway paving. He said that as a consequence of lowering the floor, the entry to the unit required an additional step to accommodate one additional riser. To ensure that the staircase would not encroach into the garage it was moved further into the unit which entailed altering the laundry wall and the installation of an additional down light to illuminate the stairwell. He said that the changes to the step, the laundry and the additional down light were discussed and requested in August 2014. As to the shelving, he said that in July 2014 he visited Bunnings with the Owners in order to show them the types of shelving that were available for the garage and they requested him to supply and install it.

122. In addition to these changes Mr Paterson said that, in April 2014, the Owners requested him to change the position of the passenger door into the garage from the courtyard of Unit one.

123. Altogether, he said that the changes made were:

    (a) an additional spotted gum step between the laundry and the garage;

    (b) a further plaster wall in the laundry as a result of the added step;

    (c) an additional down light in the new entryway created between the laundry and the garage;

    (d) varying the layout of the laundry cabinet, resulting in an altered rough-in and tap locations;

    (e) moving the external door from the courtyard; and

    (f) supplying and installing keyed-alike garage door locks.

    The supporting invoices have been produced.

124. Mrs Mann denied having requested any of this work. She said that the issue with the level of the garage floor had previously been raised by the Council in the planning stage. Whether that is so or not, the evidence is that the floor was lowered beyond the level required by the Contract documents and so I think it is a variation.

125. Mrs Mann agreed that she and her husband had gone to Bunnings with Mr Paterson and viewed some shelving but she said that Mr Paterson offered to do it. She said that she thought that it was "a nice gesture" but she did not expect to pay for it. As to the lock, she admitted having asked Mr Paterson to install it but she said that since the door into the garage was an external door it was required to have a key.

126. I am satisfied this work was requested.

Variation 1.2 - extension of rear deck - variation of permit

127. Mr Paterson said that in May 2014 the Owners asked that he extend the alfresco area by 10.2 m². He said that in June 2014 they asked him to apply to the Council to amend the relevant town planning permit and that on about 3 July 2014 they asked him to design amendments to the endorsed drawings.

128. Mrs Mann denied having requested the Builder to extend the alfresco area and deck. She said that it was only after Mr Paterson had carried out the framing works for the alfresco that he told them that he had increased the area because he thought that it would be a better use of space. She said that he did it without a permit but told the Owners that there would be no problem getting one and that they should leave it to him.

129. I have to choose between two conflicting accounts. I think that it is unlikely Mr Paterson would have done this without any instruction and since I think he is a truthful witness whereas I have great concerns as the credibility of the Owners, I accept that this work was requested. A receipt has been produced for the out of pocket expenses.

Variation 1.3 - relocate brick wall on the meals laundry area

130. Mr Paterson said that, in April 2014 the Owners requested him to extend the family room in Unit one by 455 mm. By that time, the strip footings had already been poured and base brickwork had been laid for the walls. The claim made is for excavation, concrete, bricklaying and additional subfloor timber. The invoices have been produced.

131. Mrs Mann does not deal with this variation in her witness statement. I am satisfied that the additional work was requested.

Variation 1.4 - Merbau deck for extended alfresco area (10.2 m²)

132. This claim relates to the construction of the extended deck area that Mr Paterson says was requested by the Owners in May 2014.

133. Mrs Mann claimed that Mr Paterson did for this on his own initiative without any instruction. She said that, if Mr Paterson had told her and her husband that

the Builder intended to charge an extra $10,985.55 for the paperwork and work involved in extending the alfresco area they would have told him not to do it. As with all the variations, the cost to be allowed is not the amount the Builder has claimed but the value assessed by Mr Pitney which is included in his overall assessment. Mr Paterson acknowledged that although the Owners requested him to extend the area there was no discussion about what it would cost. He said that they did not ask him.

134. I am satisfied that the work was requested, that it was done and that the materials and labour referred to were supplied.

Variation 1.5 - Colorbond roof to extended decking area

135. This variation was for the cost of extending the Colorbond roof over the additional alfresco area. It follows on from the previous item and was part of the same request. I am satisfied that the work was requested, that it was done and that the materials and labour referred to were supplied.

Variation 1.6 – extra for kitchen tiles

136. The Builder was requested to supply tiles at a cost of $46.95 per square metre instead of $35 per square which was the Contract allowance. The difference claimed is $705.52 plus $141.10 for Builder's margin. The Builder also claimed three hours labour at $110 an hour, making a total claim of $1,176.62.

137. Mrs Mann did not dispute liability although she disputed the calculation of the amount claimed. What is relevant is the value of the work and materials supplied in laying the tiles the Owners requested and that forms part of Mr Pitney's assessment.

Variation 1.7 - wall tiles in pantry

138. The Contract documents required a glass splashback in the pantry which was taken out of the Contract as part of the kitchen cabinetry credit. The Builder was then requested to install tiles where the glass splashback would have been. The claim is for 1.96 m² of tiles at $89.95 per square metre, $25 for the caulker , a Builder's margin of $43.78 and $118.58 labour, making a total of $381.29.

139. Mrs Mann suggested that the cost of providing the glass splashback should be deducted but the splash backs were removed from the Contract with the cabinetry adjustment. There does not appear to be any other dispute about the claim. The important issue is that I am satisfied that the work was requested.

Variation 1.8 - relocate laundry trough after rough-in completed

140. Mr Paterson said that, after the laundry plumbing rough-in had been completed in accordance with the Contract drawings, the plumbing services had to be relocated because the layout of the laundry was substantially changed due to the construction of the nib wall. He said that this work was requested in May 2014. I am satisfied that this work was done and that it was requested.

Variation 1.9 - tiled kick board to bathroom vanities

141. Mr Paterson said that in October 2014, the Owners asked him to supply and install tiled vanity kick boards in each bathroom in Unit one, in accordance with shop drawings provided by the Owners' cabinetmaker, KDC. The cabinetmaker sent drawings to the Builder showing the areas to be tiled. The invoice for the tiled kick board for $180 has been produced.

142. I am satisfied that this work was requested.

Variation 1.10 – Two-pack finish on front doors

143. It is not disputed that the Owners requested the Builder to have the front doors painted using a two pack process instead of normal paintwork. In a text message dated 18 April 2015 the Builder quoted an amount of $450 for each door.

144. However the present claim is not in contract but for the fair and reasonable value of the work and materials received and that is included in Mr Pitney's assessment. The work was requested.

Variation 1.11 - Spotted gum instead of Rose gum

145. The Contract documents required the floors to be made of rose gum. The Owners chose spotted gum instead. The Builder claims a cost increase for the change.

146. Although Mrs Mann agreed that they chose spotted gum for the flooring she denies that there was any request for a change of timber. She said that Mr Paterson sent them to a supplier to choose timber, they came back and they informed him by email that they had chosen spotted gum.

147. Mr Hellyer said that the evidence indicated that the cost of rose gum was no less than the cost of spotted gum and there should therefore be no cost difference. Whether or not that is so is not to the point. The change was requested and it is the value of what was supplied and laid pursuant to that request that is in issue and that is included in the overall valuation of the work.

Variation 1.12 - extra for carpet

148. The Contract documents allowed $150 per linear metre for carpet. The carpet selected by the Owners cost $228.80 per lineal metre. The Builder claims the price difference but the carpet supplied is included in the valuation of the work.

Variation 1.13 - skylights to laundry and stairwell

149. Mr Paterson said that, in September 2014, the Owners asked him to install skylights in the laundry and in the stairwell. Mrs Mann agreed that Mr Paterson had suggested putting in these two skylights and that the Owners thought that it would be a good idea but she said that Mr Paterson did not say that they would be charged for them. That was disputed by Mr Paterson.

150. Mr Paterson said that the conversation occurred following the removal of the window in the laundry. He said that the Owners were concerned that the laundry would be dark and the suggested installing a skylight and also one on the staircase to avoid having to leave a light on during the day.

151. I am satisfied that this work was requested and I do not believe that the Owners expected that the Builder would be carrying out this work that they had requested for nothing.

Variation 1.14 - change of timber for stairwell

152. The stairwell was to be made from hardwood. Mr Paterson said that he intended to use Rose gum because it would need to match the flooring. In a witness statement Mrs Mann agreed that one would expect to choose the same timber for the stairwell as for the floor. The claim made is for the difference in price but it is simply the value of the stairwell that is to be allowed.

153. It was not suggested that this change was not requested. Rather, that because they were sent to choose timber for the floor and chose more expensive timber they should not pay anything extra. I do not understand that contention but it is irrelevant in any event. It is the value of what was requested and supplied that is relevant.

Variation 1.15 - solid doors instead of hollow-core doors

154. The specification provided for "Doors 2040 height Stanford or similar". Mr Paterson said that in August and September 2014 Mrs Mann told him that she was not happy with the hollow core doors that the Owners had in their existing house and asked him to replace the hollow core doors in the specifications with solid doors. He said they had a number of discussions concerning noise transfer through the doors and discussed the cost per door. He said that the Owners told him that they would be happy to pay that.

155. Again, the claim made is for the difference in price but it is simply the value of the doors supplied pursuant to the request that is relevant. Mrs Mann denied having made any request to change the doors to solid doors but I prefer the evidence of Mr Paterson and accept that the request was made.

Variation 1.17 - eastern boundary fence line

156. The scope of works under the Contract excluded boundary fencing. The Whitehorse City Council required the height of the eastern fence to be increased as a condition of the planning permit the Owners had obtained in December 2013. The additional height was achieved by means of attaching a woven fence extension to the existing fence.

157. Mrs Mann said that the Owners did not request this fence extension. She said that Mr Paterson discussed it with them in February 2015 after he had installed a section of lattice on the eastern boundary fence.

158. I prefer Mr Paterson's evidence and accept that the work was requested.

Variation 1.18 - western boundary fence

159. Mr Paterson said that Mr Mann directed him to build a new fence on the western boundary. He said that there were also discussions by the Owners with the neighbours, Mr and Mrs Barlow, to which he was not privy. He said that he was instructed by Mr and Mrs Mann to build the fence as high as possible.

160. In cross-examination Mr Hellyer put to Mr Paterson part of a report from Mr Lorich that an appropriate allowance for the fence would be $100 per lineal metre, which would make $3,920 plus an additional $640 to remove the old fence and take it to the tip. It appears from Mr Lorich's calculations that he was allowing $55 per hour for a carpenter instead of $110 per hour that Mr Paterson charged for his own labour and $88 per hour charged for Mr Knecht's time. Mr Lorich also allowed a margin of 15% whereas Mr Paterson had claimed 20%. The fence is include in Mr Pitney's assessment, where he allows $95 per lineal metre.

161. Mr Paterson said that there were difficulties in constructing the fence due to a number of obstacles along the tree line. He said that there were a substantial number of tree roots on both sides of the boundary. He also said that what he constructed was different from a standard fence. He said that it had a treated pine plinth approximately 200 mm high, palings 1.9 metre long and a 600 mm trellis on top. He said that the post holes were increased in size because of the height of the fence and there was a capping and an extra rail to pick up the top of the trellis. Nevertheless, I think that I should accept Mr Pitney's independent assessment which appears to be similar to that of Mr Lorich.

162. Mrs Mann said in her witness statement that the Owners did not request the Builder to carry out these works. She said that in discussions on site in November 2014, Mr Paterson had said to Mr Mann that he was going to remove the existing fence and build a new one and that he always builds fences on the properties that he develops himself.

163. Mrs Mann said that she and her husband told Mr Paterson that, if the fence needed replacing, they had a fencing contractor who had done fences at their former home that they would use for that. She said that Mr Paterson told them that he was on site doing these works anyway and it would be easier for him to do it. She said that the Owners agreed to him building the fence on this basis and that at no time during these discussions did Mr Paterson say that there would be a charge for the work or give any indication as to the amount the Builder would charge.

164. I do not believe that the Owners did not expect the Builder to make some charge for such an extensive scope of works. It was acknowledged that the work was requested.

Variation 1.19 - brick instead of picket front fence

165. The Contract specifications provided for a timber fence with curved inlays to be constructed along the front boundary. Mr Paterson said that, on about 10 June 2014, the Owners requested him to apply to the Council for an amendment to the planning permit to allow a fence constructed of brick columns and brick plinth with timber picket infill instead of a picket fence. The permit was granted and the fence was constructed by the Builder.

166. Mrs Mann said that the Owners did not request the Builder to carry out these works. She said that Mr Paterson had suggested to the Owners that, because

there would be brick pillars on the front veranda of Unit one it would look better if the front fence had brick pillars and timber in-fills. She said that they agreed that it would look better. She said that when they raised issues about the Council Mr Paterson said to them that they should leave it to him and he would fix it. She said that he then constructed the brick fence but did not first say that there would be any charge for it.

167. Mr Paterson said that the proposal for a brick fence had been rejected by the Council at the permit stage but that because the Owners were particularly keen on a brick fence and had seen lots of brick fences in the neighbourhood and thought that they should be able to have one, he discussed the matter with someone at the Council and applied for the town planning amendment on behalf of the Owners. He said that the Owners were aware that there would be an additional cost but he acknowledges that no exact price was discussed.

168. In cross examination Mr Hellyer put to Mr Paterson that a more appropriate assessment of the construction cost of the front wall was the figure provided by Mr Lorich in his report. Mr Paterson pointed out that Mr Lorich did not allow in his calculation for the tipping of the soil and that parts of the trenches for the wall had to be hand dug because of pipes and other things. He said that he used his own excavator to dig the footings for the fence. He also said that the curved timber inlays on top of the fence were custom-made.

169. I am satisfied this work was requested by the Owners. For the costing, Mr Pitney has used a lineal metre rate.

Variation 1.20 - privacy screens for second-floor windows

170. Mr Paterson said that in April and May 2014 the Owners requested him to install privacy screens. He said that the window in the play area was increased in size and lowered and there was then an overlooking requirement of the Council for a screen to prevent the occupants of the room from looking into the neighbour's bedroom and front door. He said it was also noted that there was no privacy screen on the third bedroom of Unit one which overlooked Unit two and that it was decided that, to stop the tenants of Unit one looking into the Owners' residence, a privacy screen should be added to that window was well. He said that there was a discussion on site with the Owners about what should be done to resolve their concerns about the people looking into their unit.

171. I am satisfied that this work was requested.

Variation 1.21 - increased size of playroom window, wireless connections, water tapping the and energy rating permit

172. Mr Paterson said that in April 2014 the Owners asked him to supply and install larger windows to allow more light into the playroom of Unit one. The rest of the variation relates to payments made by the Builder on the Owners' behalf.

173. The energy rating permit was issued by a Mr Calache who required payment. Mr Paterson said that Mr Mann was in hospital at the time and so he paid it on his behalf. He does not allege that he was requested to do so.

174. Mr Paterson said that a telecommunication services contribution report was required for a statement of compliance for the Council. This related to a condition of the town planning permit which was not being met. He said that he became aware of this in January 2015. He does not suggest there was any request that the payment be made. The claim is for the engagement of wireless connections and the report.

175. The Builder also paid the required contributions to Yarra Valley Water which had to be paid before the plumbing works could take place.

176. The three amounts paid by the Builder were as follows:

    (a) Wireless Connections $385

    (b) Mr Calache $495

    (c) Yarra Valley water $1,650.59.

    Receipts for all three sums have been produced.

177. The additional work relating to the windows was made up of an additional $470 paid to the windows supplier. A builder's margin has been claimed in respect of that and the amounts the Builder paid. This additional work and these payments are all part of the work and materials necessarily incurred to achieve the end result that Mr Pitney has valued. No additional amount can be claimed by the Builder for expenditure incurred in producing that end result. It is the benefit conferred upon the Owners that is to be paid for.

Variations for Unit two

178. The variations claimed for Unit two are as follows.

Variation 2.1 - Master bedroom walk-in robe

179. This variation relates to changes made to the walk-in robe. The first was the change from a hollow core internal door to a solid door. Mr Paterson said that this was requested in August 2014. He also said that the Owners asked him in September 2014 to increase the height of the internal doors from the standard 2040 mm as specified in the Contract to 2340 mm and to vary the door in the robe from a hinged door as shown in the plans to a cavity sliding door. He said that in January 2015 Mrs Mann took him to their existing home and asked him to vary the robe design to include additional shelving, a shoe drawer and double and single hanging drawer units as she was not satisfied with what she currently had.

180. Mrs Mann said that Mr Paterson asked her how she wanted the wardrobe to be fitted out. She said that she told him that there would need to be a single hanging space, three sets of drawers and the rest of the space should be double hanging. When this was put to Mr Paterson in cross examination he said that he could not recall the exact conversation but that she took him to the house in Elder Street and the layout of the robe was designed in that conversation.

181. There is little detail of the layout of this wardrobe in the plans. There are no elevations and the floor plan simply shows a shelf extending along two of the

walls but gives no indication of any hanging heights or drawers. Mrs Mann did not suggest that what is drawn on the plans was not provided. The complaint was that it was of unreasonably poor quality.

182. However Mr Pitney has only valued the wardrobe that has been supplied and since there is no dispute that this part of the work was requested, that amount must be allowed.

Variation 2.2 - Master bedroom ensuite

183. The claim relates to four items. As with the walk-in robe there is a claim for $97 for a higher solid core door and a further $189 for a cavity sliding unit. The Owners had selected more expensive sanitary ware, including a grated shower waste costing $500.50.

184. The Builder also claimed for the cost of an openable Velux window and an electric blind, which cost $2,642.90, instead of the window shown on the plans, which would have cost only $440, an increase of $2,202.90. There is a claim for varying the frame to allow for a medicine cabinet which Mr Paterson said was requested by the Owners in September 2014. Some details of these changes were provided in a shop drawing from KDC dated 9 October 2014 that was sent to the Builder. The Builder claims the cost of providing these additional works.

185. Mrs Mann said that the Owners did not request the Builder to install an openable Velux window instead of a skylight and that they were not told about the change until Mr Paterson had already installed it. She said that he did not mention anything about a variation or extra cost. I think that is unlikely to be true and I prefer the evidence of Mr Paterson. I am satisfied that the work claimed for was requested.

Variation 2.3 - change to bedroom door

186. By this claim the Builder claims for the extra cost of the changed door. I am satisfied that the change to the door was requested and the value is included in Mr Pitney's assessment.

Variation 2.4 - entry ceiling / highlight above door / door painting

187. Mr Paterson said that in May 2014, the Owners asked him to install a single highlight above the front door. He said that in August 2014 the Owners requested him to increase the entry ceiling height to accommodate a large painting that they had of a golf course. He said they took him to their existing house to show him the painting they wanted to hang. Also claimed in this variation is the cost of painting the front door with two pack paint.

188. The Owners denied having requested any of this additional work. Mrs Mann said that it was not until Mr Paterson had increased the height of the ceiling in the entry that he told them that he had done it. She also said that it was not until after he had installed a highlight window that he told them that he had done that because he thought it would look better.

189. Mr Paterson denied this evidence. He said that there were multiple discussions about the changes and that measurements were taken at site visits to the Owners'

house. He said that it was discussed that, because of the nature of the design and the pitch of the external roof and the fact that the second storey did not encroach into that area over the foyer, the ceiling could go higher and it would be a perfect spot for the painting.

190. I think that it is most unlikely that Mr Paterson made this change on his own initiative. I prefer his evidence and accept that the work was requested by the Owners.

191. The Owners agreed that they requested the two-pack painting of the front door.

Variation 2.5 - changes to the stairwell

192. Mr Paterson said that in June 2014 the Owners requested a change of timber for the staircase to spotted gum. That is supported by an email sent to him by Mrs Mann on 24 July.

193. Mr Paterson said that in August 2014 the Owners asked him to vary the stair design to remove the winder treads and increase the run of the treads. The plans show that treads 8, 9 and 10 were to be winders and this was changed so as to introduce a landing and eliminate the winders.

194. Also claimed on this variation is a Velux skylight and electric blind and additional ventilation with a custom egg-crate grille. Mr Paterson said that these items were requested in September 2014.

195. Mrs Mann said that the Owners did not request any of this additional work although she acknowledged that it was reasonable to expect the staircase would be made from the same timber as the floor. She said that Mr Paterson carried out all of these works on his own initiative. I do not accept that evidence. I am satisfied that all of this was requested by the Owners.

Variation 2.6 - changes to en suite/powder room

196. Mr Paterson said that, in May 2014 the Owners requested him to redesign the powder room in order to increase the size of the kitchen. Also included with this variation are the claims with respect to the change of the door to a solid door with an increased high to 2340 mm and the extra cost of fitting the sanitary ware that the Owners had chosen and the installation of a shower channel grate.

197. An email from KDC dated 9 October 2014 enclosed some designs to assist with the positioning of plumbing and medicine cabinet niches that were not in the Contract plans.

198. Mrs Mann denied that any request was made for additional work but I am satisfied that the work was requested.

Variation 2.7 - bulkhead over the bar

199. This claim was for the construction of a bulkhead above the cabinetry over the bar. Mr Paterson said that, in September 2014, the Owners asked him to vary the framing in the kitchen to accommodate a dumbwaiter. He also produced an email from KDC dated 23 October containing a shop drawing of the bar. He said

that a bulkhead was required but that KDC was not going to be doing it and in the email they sent him they asked when Mr Paterson was planning to make it.

200. Mrs Mann said that they did not request the Builder to construct a bulkhead. She said that he offered to do it, saying that it was a simple job and no mention was made of any additional cost or variation.

201. I am satisfied the work was requested and I do not accept that the Owners genuinely thought they would not have to pay for it.

Variation 2.8 - changes to kitchen

202. There are a number of changes included in this variation.

203. Mr Paterson said that on or about 22 September 2014, the Owners asked him to relocate the existing bar walls in order to accommodate the dumbwaiter that was to service the cellar.

204. The glass splashbacks had been removed from the Contract as part of the cabinetry credit. The Owners' colour consultant, Ms Densem, specified tiling to be installed where the splash backs had been in the kitchen. The instruction was given by an email from Ms Densem to the Owners and to Mr Paterson on 14 August 2014. An exchange of emails followed concerning confusion about the type of tile specified but there is no doubt that the Builder was requested to tile the area in question.

205. I do not understand that there is any substantial defence to this claim. Mrs Mann suggested there should be a credit for the splash backs that were not supplied but that is already incorporated in the overall credit given by the Builder for the removal of the cabinetry. In any case, the work is included in Mr Pitney's overall valuation.

Variation 2.9 - additional water point for fridge, added bulkhead, relocated ducted vacuum point

206. Mr Paterson said that in October 2014 the Owners requested him to relocate the vacuum point to accommodate the amended kitchen design by KDC. He said that he was also requested to supply and install an additional water point for the refrigerator and a bulkhead for the cupboards, none of which was allowed for in the Contract. A number of emails have been produced and all of this appears to be additional work.

207. Mr Paterson said that the vacuum point had been positioned during the subfloor stage in accordance with the plans and before the kitchen footprint was altered. The alterations to the layout of the kitchen were considerable. An L-shaped bench shown on the plans was deleted and an island bench that came up towards the bar was substituted. The changes meant that the ducted vacuum point was in the middle of the floor.

208. In regard to the bulkhead, this was required for some overhead cupboards that KDC had supplied. It was necessary for the Builder to provide a bulkhead to support these cupboards.

209. Mrs Mann agreed that it was necessary for the Builder to relocate the vacuum point because of the changed kitchen design but denies responsibility to pay for that work on the ground that it was the Builder's fault that she had to engage KDC. I do not accept that proposition. She also said that they did not request the supply of a water point for the refrigerator and that the overhead cupboards were supplied at Mr Paterson's suggestion although she did not say that the bulkhead was not necessary in order for the cabinets to be installed by KDC.

210. I am satisfied that it was the Owners' decision to engage KDC and that it was not the fault of the Builder. Since the Owners purchased a refrigerator that required a water point it is absurd to suggest that the Builder should not have provided one. The emails from KDC concerning the cabinetry and the bulkhead are clear and unequivocal. I am satisfied that the Builder was requested to do this work.

Variation 2.10 - study nook in pantry

211. Mr Paterson said that in September 2014 the Owners requested him to install a study nook in the kitchen area to the design of KDC in accordance with shop drawings which were provided by KDC. The nook itself was made by KDC but it had to be installed by the Builder.

212. Mr Paterson said that they had to put in a lintel, pull-out studs in the area to be plastered and the plaster area there had to have externals or a reveal put on it before the cabinet was installed with flush mounted doors.

213. Mrs Mann denies this was ever requested or even discussed. She says that the study nook was in the south-west corner of the lounge room and it was constructed by KDC not the Builder. I am satisfied that the Builder carried out this work in order to accommodate the study nook that the Owners had requested from KDC and that it was requested to do it.

Variation 2.11 - and window and additional wall space for TV

214. This item is no longer claimed by the Builder.

Variation 2.12 - changes to laundry

215. Mr Paterson said that in about September 2014 the Owners requested him to relocate the laundry door between the garage and the laundry to allow for an additional broom cupboard. He said that the footprint of the laundry was completely changed from what was drawn by the Architect. He said that the plumbing had to be altered and the drying cupboard that was going to be underneath the stairs was relocated.

216. In cross examination he provided details of numerous changes that he said were made. He said there were multiple discussions on multiple occasions regarding the footprint and the changes that took place between what was drawn and what was built. There is also a claim in this variation for the supply of solid doors 2340 mm high.

217. Mrs Mann said that none of this work was requested and it was not discussed. In regard to the plumbing she said that the location of the plumbing was wrong. She

said she did not request that the drying cupboard be relocated. I prefer the evidence of Mr Paterson. I am satisfied that the Builder was requested to make these changes.

Variation 2.13 - playroom

218. Mr Paterson said that in July 2014 Mrs Mann requested him to supply and install a highlight window to allow additional light into the playroom. That same month he said that the Owners requested him to recess a cavity into the playroom wall in order to accommodate a television unit and a bookshelf.

219. Mrs Mann said that the Owners did not ask the Builder to install a highlight window in the playroom and that there was no discussion about it before it was carried out. She said that the unit in Maple Street had a highlight window in the upstairs playroom. As to the framing of the playroom wall, she said that there was no discussion about that until Mr Paterson had finished it and he told them that he had done it to accommodate a TV unit and to install a bookshelf, which he thought would be a better use of space.

220. Mr Paterson said that there were multiple discussions regarding the light in the playroom and that the Owners were concerned about trees blocking the light from the western boundary. He accepted that there was no discussion regarding specific cost but he said that he was directed to put it in because extra light was required. He denied having put in the cavity for the television and the bookcase on his own initiative.

221. Neither the highlight window nor the cavity for a television and bookshelf are shown in the plans and so it is additional work. I think it is unlikely that the Builder would have incurred this cost this without instructions. There is no contemporaneous document from the Owners to the effect that this was done without their instructions. In any case, I prefer Mr Paterson's evidence. I am satisfied that the work was requested.

Variation 2.14 - sliding door to robe and solid door to bedroom two

222. The Builder claims for the larger solid door and for a smart robe door unit to match the bedroom doors. The larger doors were requested, he said, in August 2014 but the smart robe unit was requested in November 2014.

223. Mrs Mann said that these matters were not requested and there was no discussion about them. She said that as far as she was aware, the doors that were supplied and installed corresponded with the doors which were specified. That is not the case.

224. Mr Paterson said in cross examination that the change was made because the Owners wanted all the doors to be the same, with the door system for the robe being changed from a vinyl wrap system to a smart robe system whereby a standard door was put into a system installed in the wall. Because of the change from vinyl wrapped doors the timber doors had to be painted.

225. I prefer Mr Paterson's evidence and I am satisfied these changes were made at the Owners' request.

Variation 2.15 - changes to bedroom three

226. This claim relates to the provision of a sliding door to the robe, a higher solid door for the room and a bookshelf and a bay window added to bedroom three. Mr Paterson said that the Owners requested him to supply and install a smart robe system in August or September 2014 and in August 2014 they requested him to supply and install a bay window to match bedrooms one and two in Unit one. Finally, he said that in August 2014 the Owners requested him to supply and install a bookshelf.

227. Mrs Mann said that the Owners did not request Mr Paterson to supply and install a bay window and that there was no discussion about any of this work until he had carried it out. She said that he told them that he liked building double gables and thought that this would look better.

228. Mr Paterson said that the room was originally framed up without the bay window and that this was to be the Owners' son's bedroom. He said that there was a double bay window in Unit one but it was overlooked in the plans for Unit two and he was requested to provide it.

229. Again, it seems unlikely that the Builder would have carried out such extensive work on his own initiative. I prefer the evidence of Mr Paterson and accept that this work was requested.

Variation 2.16 - bathroom second story

230. Mr Paterson said that the Owners requested him to supply and install bathroom sanitary items that they had selected from E & S Trading which exceeded the allowance under the Contract. Included in these items was an expensive stand-alone bath with a special tap extending from the floor instead of the standard hob bath and sanitary fittings shown in the plans. He said that they also requested him to install a stainless steel strip floor shower waste grate rather than the puddle flange which had already been roughed in. He said that there was a large walk-in shower and a double vanity which were not shown on the plans. He said that all of this meant the size of the bathroom had to be increased and that he was directed to make it bigger.

231. Mr Paterson said that, in September 2014, the Owners also asked him to allow for the installation of a medicine cabinet constructed by KDC, which was delivered on 9 October 2014. He said that in August 2014 Mrs Mann asked him to install in-floor heating to match the downstairs bathroom and, also in August, he was asked by the Owners to install a solid sliding door instead of a hinged hollow core door.

232. Mrs Mann acknowledged that the Owners had selected their sanitary ware from E & S Trading. She said that the Owners did not request a shower strip waste, nor did they ask for the bathroom to be increased in size. In regard to the medicine cabinet she said that the Owners did not request that and that Mr Paterson did not say that there would be any extra cost. She denied having requested the Builder to install in floor heating to match downstairs and said that Mr Paterson arranged the installation of the floor heating before he told them

that he had done it and that he did not say that it would be a variation or extra cost. She said there was no allowance in the Contract for bathroom fixtures and fittings.

233. I think it is unlikely that Mr Paterson would have carried out all this extra work on his own initiative. Even on the Owners' evidence they were aware of the sub-floor heating and yet raised no objection or query. As to the sanitary ware, the Builder was entitled under the Contract to install what was listed in the specifications and the extra claimed is, according to Mr Paterson's evidence, the difference in cost between what the Contract required and what the Owners had chosen themselves and instructed him to pay for and install. Mr Paterson said that he had told the Owners that if they wanted something different there would need to be an allowance for the extra cost and the difference would be addressed in the final accounting at the end of the job.

234. The Owners are not stupid people. They knew what they had selected and the prices, because they gave those prices to Mr Paterson to see if he could get better prices. What they chose was considerably more expensive than what was provided for in Contract. I am satisfied that the Builder was instructed to make these changes and that an additional claim for the sanitary fittings was appropriate.

235. The Builder claims the cost of spotted gum flooring as against the rose gum flooring that was specified in the Contract. That is an identical claim to that made with respect to Unit one and the considerations are the same. I am satisfied that these changes were requested and that this is a reasonable variation.

Variation 2.18 - selected plumbing in excess of allowance

236. Mr Paterson said that the allowances for the plumbing fittings in the Contract was $4,088.50, which he detailed on page 572 of the tribunal book. He said that the other items selected by the Owners exceeded the allowance by $10,830.30 and the Builder claims that sum plus $2,166.06 Builder's margin.

237. In cross-examination Mr Paterson agreed that there was no prime cost allowance in the Contract documents but he said that the appliances to be supplied were identified by name in the specification and he gave evidence as to what these would have cost. He agreed that there was no discussion at the time regarding the difference in cost between what was allowed for in the Contract and what was to be supplied, although the Owners directed him to supply all of the items that they had selected, knowing that they were not in accordance with the specifications.

238. Mr Paterson said that he did not send the Owners to E & S Trading. He said that the sanitary items that were supplied to Unit one were those specified in the Contract and the only upgrade was in regard to Unit two. He said that the Owners asked him to see if he could get a better price for the items they had chosen at E & S Trading and although he was able to obtain a better price for some items from his usual supplier, the Owners elected to obtain all of the items from E & S Trading.

239. Mrs Mann said that the Owners had no idea that there would be any extra charge for these items. I think that is most unlikely. Moreover, they would have had no reason to ask Mr Paterson to try and obtain lower prices if they did not think that they were going to have to pay for the upgrade to the more expensive items themselves. Again, I prefer the evidence of Mr Paterson and I am satisfied that what was supplied was requested by the Owners.

Variation 2.19 - solar panels

240. Mr Paterson said that, in August 2014 Mr Mann told him that he had purchased a spa and they discussed how it could be heated. Mr Paterson said that the gas supply from the street, which had already been laid and connected to the mains supply, would be insufficient for the purpose of heating the spa as well as providing gas to the unit and he said that Mr Mann asked him to consider whether solar panels could be installed for heating the spa. He said that, at a site meeting in October, he was told to install 12 solar panels and an inverter for that purpose.

241. The claim is made up of the sub-contractor's charge for the provision and installation of the panels and the inverter and the Builder's margin.

242. Mrs Mann said that the Owners did not ask the Builder to install the 12 panels. She said that, before the signing of the Contract, they told Mr Paterson they wanted to have solar panels for Unit two and Mr Paterson suggested that six panels would be appropriate. She said that it was not until January 2015, after Mr Paterson had installed 12 panels, that he told them what he had done. She said that he told them they would need an extra six panels for the spa. She said that he did not say that this would be a variation.

243. I think it unlikely that Mr Paterson would have had works of this magnitude done and incurred such an expense without any instruction from the Owners. I prefer Mr Paterson's evidence. I am satisfied that this work was requested.

Variation 2.20 - alarm/intercom system

244. Mr Paterson said that he was requested on site in about December 2014 to install a Panacom video intercom and alarm security system.

245. Mrs Mann denied that the Owners requested the Builder to install any video intercom or alarm security system. She said that they told Mr Paterson they would be installing their own alarm system after they moved in. She said that after they took possession of the site they removed the alarm system the Builder had installed and arranged for the installation of the alarm system they had always intended to install.

246. When this allegation was put to Mr Paterson in cross-examination, he maintained that the Owners had requested the alarm and the intercom and that they were particularly keen on having a point upstairs for monitors, a point in the kitchen, and also one in the cellar to see who was at their front door. He denied that they told him they would be installing their own system later and said that the wiring for the alarm system would need to be roughed in before the plaster

was hung. When Mr Hellyer put to Mr Paterson that, in December, the plaster had been hung for some months, Mr Paterson said that it was in late November. He said that the plasterboard was held up in Unit two because the works that were taking place concerning the dumbwaiter.

247. Mr Paterson's evidence about this was quite detailed and I think he is a more reliable witness than the Owners. Since the supporting invoice that he produced is dated 23 October 2014, the request must have been before December and that would tie in with the hanging of the plaster. Despite this difficulty with his evidence I think that it is unlikely that he would have installed the system if it had not been requested.

248. I am satisfied that the work was requested.

Variation 2.21 - roof storage Unit two

249. Mr Paterson said that in about August 2014 the Owners requested him to construct roof storage areas within the roof space of Unit two. He said that there were then ongoing discussions concerning the construction of the storage.

250. Mrs Mann said that before signing the Contract Mr Paterson suggested that they incorporate roof storage into Unit two but he could not give them any idea what it would cost. She said that he was to provide them with a price for the work after framing was completed. She said they had no further discussions about the matter. She said that Mr Paterson proceeded to build the roof storage without telling them and without ever providing them with a quotation or indication of the cost.

251. I think it is unlikely that Mr Paterson would have carried out work of this magnitude if it were not requested. I think it is even more unlikely that the Owners, who were on site up to three times a day, were not aware that the work was being done. Yet there is no written contemporaneous note or query about the matter. I prefer Mr Paterson's evidence. I am satisfied that the work was requested.

Variation 2.22 - acoustic insulation garage wall

252. Mr Paterson said that in about March 2014 Mr Mann asked him what he could do to reduce the noise from the Unit one garage which shared a wall with the Unit two master bedroom which was to be the Owners' bedroom. He said that he was instructed to install acoustic plasterboard between the garage and the master bedroom. He said that during discussions about this item, Mr Mann told him: "Just build Unit two as if it was your own house".

253. Mr Paterson said that he had to install the plasterboard as the brick wall of the garage was being built because it was in the cavity between the timber frame and the brick wall.

254. Mrs Mann said that the Owners did not request this work and that she was not aware of the discussion that Mr Paterson said he had with her husband. There are a number of photographs in the Tribunal book taken by the Owners showing the Builder installing this acoustic plasterboard. As with all the other variations it

was not work that was specified in the plans and I am satisfied that it was requested by the Owners.

Variation 2.23 - excavation and concreting for spa

255. Mr Paterson said that the spa ordered by the Owners was installed about November or December 2014. He referred to emails that Mrs Mann sent that were dated 15 August 2 and 14 October 2014, to the supplier of the spa to the effect that Mr Paterson would take delivery of the spa and pay the balance owed of $9,099. Mr Paterson said that he poured a concrete slab for the spa to sit on, paid the balance of $9,099 to the spa company and engaged a crane truck to deliver the spa and crane it across from the park.

256. Mrs Mann denied that they asked Mr Paterson to pay the balance due on the price of the spa and says that he offered to do that on their behalf. She said that the spa had not been installed, that Mr Paterson organised its delivery directly with the spa company and that the Owners were not consulted about it. In the original points of defence the Owners denied any liability with respect to this claim, including repaying Mr Paterson the price of the spa they had purchased and asked him to pay for. That quite untenable position was abandoned at the hearing when it was acknowledged that at least the amount of $9,099.00 the Owners asked Mr Paterson to pay on their behalf would have to be refunded.

257. I am satisfied that the work described by Mr Paterson was carried out, and that it was requested by the Owners.

Variation 2.24 southern boundary fence

258. Mr Paterson said that in about November or December 2014 Mr Mann asked him to construct the rear retaining wall and the boundary fence. He said that the Owners were concerned about their privacy, about views from the park and also having to look at a neighbour who would water his garden in his underwear. He said that they told him that they wanted the fence to be as high as possible.

259. After discussions that involved Mr Knecht holding up a tape measure, they directed Mr Paterson to construct the fence the same height as the Builder's on-site toilet which was nearby. Mr Paterson said that with the height of the retaining wall and the trellis on top, the overall height of the fence was 3.5 m. He said that he informed the Owners that such an exceptionally high fence would require a building permit but they assured him that their "barrister" would take care of the Council and that he should go ahead and construct the fence at the height they had requested.

260. Following construction of the fence the Council objected to the height and representations were made to a council employee, a Ms Johnson, who prepared a report recommending that the fence be lowered. A meeting took place at the Council between the Owners, Mr Paterson, Ms Johnson and someone else from the Council during which Mr Mann argued that they should be permitted to have the fence at the height constructed because of another fence of a similar height at the rear of nearby property. An on-site inspection was then carried out by the

Council representatives and eventually the Council agreed to allow the fence to remain.

261. Mrs Mann denied that Mr Paterson made any mention of the fence exceeding the permissible height or that she or her husband told Mr Paterson that their barrister would sort out any problems with the Council. I prefer the evidence of Mr Paterson.

262. Mr Hellyer suggested to Mr Paterson in cross-examination that a fencing contractor would have constructed the fence much more cheaply. Mr Paterson said that there was also a retaining wall built to support the fence and that backfilling and moving of soil were required. Mr Hellyer referred Mr Paterson to the criticisms of his costings contained in one of Mr Lorich's reports.

263. Mr Paterson said that there were multiple copies of the plans that had to be submitted to the council and that the council keeps two copies. I accept his evidence about the copying.

264. He went into the cost claimed for the fence in great detail and agreed with some of Mr Lorich's figures and disagreed with others but since what is claimed for the quantum meruit is the valuation by Mr Pitney it is unnecessary to go into that evidence.

265. I am satisfied that the Owners asked the Builder to build this fence and that, although it might have been cheaper to hire a fencing contractor to do the job, it was not a normal fence. It required the initial construction of a retaining wall made of sleepers and steel posts set in concrete, palings of 1.9 metres, trellis and capping. The construction also involved a large amount of excavation and soil disposal. As to the costing, I accept Mr Pitney's assessment which appears to be much less than the amount the Builder had claimed as a variation.

Variation 2.25 - storeroom

266. As with the other doors, the door for this room was changed to a solid door that was 2340 mm high. Since what is to be allowed is the value of what was supplied it is only necessary to say that I am satisfied that the change of doors was requested by the Owners.

Variation 2.26 - dumbwaiter

267. The Owners purchased a dumbwaiter to be supplied which was to be installed by the Builder in the cellar and the kitchen. On 22 September 2014 the supplier, a Mr Coles, sent an email to the Builder and the Owners, setting out the installation requirements. The location of the dumbwaiter had to suit the walls of the cellar and also the cabinetry in the kitchen. Mr Paterson said that he discussed the various options with the Owners and that it was eventually decided that it would be located behind the wall of the cellar. The bar would be moved forward and a void that had been created to accommodate the air-conditioning would be used so as to allow the dumbwaiter to open into both the cellar and the kitchen, albeit the openings were at a 90° angle to one another.

268. During cross-examination I asked Mr Paterson whether there was any discussion about what all this might cost. Mr Paterson said that the Owners told him: "Get it done because we want the dumbwaiter because we want to transfer food up and down". Mr Paterson said in his witness statement that, in the course of these discussions, Mr Mann said to him: "Make it work no matter what the price".

269. The work to create the recess for the dumbwaiter involved was substantial. It involved cutting through the block work wall, removing the scoria material behind it and manufacturing and installing a stainless steel shaft to accommodate the dumbwaiter mechanism.

270. Apart from the work involved, the Owners requested the Builder to pay $5,000 to the supplier of the dumbwaiter, even though they had ordered it themselves. Repayment of that sum is also claimed by the Builder. The other major cost incurred by the Builder was to the engineering company for the manufacture and supply of the stainless steel shaft, which cost $3,531.

271. Mrs Mann said that the Owners suggested that the dumbwaiter could sit in front of the block work wall and they would arrange for shelving to be installed on both sides after they moved in. She said that it was Mr Paterson who suggested cutting into the block wall and recessing the dumbwaiter behind the wall. She said that, without any further consultation with the Owners, Mr Paterson then proceeded to cut the block wall and form a recess for the dumbwaiter. She said that at no time did Mr Paterson mentioned that this would be a variation or any extra cost.

272. I prefer the evidence of Mr Paterson. I think it is most unlikely that the various options to cope with the design constraints were not discussed between the parties and it is unlikely that Mr Paterson would have carried out such a difficult and costly task without specific instructions. It is not credible that the Owners did not expect this to be a variation. I accept Mr Paterson's evidence that he was told by the Owners to get it done and that Mr Mann asked him to make it work no matter what the cost.

Variation 2.27 - acoustic insulation in ceiling

273. Mr Paterson said that, in about September 2014, the Owners requested him to install acoustic insulation between the ground and first floor to reduce noise. Mrs Mann did not deal with this claim in her witness statements. I am satisfied that the work was requested.

Variation 2.28 - extra cost for tiles

274. This is a claim for the extra cost of tiles beyond what was allowed for in the Contract. Since what was supplied has been valued by Mr Pitney it is only necessary to say that I am satisfied that the Builder was requested to lay the tiles the Owners had selected. Indeed, the contrary was not asserted.

Variation 2.29 - materials for shed

275. The specification included a timber storage shed for Unit two in the Contract scope of works. The shed was constructed by the Builder. Mr Paterson pointed

out that the shed is not shown on the drawings and so, he said, the allowance in the Contract price was only for the labour in constructing the shed and did not include the materials. I do not think that is a correct interpretation of the Contract documents.

276. The Builder contracted to provide a shed and I think that a reasonable interpretation of the specification is that it was to be a timber shed of reasonable dimensions sufficient to satisfy the town planning requirement it was intended to serve, that is, external storage. However the claim allowed is not under the Contract. It is the value of what the Builder has supplied and that has been assessed by Mr Pitney.

Variation 2.30 - additional electrical work

277. Mr Paterson said that, throughout the lock-up stage of the project the Owners gave directions concerning the electrical work to Mr Bradbrook and Mr Keavy which significantly varied the electrical scope of works. His evidence in this regard is supported by the two electricians concerned.

278. It is common ground that there was no electrical plan provided with the plans. The Architect quoted a price to prepare such a plan but this was not accepted by the Owners. Mr Paterson said that he costed the job on the basis that the electrical layout would be same as the other development the Owners had inspected, but the Owners requested numerous additions and changes. He said that, in attending to all of these the electrician, Mr Keavy, charged the Builder an additional $6,435. Mr Keavy's account for that sum was produced and relied upon. With the Builder's margin of $1,287, the variation claimed was $7,720.00.

279. Mr Keavy said that the Owners gave him and also Mr Braybrook directions about what was to be done and where things were to go and that often the request concerned changes that they want to make to what had already been done. He said that they made such a large number of requests that it became quite disruptive and greatly increased the cost. The variations included a dedicated circuitry for the Cellar hatch mechanism and the dumbwaiter.

280. Mr Bradbrook said that the Owners came on site at least once a day while he was there but often 2 to 3 times a day and that he spoke to them almost every time they were there. He said that the changes he was requested to make almost always came from the Owners directly. Examples of the changes requested that he gave in his witness statement were:

    (a) a cable in the upstairs guest bedroom, so they could hang two pendant lights, one on either side of the bed. He said that he installed the cables but the pendant lights were never installed because the Owners changed their minds;

    (b) they requested gimballed lights to be installed over an empty space on the wall so they could hang a piece of art in that space;

    (c) they requested extra power points for telephones, fax and chargers in the study nook next to the doorway to the alfresco area;

(d) they asked for extra power points, data points and phone points for their son's computer consoles/video games in the upstairs playroom;

(e) there were three way switches for the main down lights and two-way switching for the pendant lights added in all bedrooms, with switches added either side of the bed;

(f) there was in floor heating added to all three bathrooms in Unit two; and

(g) they told him that they wanted to change the location of the bed in bedroom two from one wall to the opposite side of the room after it had already been wired up, which meant that the light wiring, power points and wiring had to be extended and moved after they had been installed.

He said that he kept notes of some of these extra requests.

281. Mrs Mann denied having requested any variations. She said that she was directed by Mr Paterson to indicate to Mr Keavy and Mr Bradbrook where they wanted the electrical points and fittings. She says they were not told that there would be any variations or extra cost. I am satisfied that the extra work was requested.

Conclusion as to the variations

282. Because of the conclusion that I have reached in regard to the termination issue it is unnecessary for me to determine what should be allowed for each variation. The only issue in each case is whether the work was requested by the Owners.

283. In the first place, I prefer the evidence of Mr Paterson. I find the Owners to be unreliable witnesses. Mr Paterson's evidence is also supported in many instances by that of other witnesses and the documents. Further, the case put on behalf of the Owners is unlikely. I think it would have been very naive of the Owners to have expected that the Builder would carry out all of the above additional work for no charge and I do not believe that they are naive. They are experienced business people.

284. Since I am satisfied in each case that the work which was the subject of the variation was requested by the Owners, it forms part of the quantum meruit claim, the overall cost of which has been assessed by Mr Pitney.

Provisional sums

285. Provisional sums were included in the Contract for the following items and the following adjustments were claimed by the Builder.

Provisional sum item 1 - The cellar

286. The provisional sum for the cellar, including GST, was $31,000. The plans provided that the cellar would be 3 m² with a concrete floor and would be accessed by a trapdoor in the floor of the kitchen and a timber staircase or ladder. Mr Paterson said that he assessed the provisional sum on the basis of the design in the plans.

287. I accept Mr Paterson's evidence that Mr Mann asked him to increase the size of the Cellar to the present dimensions and that, progressively during construction,

further changes were requested. These included lining the walls with sandstone, including feature sandstone block work, a custom-made spiral staircase with a custom-made automatic electrically operated circular hatch, and custom made wine racks, cedar lining boards for the ceiling, the dumbwaiter shaft, which has already been referred to, floor lighting and floor tiling. This involved design of the automatic cellar door mechanism and the change of the slab design from an edge beam to a solid slab. It was said that, when viewing the cellar during an inspection, the Owners' solicitor commented that it was like something out of the television series "Grand Designs". It is certainly grand and most impressive. The contrast between what I saw during the inspection and the spartan cellar drawn in the plans is stark.

288. The total claim for the cellar on this variation was $203,135.76 but Mr Pitney has assessed the value at $148,832.75 plus margin and GST.

289. Mr Paterson denied that he had done any of this extra work on his own initiative and said that all the changes were at the Owners' request. I accept that evidence. He had no incentive to make such substantial and expensive changes without the Owners' instructions.

290. The construction of the cellar seems to have grown in stages. First, there was the increase in size which occurred very early and then the addition of the other features culminating in the installation of the dumbwaiter. Mr Laird put the claim in regard to the cellar on the basis of it being a provisional sum. However it is the value of what the Owners requested that is important and the value of the benefit that was conferred upon them when their requests were fulfilled. I find that each addition, including the initial increase in size, was requested by the Owners.

Provisional sum item 2

291. The numbering system used does not include a claim number two amongst the provisional sum items.

Provisional sum item 3 – the deletion of the "Vergola"

292. The plans provided for the rear deck to have an electrically operated pergola over the top of it. It was a proprietary product known as a "Vergola". The Contract provided for a provisional sum of $40,000 inclusive of GST for the provision and installation of the Vergola. Mr Paterson said that, before the Contract was signed, he obtained a quotation for the Vergola of between $27,000 and $30,000 and the Owners instructed him that they did not want to spend that much on an electric roof.

293. It was agreed that, instead of installing the Vergola , the Builder would construct a normal roof with skylights in its place. The Builder claims that the cost of constructing a replacement roof plus the deck over which it was constructed amounted to $33,925.74. After deducting the provisional sum of $40,000, a credit was allowed by the Builder to the Owners of $6,074.26.

294. The cost of providing the replacement roof has also been costed by Mr Lorich, Mr Campbell and Mr Pitney. When questions as to the scope of work are reconciled, the issue was, whether the provisional sum that had been allowed related only to the Vergola or whether it also included the deck.

295. Mr Laird pointed out that the word "Vergola" appears in the plans over the whole area, indicating that it is intended to incorporate the deck as well as the Vergola overhead. Mr Hellyer submitted that it only relates to the Vergola itself. I prefer Mr Hellyer's interpretation but the question is academic since I am only concerned with the value of what has been provided. I am satisfied that this change was requested by the Owners.

Provisional sum item 4 - appliances

296. The provisional sum for appliances set out in the quotation is $16,000 including GST. Mr Paterson said that this was an error and that it should have been only $8,000, being $4,000 for each unit. He sent an email to the Owners on 7 March 2014 advising them of the mistake but saying that he would honour the $8,000. Attached to this email is the quotation from the supplier for $3,984 for the appliances for each unit. I am satisfied that the figure of $16,000 was a mistake and should have been $8,000.

297. Mr Paterson said that and during the next site visit Mr Mann told him that the Owners accepted that it was a mistake and that the total allowance should be $8,000 for appliances and not $16,000.

298. The appliances selected by the Owners cost the Builder $14,436, which was $6,436 in excess of the provisional sum. The Builder claims the difference plus a margin of 7%, which is $8,045.00.

299. As with the other variations, it is the value of what has been supplied that is relevant and that is part of Mr Pitney's valuation.

The claim with respect to the Provisional Sum items

300. Since I find that the Contract was brought to an end in the manner referred to below and that the Builder is entitled to recover the value of all of the work and materials supplied at the Owners' requested on a quantum meruit basis, it has not been necessary for me to separately determine any of these claims on the basis of it being either a variation or a provisional sum being exceeded because the fair and reasonable value of what has been provided at the request of the Owners is included in Mr Pitney's valuation.

Time and delays

301. The construction period expired on 20 December 2014. The Owners seek liquidated damages because the work was still incomplete when they excluded the Builder from the site on 28 April 2015.

302. In an email dated 18 February 2015, Mr Paterson said to the Owners:

> "As you are well aware the project has been delayed due to the various design changes and variations that have been incorporated into the original design."

303. In his witness statement, Mr Paterson blamed the delays in completing the job on four items, they are:

(a) Kitchen cabinets, vanities, mirrors and splash backs;

(b) Floor and wall tiles;

(c) Planning amendments;

(d) The balustrade for the cellar.

The cabinetry

304. The cabinetry was the responsibility of the Owners and their Contractor, KDC. The Contract between the Owners and KDC is dated 22 October 2014. By an email dated 14 November 2014, KDC informed the Builder that the cabinetry would be installed in Unit one between 17 November and 19 December 2014.

305. By another email dated 1 December 2014 to the Owners, KDC provided a further installation schedule to the effect that the cabinetry would be installed between 8 December 2014 and 19 December 2014, together with the glass splashbacks, and handover would be on dates to be arranged. These dates appear to have been optimistic because on 27 January KDC emailed the Builder, saying that the majority of the work had been done and outlining further works to be done up to 9 February.

306. Mr Paterson said that he telephoned Mr Simpson of KDC on 5 February to inquire about the delay. He said that he then received an email from Mr Simpson on 6 February to say that they (KDC) were very busy and that, knowing that he would not have received full payment from the Owners, it had not been at the top of his list. Mr Paterson responded asking how much the Owners owed KDC and Mr Simpson replied that the Owners still owed about $18,000.

307. Whatever the reason was, delays relating to the supply and installation of the cabinetry were the responsibility of the Owners. Mr Paterson said that the Unit two kitchen was still not complete by 8 April 2015 when he contacted KDC again to arrange access the following week. He said that the installation of the kitchen had still not been completed when the Builder was excluded from the site.

308. Mr Hellyer pointed out that during the period from 8 to16 April 2015, KDC was experiencing difficulty in accessing the site. However in an email dated 10 April 2015 KDC stated that the cabinetry would not be installed until 20 April 2016 and by then the Owners had purported to terminate the Contract. I am not satisfied that the delays in the cabinetry were the fault of the Builder.

The tiles

309. According to Mr Paterson, the Owners chose tiles from a supplier that he had recommended to them. They had also engaged an interior designer, a Miss Densem, to advise them on the tiles to select. Tiles were ordered on 21 October 2014 but when Mr Paterson contacted the supplier he was informed that the tiles the Owners had selected had been on back order since 8 September 2014 and

were not expected to be in stock until December 2014. He said that he spoke to the Owners on site about that problem on the same day he placed the order and said that he told them that would mean that construction would not be finished before the Christmas and New Year shutdown. He said that Mrs Mann told him that they did not want to select other tiles and that they were happy to wait.

310. In fact, the floor tiles were delivered on 21 November 2014 and the wall tiles were delivered on 9 December 2014. Mr Paterson claims that the delay with respect to the tiles delayed completion of the project by at least a month.

The planning amendments

311. Mr Paterson said that, when the Owners told him that they wanted to extend the Unit two deck and the Vergola roof and to have the fences as high as possible on the southern and western boundaries he warned them that the fences could not exceed 2 m but that they insisted that they would get their "barrister" to sort it out.

312. Following the construction of the fences at the heights requested by the Owners the Council issued a building notice requiring the Owners to either have the construction of the rear fence certified by a building surveyor or to demolish and remove it. Mr Paterson said that the Owners gave him the notice and asked him to comply with it but that after he took it home and read it he returned it to them the following day and told them that it was their responsibility. He said that they asked him to help prepare their application to the Council to amend the planning permit to allow these changes and he did so.

313. On 5 February 2015 Mr Paterson submitted an application to the Council for the rear retaining wall and paling fence, for the paling fence on the western boundary, for a timber shed on the western boundary, for the lower deck with the spa installed in it and for an extension to the Vergola roof to cover the whole of the deck, being the things the Owners had wanted.

314. In his covering email to Miss Johnson at the Council, Mr Paterson said:

> "Hi Lucy,
>
> Thank you for looking at this quickly for me.
>
> Can you please send me an email flanking the likelihood proposed amendments A - E being approved by Council.
>
> The only item I am interested in is the Vergola roof as it is included in my contract, I will not be upset if I build what is already approved.
>
> Is it possible to give me an indication when Council may make a decision on these amendments as my handover and client settlement of their home is approaching?"

315. Mr Hellyer said that, in writing this email, Mr Paterson was seeking to advance his own interests to the detriment of that of the Owners. However Mr Paterson submitted the application for the permission they wanted and there is no reason to suppose that the Council would not have dealt with the application on its merits.

316. Thereafter, there were emails between Mr Paterson and Miss Johnson concerning the matter and discussions between Mr Paterson and the Owners. At the Owners' request a meeting was arranged at the Council offices between the Owners and Mr Paterson on one side and officers of the council including Miss Johnson on the other. Mr Paterson said that during this meeting the Owners blamed him for the problems, saying that they were not builders. He said that Mr Mann behaved in a very overbearing and aggressive way towards the Council officers and that he (Mr Paterson) subsequently apologised to them by email for that conduct.

317. Following a subsequent site meeting held on 12 March 2015, Miss Johnson sent Mr Paterson an email to say that the Council had decided to approve the fence height as installed. A formal notice of decision was received from the Council on 26 March 2015 approving the construction but requiring amended drawings to be prepared to reflect the changes that had been approved.

318. Mr Paterson said that he obtained a fee proposal for preparing the amended plans from the Architect on 1 April 2015 and forwarded it to the Owners but it does not appear that they ever had the plans prepared before the Builder was excluded from the site.

The cellar balustrade

319. The access to the cellar spiral staircase was, effectively, an opening in the kitchen floor above the staircase. Either a balustrade around the opening had to be constructed in order to prevent anyone falling into it when the door was open or a dispensation had to be obtained from the Building Control Commission to allow it to be constructed without a balustrade. Mr Paterson sought instructions from the Owners as to what they wanted in this regard but no instructions were given. In his witness statement, Mr Paterson claimed that the cellar balustrading issue delayed the Builder from 3 March 2015 until the Builder was excluded from the site.

Other causes of delay

320. Until such time as the dumbwaiter was installed the framing for the kitchen could not be completed and the kitchen could not be plastered. Further, the tiling of the cellar could not be completed until the Owners had selected the tiles they wanted. The cellar also needed to have a door hatch to close it off but the Owners had not chosen what they wanted in this regard. According to Mr Paterson, no instructions about the tiling of the cellar floor or as to what was to be done about the door into the cellar were received from the Owners before the Builder was excluded from the site.

321. On 15 April 2015 the building surveyor, Mr Pisotek, was prepared to issue a conditional occupancy permit if the cellar was secured from entry and certain other items were attended to, including as-built drawings. The Owners did not accept the Architect's quote to prepare the required drawings.

Conclusion about delay

322. I am satisfied that the delay in completing the work arose from the matters set out above and that it would have been impossible for the Builder to have completed Unit two before it was excluded from the site.

Defects and incomplete work

323. Evidence about most of the defects alleged was given by Mr Lorich and Mr Campbell. Evidence concerning the defects alleged in the roof were given by Mr Quick and Mr Coghlan. Evidence concerning the heating and air conditioning systems installed were given by Mr Anderson on behalf of the Owners and Mr Kier on behalf of the Builder. Also present when they gave evidence was Mr O'Brien, the director of the company that supplied and installed the heating and air conditioning and Mr Pitney who had costed rectification work relating to it. Mr Thompson gave evidence about the painting and Mr Pitney gave evidence as to the value of the work for the quantum meruit claim and also the costing of most of the rectification work.

324. Mr Lorich's first report was prepared before any rectification work had been done. By the time Mr Campbell and Mr Pitney visited the site a number of items identified by Mr Lorich in his first report had been attended to. That report and the accompanying photographs therefore represent the best evidence that I have of the state of the premises as they were when the Builder was excluded from the site.

325. Mr Laird pointed out that the Owners had neither permitted the Builder access to the site nor complained about the alleged defects before many of them had been rectified. He said that the Builder had no opportunity to rectify any of the alleged defects or to have them inspected by its own experts before they were rectified. I accept the legitimacy of that complaint but I still have to assess the evidence that I have and having done so I have not seen any instance where it would be appropriate to draw an adverse inference against the evidence led on behalf of the Owners in regard to the alleged defects.

326. In assessing the cost of rectification, Mr Pitney's allowance for a builder's margin was 25% compared with 30% for Mr Lorich and Mr Campbell. However Mr Lorich allowed a further contingency sum of 10% on some items whereas Mr Pitney allowed a contingency of only 2.5% and Mr Campbell allowed no contingency at all. Mr Anderson allowed a margin of 15% on materials and his labour rate of $90 per hour appeared to include the margin. Mr Quick allowed a margin of 30% and no contingency. Mr Coghlan largely agreed with Mr Quick's costings.

327. For consistency I will adopt a standard margin on all defects of 30%. That seems to be a mid-point between the various experts and there is also some comfort in the fact that it is also a rate commonly allowed by this Tribunal in costing the rectification of defects in building cases.

328. Before turning to the individual items there are two major items which affect both units and will be dealt with separately.

Roofing defects $42,000

329. Mr Quick produced two reports setting out a variety of defects in the roof of both units. He costed the rectification of the defects detailed in his initial report of 20 May 2015 at $41,550. This total is made up of round figures given for various parts of the work that he describes in part seven of the report. He costed the defects identified in his second report of 3 November 2015 at $5,197. This is made up of $3,492 for a defective exhaust flue and $1,705 for the installation of insulation. In his detailed costings, Mr Quick costed the work identified in his original report at $43,263

330. Mr Pitney prepared a comparative chart of the estimates prepared by Mr Quick , Mr Lorich, Mr Campbell and himself for the items identified by Mr Quick. For the items identified in the first report Mr Lorich assessed a cost of $41,550, Mr Pitney assessed $20,647 and Mr Campbell assessed an amount $21,447. All of these figures are GST inclusive. Mr Pitney allowed $90 an hour for labour for a plumber whereas Mr Quick allowed $120 per hour.

331. The principal roofing expert for the applicant, Mr Coghlan, agreed with much of Mr Quick's evidence and identify further defects. Mr Coghlan assessed the cost of rectification at $42,800.

332. During concurrent evidence, Mr Quick and Mr Coghlan and Mr Pitney defended their costings. There was disagreement as to the existence of some alleged defects and some disagreement as to the methodology of rectifying others that were acknowledged. As is the case with many differences of opinion between experts concerning a multi-faceted rectification, every view expressed was defensible. One expert would have a higher assessment than another on one item and a lower assessment on another item. Weighing up the various opinions and bearing in mind that in many cases one expert is as likely to be right as another, I assess the cost of rectifying the roofs of both units at $42,000 including margin and GST.

Heating and air conditioning $8,787.35

333. The heating and air conditioning system was first inspected by Mr Lorich. He stated that the upstairs ducts in Unit one had very limited airflow and suggested that perhaps the ductwork was crushed in some unknown area. I am unable to make such a finding in the absence of any evidence to that effect although I accept that he observed a limited air flow.

334. Mr Lorich said that as there is no access to this ducting without major ceiling removal. He said that an alternate solution would be to install a multi-head split system into the bedroom and living areas in the upper floor, which he costed at $12,152. I note that there is now a split system air-conditioner installed in the upper level of Unit one. I cannot take such a broad brush approach. Before finding any amounts are to be allowed to the Owners I must be satisfied that the work is defective or incomplete in some respect.

335. As to Unit two Mr Lorich said that the air-conditioning/heating unit was to have four zones but that only three zones exist. It was suggested on behalf of the

Builder that this change was by agreement. Mr Lorich said that the return air transition and return air grille filter needed to be installed and that all of the subfloor ducting needs to be tied up off the ground wherever possible. He costed that part of the rectification at $1,334. I am not sure whether this relates simply to the filters and tying up the ductwork or whether it involves something else. In fairness to Mr Lorich, he dealt with all issues in both buildings and did not go into these particular matters in the same depth as did the two mechanical experts, Mr Anderson and Mr Kier, and so I think I should place more reliance upon their evidence.

336. Mr Anderson prepared three reports relating to the system, dated 16 March, 26 May and 1 June 2016 respectively. An addendum to his 16 March report provided costings. In answer to the allegations made, Mr Kier produced a report dated 14 July 2016. The issues raised and my findings in regard to them follow. I assess the cost of rectification and completion of all of the items at $6,145.00. With margin and GST the total becomes $8,787.35.

337. The individual items are as follows:

(a) Unit one - location of the heating unit *Not established*

The heating unit is outside the building adjacent to the side path and below the level of the paving. Mr Anderson said that this would restrict access to the unit for servicing. Fears were also expressed during the hearing that perhaps water might pond in the area and effect the unit. Mr Kier agreed that the installation was inappropriate although he pointed out that the Builder had installed an agricultural drain under the unit to enable any condensate to drain away.

It is common ground that the paving around the unit was laid by the Owners' landscaper and not by the Builder and so I am not satisfied that the height of the surrounding paving, which has caused the difficulty, is the Builder's responsibility. In any case, I noted at the on-site inspection that no water was ponding in the area despite their having been quite heavy rain shortly beforehand.

(b) Unit one - Condensing unit *Not established*

The outdoor refrigerated condensing unit is less than 200 mm away from the building wall. Mr Anderson said that the manufacturer recommends a minimum clearance of 300 mm unless air deflectors are installed. He costed the installation of air deflectors at $200.

Mr Kier said that the deflectors are only applicable for the discharge side of the condensing unit and so are not relevant. He said that he checked with the manufacturer and was informed that the clearance of the rear of the units will have no appreciable impact on the performance of the unit as long as all other clearances are achieved. He said that the unit was in a reasonably open area and that he did not consider the relocation of the unit was necessary.

The Owners bear the onus of proof and since there is a difference of opinion as to whether this is necessary and since the unit does appear to be in an open position I am not satisfied that a defect is established.

(c) Unit one - return air grille $380.00

Mr Anderson said that the return air grille is undersized, being only 0.2664 m² whereas the manufacturer recommends a minimum size 0.36 m² for a filtered return air grille for heating and a minimum return filter area of 0.48 m² for an add-on cooling system. He said the cost of replacing the existing grille with a larger grille was $380.

Mr Keir said that the required sizing for that particular unit was nominated to be 0.302 m². He said that the grille was undersized but only by a small amount. He said that he did not consider this to be a significant issue and it would not have a measurable impact on the performance of the system.

Since it is acknowledged that the grille is undersized I find a defect and will allow the amount $380 Mr Anderson has assessed `

(d) Unit one - return air duct $50.00

The circular duct has been brought through a square hole, leaving gaps. Mr Anderson said it will cost $50 to install a starting collar and seal it to the floor. Mr Kier agreed that the connection should be sealed and agreed on the costing. The assessed amount of $50 will be allowed.

(e) Unit one - loose nuts *Not established*

Some nuts around the filter grille were found to be loose. Mr Kier pointed out that possession of the unit had been given some time beforehand and it is not established who loosened the nuts. I am not satisfied on this item.

(f) Unit one ground floor dampers *Not established*

Mr Anderson found that at the time of his inspection a number of ground floor outlet dampers were partly closed, and he suggested that perhaps the system was never balanced properly. Mr Kier said that when he inspected the unit the motorised damper servicing the upper floor was not operational and the airflows will not be able to be achieved to the upper floor until that is rectified. He said that he was informed that the Builder had balanced the system and he suggested that perhaps the air balance had since been carried out in the unit by the Owners or the tenant. Mr Anderson assessed eight hours at a cost of $90 per hour as the cost of rebalancing the system.

Unlike Unit two, this unit was handed over and there is no evidence that the system was out of balance at the time of handover. I am not satisfied on this item.

(g) Unit one - Builders debris supply air boots $495.00

Mr Anderson said that there was Builder's debris seen in a number of supply air boots. He allowed for six hours to clean all ductwork. Mr Kier agreed that there was a very minor debris and allowed five hours. Since one

expert is as likely to be as right as the other I will allow 5 ½ hours at $90 per hour.

(h) Unit one - ductwork not adequately suspended $150.00

Mr Anderson said that, although he had not inspected the subfloor, he suspected that the ductwork was not supported because he observed that it had not been in Unit two. Mr Kier agreed with a figure of $150 to install approved flexible duct hangers.

(i) Unit two - location of heating unit $1,490.00

The heating unit is located outside the building and beneath the verandah deck. The deck is constructed of spaced decking boards. The cooling system fan coil unit is outside on the east side of the living/meals area.

Mr Anderson said that the requirement of AS/NZ S5601 Clause 6.3.14 for the installation of a gas heater in an underfloor location requires a minimum clearance of 1.2 m between the lowest part of the floor structure and the ground level. I asked Mr Anderson whether an open external deck could be regarded as an underfloor location in this context and he said that his enquiries of an officer of Energy Safe Victoria suggested that it was. He said that fixed artificial lighting was also to be provided to the appliance. He added that the gas heater does not have a condensate drain fitted but discharges directly into the subfloor space. He costed $600 for materials and six days labour to relocate the unit outside the decking area.

Mr Kier said that it is unclear whether this space is considered to be under a floor. He said that the service manager of the supplier advised that the recommendation was that there be 200 mm clearance over the unit for service access and that this could be achieved by unscrewing the timber decking required. He pointed out that the unit is in an open space in an open area ventilated on three sides with excellent natural light. He said that he was advised by an inspector of Energy Safe Victoria that the location of the unit complies with regulations.

Mr Kier said that, in order to achieve the required gap of 1.2 m below the decking the unit could be lowered by 100 millimetres. Mr Anderson said that it was 2.8 m from the entrance to the subfloor area for servicing whereas it should be no more than 2 m. However the decking is open on all sides and it is a matter of where the access door is located when it is ultimately enclosed.

Mr Pitney suggested that it would take no more than a day to lower the unit by the required amount and Mr O'Brien, whose company installed the unit, agreed with that. Mr Pitney said that it should cost no more than $405 to install a light next to the unit which is also required. After Mr Paterson pointed out that the power point was already there, it was then stated that it would cost $25 to provide the light. A further $25 will be required to provide tubing for the condensate plus an hour and a half's work to install it. If a condensate pump were needed that would cost $200 and an hour's

labour for an electrician to install it, but this would only be necessary if the water could not be run away by the natural fall of the land. It is not established that a condensate pump is necessary. It was acknowledged that there is a substantial fall in ground level to the rear fence and a longer tube can be fitted.

Weighing all this evidence up, I will allowed two days labour at $90 per hour and $50 for materials, making $1,490.00.

(j) Unit two - Condensing unit *Not established*

This is similar to the claim with respect to Unit one and I am not satisfied that a defect is established.

(k) Unit two - Condensing unit too low

This claim has been abandoned

(l) Unit two - Cooling coil etc. not accessible $320.00

Mr Anderson said that the condensate drain that was fitted and the refrigerant pipework installation are incomplete. The condensate drain needs to be trapped and available for inspection. Mr Kier agreed. Mr Anderson had included this cost with the relocation of the unit but since I have not allowed that I need a figure for the necessary work. It appears at the very least that it will be necessary to run another drain tube from the cooling coil unit to a point of discharge.

I am satisfied on Mr Anderson's evidence that there is work to be done and the area appears to be somewhat difficult to access. . I will allow three hours at $90 per hour and $50 for materials, which is $320.00.

(m) Unit two refrigeration piping not adequately supported $410.00

Mr Anderson said that the refrigeration piping between the outdoor condensing unit and the cooling coil was not adequately supported in the subfloor space and that insulation and redundant pipework was left lying under the building. He assessed five hours of labour and $50 in materials to deal with this item.

Mr Kier said that he had a quotation from Mr O'Brien to carry out the necessary work in three hours with $50 in materials. I will allow four hours at $90 per hour and $50 for materials, which is $410.00.

(n) Unit two - connection to return air plenum $230.00

Mr Anderson said that the return air duct is not connected to the return air plenum beneath the staircase and the duct is lying on the ground drawing air from the subfloor space. He costed rectification at two hours labour plus $50 for materials.

Mr Kier agreed with the costing although he pointed out that the duct had been removed in order to commission the trap door hatch to the cellar and that the Contract was terminated before it could be replaced.

Since I am assessing the value of the work and Mr Pitney's valuation assumes that the work is complete I should allow the cost of completing this part of it, which will be $230.00.

(o) Unit two - return air grille irregular and undersized $390.00

Mr Anderson said that the return air grille located below the staircase is an irregular shape and a return air filter is required and has not been installed. He assessed a figure of $120 for materials and three hours labour to rectify the problem.

Mr Kier said that the return air grille was located in the position required by the Owners to enable changes in the laundry layout. It seems clear that there is nowhere else to put it. Mr Kier also said that he disputed that the grille was undersized. Mr Anderson said that it could become undersized when the filter was fitted but that if the filter were fitted inside, then the size would be sufficient.

It is acknowledged that this is incomplete work and the cost of completion seems to be agreed at three hours labour $90 an hour plus $120 for materials, which makes $390.00.

(p) Unit two ductwork below floor inadequately supported $510.00

Mr Anderson said that most of the ductwork below the floor was lying on the ground and that additional supports are required. He said that flexible duct supports have been installed that do not comply with the requirements of the relevant Australian Standards.

Mr Kier said that substantial ductwork was removed to enable the installation of the trapdoor and the Contract was terminated before the work could be completed and the ductwork rehung.

Mr Anderson assessed the cost of rectification at 16 hours labour and $150 worth of material. Mr Kier agreed with the materials but said that it would be only four hours labour. Mr Anderson defended his much higher figure by saying that there was not a great deal of space beneath the floor. Mr Kier said that he had a quotation to do the work for four hours labour from Mr O'Brien. Although Mr O'Brien is not a disinterested witness I find it hard to see how it take any more than half a day to do this job. I will allowed four hours and $150 for materials, which makes $510.00.

(q) Unit two ground floor outlet dampers $450.00

Mr Anderson said that a number of the ground floor dampers were partially closed. This is a similar situation to what was found in Unit one although in this case it is acknowledged that the Contract was terminated before the system was balanced. Nevertheless, since I am allowing a valuation of all the work on the basis that it was complete and not defective, I should allow the cost of balancing the system.

The cost of balancing the system was assessed by Mr Lorich at $510, by Mr Campbell at $400 and by Mr Pitney at $210. Mr Lorich allowed six

hours, Mr Pitney allowed two hours and Mr Campbell said that he obtained the price from Rawlinson's guide. Mr Anderson has assessed it at eight hours labour, which would be $720. Mr Kier allowed only two hours labour.

Precisely what is involved in balancing the system was not clearly explained to me. Obviously it is something that takes a number of hours, the question is, how many? Both the mechanical experts are equally qualified and one is as likely to be right as the other. I will allow five hours at $90 an hour, which is $450, which falls within the scope of the figures assessed by the general experts.

(r) Unit two Builders - debris in supply air boots *Not established*

Mr Anderson said that builder's debris could be found in many of the supply air boots. However, he inspected the property on 12 March 2016 and by that time the Owners had had their own tradesmen working in Unit two. No such debris was referred to in Mr Lorich's earlier report. The debris Mr Anderson saw at the time of his inspection could have been the result of the Owners' own tradesmen and in any case, it had been removed by the time Mr Kier inspected Unit two on 14 July 2016. I am not satisfied as to this item.

(s) Unit two - additional outlet in play area *Not established*

Mr Anderson said that, based on his calculations, the air quantity required to condition the play area is more than double that required for either of the upper floor bedrooms. He said that this indicated that there should be either a larger duct and diffuser to service the play area or there should be two outlets, whereas only one has been installed.

Mr Kier said that the system needs to be balanced to suit the loads. He said that the air outlets are in good locations but the Owners have put furniture over the outlet in the play area restricting airflow. He also pointed out that air returning from the two bedrooms will be passing through the play area to reach the return air grille on the ground floor, reducing the loads in the play area. He said that in his opinion, additional air outlets are not required.

There is a difference of opinion between the experts. I would have thought that an assessment of the adequacy of the system could not be made until it has been balanced and that has not been done. I am not satisfied that it has been established that a further outlet is required.

(t) Unit two - the system has three zones instead of four $1,070.00

This was said a number of times during the hearing to be a contractual issue. I was told by Mr Kier that there was a variation to change the system from a four zone system to a three zone system. However, that was not one of the variations referred to in Mr Paterson's witness statement and I can find no other evidence establishing that change. According to the quotation

which doubled as the specification, Unit one was to have two zones and Unit two was to have four zones.

There was some discussion between the experts as to whether, when all of the registers are open, that constitutes a zone. If it does, then there are three zones installed in Unit two. Mr Anderson said that it was a "moot point" whether all of the registers being open constituted a zone. Mr Kier said that what was installed was what was required by the Contract. By that I assume he meant that it was a three zone system. Mr Anderson said that the addition of a fourth zone control to shut off the master bedroom will assist in resolving the over-cooling of that room. Mr Kier said that installation of a control could be considered but that it would be a variation.

On this state of the evidence I think that the Contract required an additional zone in Unit two. However, the claim is not under the Contract but is for the value of the work. Mr Pitney has allowed in his valuation for the supply and installation of the systems that were provided but made no mention of zones. I find on the evidence of Mr Anderson and Mr Kier that for the system to operate satisfactorily it should have the additional zone. I therefore treat this as a defect and shall allow the cost of the installation of the additional motorized damper, which is $350 plus 8 hours labour at $90 per hour, making a total of $1,070.00.

(u) Unit two - bathroom exhaust not connected

This is included in the roofing defects figure.

(v) Air boots poorly fitted $200.00

This item was acknowledged. Two hours labour and $20 in materials was assessed as the cost of rectification. That amounts to $200.00.

(w) Insufficiency of the system *Not established*

Mr Anderson said that it would not be practical to install additional outlets to get cooling capacity into the play area and he suggested the installation of three split units for the first floor of Unit two.

Mr Kier said that the system had not been balanced and that there is no evidence that it had insufficient capacity to cool the play area. Mr Pitney said that during discussions on site with Mr Anderson, the latter seemed to agree that a wall outlet could be installed in the plan area. Mr Anderson acknowledged that but said that it was difficult to get the additional ductwork from the subfloor to connect to it.

The specification described the heating system as: "Central heating/air conditioning (refrigerated)". The units to be installed are not identified nor are there any specifications provided as to their intended performance. However the Builder was required to install a system that met this very general description that would be adequate for the purpose.

Mr Kier said that on Mr Anderson's own calculations, both the heating and cooling systems have sufficient capacity. Although he acknowledged that

the installation of split systems would improve the performance it was an upgrade beyond the specified requirements. Since I am not satisfied on the balance of probabilities that the units installed were inadequate I do not find any defect.

Unit one exterior - Item 1 - Front fence $722.15

338. Mr Lorich said that the timber work infills are poorly constructed with timber not painted. He said that the letterbox has been damaged by brick cleaning acid and requires replacement at a cost of $440, the front gate and latch are not aligned ($110) and the brackets at the rear of the timber work are unsightly. In addition, he said that the fixing bolts of the gate uprights were not blocked and covered and that the treated pine capping was not primed or painted.

339. Mr Campbell allowed $500 for painting the timber work, $200 for the rectification of the letterbox and $65 for adjusting the gate and latch. He did not consider the other items were defective. Mr Pitney assessed $1,070 for Mr Lorich's scope of works.

340. It appears that the Builder was locked out of the site before the timber was painted and the work was finished. Since the painting of the fence is not included in Mr Pitney's assessment of the value of the work and since no claim has been made by the Builder for the painting of the timber or attending to the incomplete items those should be excluded. I will allow the $440 with respect to the letterbox and $65 for the gate and latch because those items will be included in the valuation. I accept Mr Campbell's evidence that the brackets are not defective. With margin and GST the figure becomes $722.15

Unit one exterior - Item 2 brickwork holes and nails $143.00

341. There are two drill holes evident in the face brickwork adjacent to the front door. Mr Lorich allowed two hours and assessed rectification cost $160. Mr Campbell allowed one hour and assessed that at $90 and Mr Pitney agreed with Mr Lorich's assessment.

342. It is very small scope of works involving obtaining some filler to match the colour of the bricks and then just a few minutes to fill the holes. The assessments have been made on a stand-alone basis although there will be a rectifying builder on-site attending to all of these matters. I will allow $100. With margin and GST, that becomes $143.00.

Unit one exterior - Item 3 front door $2,073.50

343. Mr Lorich said that there were cracks in the door due to excessive shrinkage, the door margins are uneven and exceed acceptable tolerances, the front door lock was not properly aligned and the front door has only two hinges instead of three, the centre hinge being missing. He has allowed $1,340 to replace the front door, and $110 to attend to each of the margins, the lock and the additional hinge.

344. Mr Campbell allowed $135 to repair and repaint the front door. He said that if the front door were replaced the problem would repeat itself because it was a dark colour and facing to the north-west. Mr Lorich said that it was appropriate

to replace the front door because, apart from the cracking, it was too small for the jamb and will require building out anyway.

345. I will allow Mr Lorich's figure of $1,340 for the replacement of the door and $110 for the additional hinge. The replacement of the door should attend to the other matters. With margin and GST, that becomes $2,073.50.

Unit one exterior - Item 4 - alfresco $68.50

346. There is paint on the brickwork to be cleaned off at a cost of $50 according to Mr Lorich and $34 according Mr Campbell. I shall allow $45. With margin and GST, that becomes $68.50.

Unit one exterior - Item 5 - roof

347. This has been dealt with above.

Unit one exterior - Item 6 - gable cladding - $1,801.80

348. Mr Lorich said that the gables of the unit have been clad in polystyrene foam which has not been sealed on the underside. A flat moulding needs to be installed and glued onto the underside to stop it from degrading and being subject to bird attack. He said the render would then need to be touched up across the bottom of all the gables. Mr Campbell agreed that the cladding on the gables needed tidying up.

349. Mr Lorich costed the work at $1,280 and Mr Campbell at $1,240. Mr Pitney queried the time that would be taken but it appears that some scaffolding will be required and Mr Campbell agreed that that is a cost that has to be allowed. He agreed with Mr Pitney that the scope of works was small. I will allow $1,260. With margin and GST, that becomes $1,801.80.

Unit one interior - Item 1 - front entry $536.2

350. Mr Lorich said there was a chip on the floor and minor paint blemishes evident to the skirtings and trim. He assessed $75 for the floor and $300 to rectify the paintwork. Mr Campbell said that he saw a split near the front door but made no allowance because he understood from the Owners that the floors of both units had been repolished.

351. Mr Pitney agreed with Mr Lorich's assessment if the defect should be found to be present. Although it is unsatisfactory that the Builder was not permitted to see this defect before it was rectified I think I have to allow it on Mr Lorich's evidence. The total is $375 and with margin and GST, that becomes $536.25.

Unit one interior - Item 2 - bedroom one $335.00

352. Mr Lorich said that the power points on the wall were not evenly set on the side walls and that the television socket is not active. He allowed $170 each to relocate the power points and connect the television point. He also allowed $75 to rectify the paintwork.

353. Mr Campbell said that the positioning of the power points was not a defect and he only allowed $175 to connect the television point.

354. The complaint about power points is entirely aesthetic. It was also acknowledged that there might be constraints as to the location in regard to the framing. There is also the evidence of the electrician that power points were altered at the direction of the Owners time to time and that they were active in determining where power points should be located.

355. Mr Lorich acknowledged that there was no functional problem but said that it was particularly noticeable when he first inspected the unit before there was any furniture installed. During the inspection, I had to have the issue pointed out to me.

356. On this matter I prefer Mr Campbell's evidence and find no defect with the power points. I will allow $175 to connect the television point and $75 for the painting. With margin and GST, that becomes $335.00.

Unit one interior - Item 3 - bedroom one ensuite **$**608.00

357. There is a complaint about the grout, which Mr Lorich assessed at $260, Mr Campbell $130 and Mr Pitney at $415. There are similar items elsewhere which will be attended to at the same time and the rectification appears to be minor. I will allow $150.

358. There is a complaint about tile lipping which both Mr Lorich and Mr Campbell assessed at $130 and that amount shall be allowed. Mr Lorich said that the shower screen was loose and poorly installed. Mr Campbell said that it was all right when he saw it and so it has probably been rectified.

359. Mr Lorich assessed this item $240 and Mr Campbell at $130. Mr Pitney's assessment covered all of the items and did not single this one out. I am conscious that Mr Lorich saw the problem whereas Mr Campbell did not and so I think I should allow Mr Lorich's figure of $240.

360. There is no privacy lock which both experts agreed was incomplete work and assessed at $70 so that amount will be allowed. The total is $460. With margin and GST, that becomes $608.00

Unit one interior - Item 4 - bedroom one walk-in robe Not established

361. Mr Lorich said that the shelving in the cupboard was very poorly fitted out. He said that there were gaps evident between the shelves and the wall, nails were visible and the drawers were very lightweight in structure. He said that the overall installation was poor, very cheap and not fit for the purpose. He assessed an amount of $3,090 to replace what was there with something more suitable.

362. Mr Campbell said that while the quality of the fit out in the walk-in robe might be viewed by some as unacceptable, there were no specifications and details as to what was to be provided. He said that the drawer construction and runners were proprietary products suitable for the purpose, although higher quality products are available. Consequently he made no allowance.

363. Mr Pitney allowed an amount of $1,330 to refit the walk-in robe if that should be found to be necessary. It appeared during their joint evidence that the difference between them related to the cost of materials per lineal metre.

364. In this instance I prefer the evidence of Mr Campbell. All that has been included in the valuation of the work with respect to this walk-in robe is $500. I cannot find that what has been supplied is worth any less than that and the Contract did not require a walk-in robe of higher quality.

Unit one interior - Item 5 - family/living $464.75

365. Mr Lorich said that the skirting board joints on the east wall had opened up and paint defects were evident. In addition, the television point was not connected. He assessed $300 for the paint defects and $85 to connect the television point. Mr Campbell said that the separation of the skirting board joints is no more than normal shrinkage but he allowed $75 to connect the television point.

366. Having observed the cracks during the site visit I prefer Mr Lorich's opinion that rectification work is required to the cracks. Mr Pitney initially allowed $130 for this item, being two hours labour and $10 for materials but during the conclave he increased it estimate to $230.

367. There is other work of a similar nature to be done and it is reasonable to suppose that it will all be done at the same time. I will allow $250 for the cracks and paintwork and $75 to connect the television point, making a total of $325. With margin and GST, that becomes $464.75.

Unit one interior - Item 6 - kitchen/meals $357.50

368. Mr Lorich said that the fly wire on the screen door was loose and unsightly, the sliding door latch had a 2 mm gap when locked, the cornice was cracked and there were minor wall cracks evident. The cover for the power point was also missing. Mr Campbell said the fly wire only required tensioning of the wire. He considered it to be a builder's maintenance issue. Mr Lorich assessed $140, Mr Campbell assessed $95.

369. To adjust the door gap Mr Lorich said $35 and Mr Campbell $32. For the cornice, Mr Lorich assessed $150 whereas Mr Campbell thought that the cracking was within tolerance. I prefer Mr Lorich's opinion. There was some discussion involving Mr Thomson as to the extent of the painting required and I note that it need only be painted to the nearest break and that there will be other painting to be allowed to be done the same time. The experts agreed on $12 for the power point cover.

370. Mr Pitney assessed $135 for all of these items. Taking into account the above matters, I shall allow $250 for all items. With margin and GST, that becomes $357.50.

Unit one interior – Item 7 – laundry *Not established*

371. The complaint made is in regard to the wall cornice which is said to be poorly finished with minor cracking. Mr Lorich allowed $118. Mr Campbell said he could not see anything wrong.

372. I was referred to a photograph but it was said that the cracking was difficult to see in the photograph. According to Mr Lorich it is a small section of wall

poorly finished at the cornice. Mr Pitney said that if it were to be allowed it should be only $14.

373. I note that the alleged defect is very difficult to see and, bearing in mind the instruction in the Guide to Standards and Tolerances as to how one ought to look at a surface in terms of distance and light, I am not satisfied this is a defect.

Unit one interior – Item 8 – pantry - $500.50

374. Mr Lorich said there was cracking evident between the ceiling and the walls with the join in the plaster wall lining visible at the right hand side of the door. He said there were/marks in several locations, poor paint finish to the framework and poor paint finish to the door edge. He originally assessed $707 to rectify the defects but this had been reduced to $450 by the time of the hearing.

375. Mr Campbell agreed on these four items and assessed a total of $249 for the first two but did not assess the others. Mr Pitney assessed $110 but in the course of evidence he increased that by a further hour's labour, an extra $60, to $170. Mr Pitney justified his figure on the basis that there were a lot of similar items to be attended to at the same time. Mr Lorich acknowledged that if the front unit were to be repainted then most of these items would be addressed in the repainting or with a little bit of extra preparation.

376. Taking Mr Lorich's assessment and then allowing the fact there is a lot of similar work to be done same time I assess this item at $350. With margin and GST, that becomes $500.50.

Unit one interior – Item 9 - powder room $965.25

377. Mr Lorich said that plaster joints are visible on the right-hand side of the mirror, the grout on top of the wall lining was poorly finished and there was a wide grout joint evident that was vertical to the living room wall. He said a privacy lock was also not fitted. He assessed the cost of rectification at $675. Mr Campbell's assessment was slightly higher. Mr Pitney's assessment was considerably less. I will allow Mr Lorich's figure. With margin and GST, that becomes $965.25.

Unit one interior – Item10 – staircase Nil

378. This item was withdrawn during the hearing.

Unit one interior – Item 11- first floor bathroom $2,216.50

379. Similar complaints were made about the uneven grout edge to the wall tiles and poor plaster finish, the gaps around the door, the door frame poorly finished, a gap to the mirror and the bath was not flashed as required by the Code. There was also a complaint about the location of the heating duct and a gap evident next to the fly wire screen on the left hand side.

380. Mr Campbell agreed with all the items except the location of the heating floor register and the gap to the mirror. Dealing first with those items, I am not satisfied that there is any problem with the location of the heating register. It was acknowledged during evidence that the location of these registers is largely

dependent on the location of the floor framing below. In addition, I accept Mr Campbell's evidence that the positioning is reasonable. In regard to the mirror, that was installed by the Owners' own contractor and so any problem with installation was not the fault of the Builder, the mirrors having been taken out of the Contract together with the cabinetry.

381. The grout was assessed at $390 by Mr Lorich and $130 by Mr Campbell. There are other areas where the same repair has to be undertaken. I will allow $250 for that. I will allow Mr Lorich's figure of $35 for the gap to the door which is very similar to Mr Campbell's figure, and the gap to the fly wire is agreed at $65.

382. The major item is the failure to install proper flashing for the bath. To rectify that requires the removal of the bath. Mr Lorich allowed $1,360 and Mr Campbell allowed $820. Both experts justified their figures during evidence and after considering what they said I will allow $1,200. The total of these is $1,550. With margin and GST, that becomes $2,216.50.

Unit one interior – Item 12 - first-floor family room $1,101.10

383. Mr Lorich said there was poor plaster and paint finish evident to all wall joints, the television antenna point was not connected, the cupboard unit had a warped door with uneven margins, the internal wall finish had minor blemishes and the privacy screen outside the east facing window was starting to rust. He also pointed out that the window sash hit the privacy screen when opened. He assessed a total of $1,287 to rectify these items.

384. Mr Campbell said that, from a normal viewing position there were some very minor paint blemishes but he did not make an assessment of the cost of rectification. He said that he agreed the door was warped and he agreed on the TV antenna point but said that he was unable to identify internal wall finish defects within the cupboard from a normal viewing position because, he said, there were household goods stored within it. He said that the positioning of the privacy screen was a design issue although he agreed that it was corroded.

385. Reference was made to the photographs and I am satisfied that the defects claimed are made out save for the absence of a restrictor which Mr Paterson said was fitted. I will allow Mr Lorich's figures for the other items, which total $770. With margin and GST, that becomes $1,101.10.

Unit one interior – Item 13 - toilet room $460.46

386. Mr Lorich said there was poor plaster finish to the ceiling and walls, the top grouted edge of the tiles was uneven, the tiling itself was uneven on the left-hand side of the vanity and on the opposite wall and the privacy lock to the door was inoperable.

387. Mr Campbell agreed with these items although he assessed slightly reduced rectification costs. Considering the various similar items of work to be undertaken together with these, I shall allow Mr Campbell's assessments, which total $322. With margin and GST, that becomes $460.46.

Unit one interior – Item 14 - bedroom 2 $421.85

388. Mr Lorich said that there was poor plaster jointing evident, the television antenna point was not working, the robe doors had an uneven margin, the wardrobe fit out was of poor quality and the window winder was not working properly. He assessed a total of $1,570 for these items, the largest being for the robe fit out.

389. Mr Campbell said that he could not detect any problems with the plaster jointing although the natural light was poor at the time of his inspection. He agreed with the TV antenna and said that the robe doors needed to be adjusted. He did not agree that the interior robe was of such poor quality that it required replacement and so he made no allowance for that, although he did allow $145 to tidy up what was there.

390. On this item, since no specific value has been included in the valuation for the robes I prefer Mr Campbell's evidence both as to the robe and $75 for the television point. The total then becomes $220. With margin and GST, that becomes $421.85.

Unit one interior – Item 15 - bedroom three $361.79

391. The complaint here is about inconsistent heights of the power points from the floor, a gap in the fly screen, a heating duct said to be in the wrong position, a television point not working and poor quality wardrobe set out.

392. I am not satisfied that inconsistent heights of the power points from the floor is a defect, particularly in this case, where the Owners were directing the electrician where to locate services.

393. Mr Campbell agreed that the fly screen required adjustment and I think that his figure of $32 is more reasonable for a simple adjustment item than Mr Lorich's figure of $65.

394. I accept Mr Campbell's evidence that the heating duct is not in the wrong position, I accept his overall assessment for this item of $253 which includes $75 to connect the television point.

395. As with the previous item, since no specific value has been included in the valuation for a robe for this room, I cannot find that the overall value of the work should be reduced on account of the standard of the robe that was supplied. The amount to be allowed for this item is therefore $253. With margin and GST, that becomes $361.79.

Unit one interior – Item 16 – garage $2,130.70

396. There is a small gap above the garage door between the cornice and the plasterboard, the plaster joints in the ceiling are visible and require sanding and repainting, the garage floor was discoloured and required painting and the articulation joints had not been caulked.

397. There was not a great deal of disagreement on these items. I accept Mr Campbell's evidence that the gap over the door will be attended to with the ceiling and does not warrant a separate costing. There is some divergence between the experts as to the cost of sanding the joints and repainting the ceiling.

I shall allow $500. The experts agreed that $900 was reasonable to paint the floor of the garage and I accept Mr Lorich's evidence that the control joint needed to be caulked at a cost of $90. The total of these items is $1,490. With margin and GST, that becomes $2,130.70.

Unit two external – Item 1 - deck at rear $1,001.00

398. Mr Lorich said that the cedar timber panels next to the roof light require sanding and the paint finish to the bi-fold doors and timber trim was poor.

399. He assessed $150 to sand and repaint the cedar panels and $600 to paint the bi-fold door. Mr Campbell agreed with the sanding to the cedar panels but said that should only cost $62. The difference appears to be an allowance that Mr Lorich made in case the panel should become damaged. I will allow $100 on this item.

400. Mr Campbell was unable to comment on the bi-fold doors because they had been repainted by the time he arrived. I accept Mr Lorich's evidence that they needed repainting and accept his assessment of $600. The total this item is therefore $700. With margin and GST, that becomes $1,001.00.

Unit two external – Item 2 - roofing

401. This item is dealt with separately above.

Unit two external – Item 3 – gas/air-conditioning commissioning

402. This item is dealt with separately above.

Unit two internal – Item 1 - garage/store $200.20

403. Mr Lorich said that the door of the electrical circuit subfloor jams and that the ducted vacuum unit was not fitted off. He also suggested that the store room subfloor trapdoor should be hinged. His assessment for the switchboard door was $75 as against Mr Campbell's figure of $37, his assessment for the ducted vacuum was $85 against Mr Campbell's figure $75 and for putting hinges on the trapdoor Mr Lorich's figure was $70 as against Campbell's figure $45.

404. It was disputed whether the trapdoor required hinges and I am not satisfied that that was a contractual requirement. On the other two figures I shall allow $140. This is incomplete work but the valuation is on the assumption that the work is complete and so it must be allowed. With margin and GST, that becomes $200.20.

Unit two internal – Item 2 – laundry $673.00

405. There was a complaint here about a bowed tile. The tiles were supplied by the Owners and the bowing is a feature of the tile they selected. It was agreed between the experts that the door was not plumb and there was a minor difference in the assessment to repair it. I will allow $510. The complaint about the cover plates on the wall is not made out as they were purposely installed to conceal junction boxes.

406. There is a complaint about the hot and cold washing machine rough-in not being completed, in that the isolation taps for the washing machine were said to be

absent. It transpired during the inspection that special taps were fitted that operate to isolate both the trough and the washing machine taps. Mr Lorich suggested that this was an unsatisfactory arrangement but it was not suggested that it was in breach of either the Contract or the Code. I am not satisfied that this is a defect. With margin and GST, the allowance on this item becomes $673.00.

Unit two internal – Item 3 - lounge room $1,122.55

407. There was a chip out of the bi-fold door which Mr Lorich and Mr Campbell agreed should be assessed at $55. There was a gap either side of the fly wire screen that Mr Lorich assessed at $65 and Mr Campbell assessed at $33. Marks on the ceiling required painting out, which Mr Lorich assessed at $200 and there is some completion work to be done for the return air for the heating and cooling system under the stairway which Mr Lorich assessed at $380 and Mr Campbell assessed at $255. The final item in the lounge room is the connection of the television point which Mr Lorich assessed at $85 and Mr Campbell assessed at $75. I accept Mr Lorich's costings on this item and the amount of $785 will be allowed. With margin and GST the allowance becomes $1,122.55.

Unit two internal – Item 4 - the Cellar $5,219.66

408. There are two defects alleged. There is a spiral metal staircase down to the cellar with a steel handrail. The handrail was placed so close to the wall of the Cellar at one point that people going down the stairs could not fit their fingers between the rail and the wall. The other defect is some cracking of the sandstone tiles where the wine racks were fitted.

409. Mr Campbell said that the handrail had been replaced before his inspection so he was unable to comment. He assessed an amount of $212 to replace some tiles that had come off the wall, although that was not the defect complained of.

410. Mr Lorich allowed a figure of $2,700 for the handrail which he was told the Owners had spent in having it replaced. He assessed $600 to make good the cracking to the walls. Apparently there are leftover sandstone tiles available to replace those that have cracked.

411. There are a number of items of allegedly incomplete work. These are:

    (a) the perspex or glass lift-up door was not installed and the electricity was not connected;

    (b) the balustrade was not fitted to the opening;

    (c) the painting work to the metal work is incomplete;

    (d) blue stone floor tiling was not completed;

    (e) the pump in the cellar floor was not fully installed;

    (f) the floor lighting was not completed; and

    (g) a final sealing of the timber treads on the staircase was required.

412. For these he allowed prime cost figures of $5,000 for the glass door and $1,000 for the balustrade for the opening. He allowed $170 to connect the pump, $680 to connect the floor lighting, $300 for the painting and $3,900 for the tiling. Of these, the only figure assessed by Mr Campbell was for the painting.

413. The first task here is to assess which of these items have been included in Mr Pitney's valuation. Any that have been must be complete and free from defects. The cost of rectification of any defects and completion must be deducted from any allowance that Mr Pitney has made.

414. The perspex or glass lift up hatch, described in the valuation as a "pit cover", is stated to be supplied by the Owners. The floor lighting included in the valuation is described as two uplights recessed into the slab at $325 each. If the work is incomplete in that respect I cannot deduct any more than Mr Pitney has allowed.

415. The power was initially connected to the motor but it was then disconnected in order to prevent access to the cellar so that a conditional occupancy permit could be obtained for the benefit of the Owners. In these circumstances it is not appropriate to make a deduction with respect to the cost of reconnecting it. The same can be said for the sump pump which was temporarily disconnected and would have been reconnected had the Owners not wrongfully excluded the Builder from the site. The Builder had incurred the expense of connecting it in the first place and should be allowed that cost.

416. The balustrading referred to in the valuation is the handrail, not the balustrading later supplied around the opening in the kitchen floor. The floor tiling of the cellar has not been included in the valuation

417. I accept that the handrail of the spiral staircase was defective. The figure of $2,700 seems a great deal to spend to alter the handrail in the manner described. It is not a figure that Mr Lorich has assessed but rather, an amount the Owners claimed to have spent to alter it. Nevertheless, the quotation and invoice have been produced and so the amount must be allowed. That amount includes margin and GST.

418. The other figures to be allowed are $600 for replacing the cracked tiles, the $212 assessed by Mr Campbell to replace the tiles that came off the wall, the valuation figure of $650 for the floor lighting and the $300 assessed by Mr Lorich for the paintwork to the treads of the staircase. These total $1,762 which, with margin and GST becomes $2,519.66. When that is added onto the figure for the hand rail the total allowance on this item becomes $5,219.66.

Unit two internal – Item 5 – kitchen $922.35

419. The defective works alleged are paint splashes on the two-pack finishes to the cabinets, the range hood being 2 mm out of level and the cornice and plaster joints being poorly executed.

420. There was general agreement about the items. Apart from the range hood the only substantial item, which was the cornice and plaster, had been rectified by

the time Mr Campbell got there. On this matter I accept Mr Lorich's assessments, which totalled $645.00. With margin and GST it becomes $922.35.

Unit two internal – Item 6 – scullery $302.50

421. The complaint here was that the paintwork was poorly carried out, there were paint splashes on the Caesar stone bench tops and there was a gap to the right-hand side of the door. Again, these matters had been attended to before Mr Campbell arrived, save for the door which he said required only a minor adjustment. I accept Mr Lorich's assessment of $225. With margin and GST it becomes $302.50.

Unit two internal – Item 7 – bar area $1,960.00

422. Mr Lorich said that the paintwork finish to the bulkhead cornice was poor and in the passage the en-suite wall was bowed, resulting in a cornice edge of uneven width.

423. Mr Campbell was unable to comment on these matters because the unit had been repainted and the problem with the wall was no longer evident. Mr Thompson said that he thought that Mr Lorich's scope of works was reasonable. I will allow his assessment of $1,500 for both painting and repairing of the wall. With margin and GST that becomes $1,960.00.

Unit two internal – Item 8 – powder room $469.04

424. Mr Lorich said that the wall tiling was uneven, grout was missing, the privacy lock was not operational, the light switch was in an unusual location and not near the door as is good practice. He also said that floor ducting was not installed.

425. The complaint about the light switch is that it is positioned outside the powder room which Mr Lorich said was not good practice. Nevertheless, Mr Campbell said that it was not defective or non-compliant and its position was most likely dictated by design or lack of available space in the powder room for it. I also note that the Owners had considerable input into the location of switches and other electrical fittings

426. In the course of his evidence Mr Lorich reduced his figure for the tiling and grout to $300. He assessed $28 for the latch, $213 for moving the light switch and $425 for putting a heating duct in the room.

427. Mr Campbell said he was unable to locate any wall tile unevenness or missing grout and the privacy lock was operational at the time of his inspection.

428. I am not satisfied that the location of the light switch is a defect, nor is it established that there was required to be a heating and cooling duct in this room. The $300 for the tiling and grout will be allowed, as will the $28 for repairing the latch. With margin and GST the figure becomes $469.04.

Unit two internal – Item 9 – entrance $357.50

429. Mr Lorich said that the skirting of the front door was chipped, the front door lock was not operational and that there was a gap evident under the sidelight panel. He assessed the cost of rectifying the paintwork on the skirting at $25, the

cost of repairing the door lock at $50 and rectifying the gap to the sidelight at $175.

430. Mr Campbell noted that the front door lock was operational at the time of his inspection and that the other items had been rectified. He said that he thought that to rectify the door lock should take no more than half an hour but as Mr Lorich pointed out, it was uncertain what was wrong. I will allow Mr Lorich's assessment of $250 for these three items. With margin and GST the figure becomes $357.50.

Unit two internal – Item 10 – bedroom one $117.98

431. Mr Lorich said that there was a small gap evident between the skirting on the wall at the right side of the room, the window sash is not fully painted on all edges and the winder to the window was broken on the right-hand side. He assessed a total of $150 to attend to these items.

432. Mr Campbell was unable to comment on these matters because they had been rectified by the time he arrived. However he said that a window winder should cost $32.50 to refit, not the $100 that Mr Lorich had allowed. There is no evidence as to what was wrong with it or that it was anything more than a matter of adjustment. I will therefore allow Mr Campbell's figure for that which, with the $50 for the other two items makes $82.50. With margin and GST figure becomes $117.98.

Unit two internal – Item 11 – bedroom one en suite $160.85

433. Mr Lorich said that there were plaster and paintwork blemishes, he assessed $150 to complete the installation of the Velux unit and $75 to complete the towel rail. All of this is incomplete work.

434. Mr Campbell said that he allowed $37.50 for an electrician to come and connect the towel rail. The unit was incomplete and the heated towel rail was not operating. The Velux window had been completed.

435. Since the Builder's claim includes the Velux window, I should allow for the cost of completing it. Since other electrical items have been allowed I do not see why I should allow any more than $37.50 to connect the electric towel rail. This item will therefore be allowed at $112.50. With margin and GST the figure becomes $160.85.

Unit two internal – Item 12 – walk-in robe *Not established*

436. Mr Lorich said that the walk-in robe fit out was very poor. The criticisms that he made in regard to this item were the same as with the other walk-in robes in the development. Mr Lorich assessed the amount of $3,425 to replace the walk-in robe. Mr Pitney assessed it at $1,330.00 if it were to be allowed.

437. I am not satisfied that the fit out of this and the other walk-in robes was below the standard that has been allowed for in Mr Pitney's valuation of the work and so it would be inappropriate to allow the cost of removing the walk-in robe and replacing it with a more expensive installation.

438. Mr Lorich also said that there were blanking plates evident to the walls and allowed to remove them and make good the paintwork. I accept Mr Paterson's evidence that the blanking plates in the walls were to provide access to junction boxes and that their removal was therefore inappropriate.

Unit two internal – Item 13 – staircase handrail $429.00

439. Mr Lorich said there were minor scratches evident in the balustrades and the plasterwork was poorly finished to the ceiling edge. When looking up it was rough and scratched and had some minor damage. He allowed $100 to give it a sand and a recoat. In addition, he allowed $200 to attend to the plasterwork which he said was poorly finished. Mr Campbell said that he did not see any of this because it was all fixed by the time he got there.

440. Mr Pitney said that he had allowed two hours for this work whereas Mr Lorich had allowed four hours for it. Mr Pitney's figure was $155. I am conscious that only Mr Lorich has seen these defects and I think I should accept his assessment. With margin and GST the figure becomes $429.00.

Unit two internal – Item 14 – play area first floor $679.25

441. Mr Lorich said that the plasterwork was poor in various areas, that the window sashes opened onto the privacy screens and the paintwork to the window was poor quality, the cabinet at the top of the stairs was simply covered over and left incomplete and the top of the narrow window facing the driveway was not painted. He allowed $200 to attend to the plaster, $25 for the window sash opening onto the privacy screen, $150 to prepare and paint the window facing the driveway, $100 to rectify the poor paintwork and $1,500 to complete the cabinet.

442. Mr Campbell agreed on a figure of $1,500 to complete the cabinet but was otherwise unable to comment on any of these matters because they had been rectified before he got there. Mr Pitney costed the whole scope of works, including the cabinet, at $1,440.00.

443. Again, Mr Lorich saw all this before it was rectified and I think that I should accept his assessments, which total $475. The cabinet will not be allowed because it has not been included in Mr Pitney's valuation of the work. With margin and GST, the figure becomes $679.25.

Unit two internal – Item 15 – storeroom $1,018.16

444. Mr Lorich said that the flooring of the storeroom was very roughly finished. He allowed $150 to patch the flooring and $75 to paint and plaster it as well as a further $85 to fit off an electric cable. In addition, he said that there is a cost for the door to be provided which he assessed at $390 and a cover for a switch which he assessed at $12.

445. Mr Campbell said that during his inspection the storeroom was full of the Owners' belongings and he was unable to see any of the matters to which Mr Lorich referred.

446. Mr Lorich's assessments totalled $712 will be allowed. With margin and GST it becomes $1,018.16.

Unit two internal – Item 16 – bedroom two $1,212.50

447. Mr Lorich said that the ceiling joints and paintwork were poor, the ducted heating outlet was in a poor location and the wardrobe fit out was of poor quality. In terms of incomplete work, he said that the door and frame to the storage area were not installed, the fan remote was not fitted and ceiling repairs were not carried out in four locations. He allowed $450 for the plastering and painting, $990 to rebuild the robe, $170 to remove the ducted vent, $390 for the door frame and $85 for the remote for the fan. Altogether, his figures total $2,085.

448. Mr Campbell said that no plaster defects were observed by him at the time of his inspection although he acknowledged that the light was poor. He said the positioning of the heating floor register was not defective or non-compliant works. As to the fit out in the wardrobe he said that the Contract did not require a higher quality than what was provided. He said that the storage room door and frame were completed at the time of his inspection and the remote was operational. There were no ceiling issues in evidence at the time of this inspection.

449. Mr Pitney costed this work at a total of $1,590 including the refitting of the walk-in robe and the two doors to the storage areas.

450. I am not satisfied that there is anything wrong with the location of the heating vent or that any higher quality robe was required by the Contract or included in Mr Pitney's valuation of the work. I accept Mr Lorich's evidence in regard to the other matters. As to the cost of rectification, I will allow $925 which, with margin and GST becomes $1,212.50.

Unit two internal – Item 17 - bathroom $776.50

451. Mr Lorich said that one of the heat lamp globes was not working and the unit was not fitted neatly, the fan was not vented to the outside of the unit, there was some minor tiling and grout unevenness and the privacy lock had a 3 mm gap.

452. Mr Campbell said that all heat lamp globes were operating at the time of his inspection. He said that the value of such a globe was $46.50. It was not established that the fan installation was defective and he considered the tiling to be within acceptable standards. He estimated the cost of rectifying the problem privacy lock at $32.50.

453. During the inspection I climbed a ladder and saw that the fan was not vented to the outside of the unit, although it appeared that the intent was run it to a hole in the soffit or gable. This claim has already been determined with the roofing items.

454. Mr Lorich assessed the cost of opening the ceiling and venting the fan to the outside at $510 and $55 for an hour's labour in adjusting the door lock. Mr Campbell allowed $33 to adjust the door lock. I would have thought that Mr

Campbell's assessment would be sufficient for something so minor so I will allow the figure of $510 assessed by Mr Lorich and $33 for adjusting the door lock assessed by Mr Campbell. The total of $543 will be allowed on this item which, with margin and GST, becomes $776.50.

Unit two internal – Item 18 – bedroom three $78.65

455. Mr Lorich said that there was poor paint and plaster finish to the walls, the window winder was defective, there was a poor quality robe fit out and there were cover plates on the walls in the robe "for no reason".

456. Mr Campbell said that he observed no plaster defects, although he acknowledged that the natural light was poor at the time of his inspection. He said that the window winder was operational when he saw it. He said that the quality of the interior walk-in robe fit out was adequate and that the Contract required nothing more. As to the cover plates he said that he was instructed by the Builder that they were to provide access to junction boxes in the walls.

457. Mr Lorich assessed $400 for the paint and plaster defects, $1,925 to reconstruct the walk-in robe, $55 to render the winder operational and $50 on account of the cover plates. Mr Pitney assessed a figure of $1,860 on these items, the bulk of which appears to be for the robe.

458. I accept Mr Campbell's evidence in regard to the robe for the reasons previously given. Also as previously stated, I do not accept that the cover plates on the walls were a defect. I will allow $55 for the window winder which, with builder's margin and GST becomes $78.65.

Further defects alleged

459. Since completing his report of 26 May 2015, Mr Lorich has prepared a number of other reports. Some of these raise matters that he was not previously asked but others offer opinions about matters that were not picked up in his original report.

The 14 October 2015 Lorich report

460. In his report of 14 October 2015 Mr Lorich raises the following further issues:

(a) Painting $18,014.05

Mr Lorich referred to the two reports prepared by Mr Thompson from the Master painters Association and said that he has estimated the cost to repaint Unit one at $21,195 and the cost to repaint Unit two at $18,840.

Mr Campbell estimated that the cost of rectifying the deficiencies in paintwork identified by Mr Thompson in Unit one was $12,920.05 including margin and GST and that the cost of rectifying the items identified to Unit two, was $8,294.00, including margin and GST. I note that the proportion of the valuation of the project overall attributed to the paintwork was $42,883 (excluding margin and GST).

Unit two has been repainted but the paintwork in Unit one is original and although criticisms were made of some aspects, subject to those criticisms it looked to me to have a satisfactory appearance. Mr Lorich inspected both

units and provided a very comprehensive initial report and in that report he did not suggest that the paintwork was so bad that both units had to be repainted.

In essence, Mr Campbell has provided a valuation of the work needed to rectify the defects that have been identified by Mr Thompson whereas Mr Lorich has taken a blanket approach and costed repainting both units.

Mr Pitney said that to provide a further coat of paint to both units would take three painters 11 days at a cost of $17,040 plus margin and GST. Mr Lorich said that the difference between his figures and those of Mr Pitney related to a different hourly rate and the need to subtract $4,300 plus margins to take account of the allowances that he had made in his assessments for painting defects in earlier items referred to above. He said that with this adjustment the figures would be similar.

On this item I prefer Mr Campbell's opinion. I accept his figures, which total $21,214.05 inclusive of margin and GST to rectify the painting defects that were proven. From this figure there must be deducted the amounts that I have previously allowed in assessing the earlier items referred to above with respect to painting.

Mr Lorich and Mr Pitney agreed that, if I were to allow Mr Lorich's figure for repainting both units, the double up to be deducted would be $4,300. However there is no specific evidence as to the amount to be deducted from Mr Campbell's figure to avoid a double up. Doing the best I can with reference to the painting components that were included in the figures I have allowed for the individual items, I will deduct $3,200. The final allowance for defective painting is therefore $18,014.05.

(b) Air conditioning/heater

This item is dealt with separately above.

(c) Subfloor insulation *Not established*

Mr Lorich said that the subfloor insulation does not technically comply with the requirements of the Contract documents. He said that the reflective foil used as insulation has a rating of only R1.97 instead of R2.0. He said that, as the building surveyor accepted it he did not believe that a defect existed. However, since preparing this report he has suggested that, on the advice of Mr Gibney, the engineer, it is in fact defective. Mr Gibney disclaimed any responsibility for saying that it was insufficient but said that he drew it to Mr Lorich's attention. Mr Campbell said that it was not defective and I prefer his opinion.

(d) Cellar wall tiles *Already allowed*

There are two wall tiles that have come away and were leaning against the wall of the cellar at the time of my inspevction. Mr Lorich suggested that the tiles be re-glued to the wall with a full body of adhesive to make good contact. For that he assessed a figure of $534. Mr Pitney's figure was $180.

I have already allowed Mr Campbell's assessment of $220 for the same work which I think is more appropriate because there will be tradesmen replacing the cracked tiles in the cellar at the same time.

(e) Ducted vacuum system $255.00

During the installation of the water pipe to the refrigerator, a hole was drilled through the bottom plate of a wall and then, accidentally, through a pipe forming part of the ducted vacuum system which had been concealed by the underfloor insulation. This is an acknowledged defect. Mr Lorich has assessed the cost of rectification at $691.00. It was acknowledged that the scope of work was very small. The actual cost of repair appears as part of an invoice dated 19 January 2016 where the plumber charged $175 plus materials and GST. If this invoice is apportioned then the actual cost of this item would appear to be close to Mr Pitney's assessment of $255.

(f) Pump to cellar/subfloor $607.75

Mr Lorich said that the pump to drain the cellar was not connected into the stormwater system and has assessed the cost of connecting it at $440. Mr Pitney assess the cost at $410. One expert is as likely to be right as the other so I will allow $425. With margin and GST that becomes $607.75.

(g) The gate to unit one $660.00

The drawings included a side gate for Unit one which was not provided. This item has been agreed at $500. With margin and GST the figure becomes $660.00.

(h) Floor sanding $1,287.00

The floors had to be sanded in order to remove bubbles. This item has been agreed at $900. With margin and GST the figure becomes $1,287.00

(i) Velux skylight remotes *Not established*

The Owners claim the cost of obtaining remote controls for the Velux windows. Mr Paterson gave evidence that the remote controls were supplied. Since I prefer his evidence to that of the Owners this claim is not established.

(j) Downpipe blockage $308.00

The Owners paid $308.00 including GST to clear a downpipe blockage. The amount is part of an invoice dated 6 October 2015. That amount will be allowed. No margin was paid.

(k) Reseal shower wastes $322.00

Some shower wastes leaked and were repaired at a cost of $240.00. With margin and GST the figure becomes $322.00.

(l) Floor junctions $985.00

There is a slight difference in height between the polished timber floors and other floor areas which Mr Lorich said was a trip hazard. Mr Campbell

disagreed and found no defect. The reason for the height discrepancy in each case was said to be that the floorboards chosen by the Owners are only 14 mm thick. However that was the thickness of the floorboards in the specification and so this problem would have had to have been dealt with by the Builder in any event.

I think that this is an instance of incomplete work. There are five doorways in question and the rectification method involves feathering a small piece of timber in each instance. Mr Lorich's costing allowed eight hours to do that but Mr Pitney said that it should not take that long to fit only 5 m timber and has costed the work at $750. For this item, considering the small amount of work to be done, I prefer Mr Pitney's opinion and will allow his figure. With margin and GST becomes $985.00.

(m) Rear deck area *Nil extra*

Mr Lorich said that the ceiling joint finish at the rear deck area of unit one was for and requires re-sanding, filling and repainting to make good. This is taken up in Mr Campbell's painting assessment so no further allowance is appropriate.

(n) Downpipe shoes not painted Nil extra

This item is also included in the figure for repainting.

(o) Skirtings in Unit one $990.80

Mr Lorich said that the skirtings in the Unit one living room are loose on the walls. I observed this on site and I will allow the amount of $756 assessed by Mr Lorich. With margin and GST becomes $990.80.

The 19 October 2015 Lorich report

461. The first five items of this report have already been dealt with above. The remaining items were as follows:

(a) Drummy plaster in laundry $321.75

Mr Lorich said that the plaster on the laundry wall was drummy and requires additional fixing for which he assessed a figure of $225. With margin and GST that becomes $321.75

(b) Rust on privacy screens $815.00

The paint on the privacy screens has rust spots and it was not suggested that the cost of repainting them is included in the allowance for painting. Mr Lorich's figure for repainting them was $900 and Mr Pitney allowed $650. There are five screens and they will require three coats. Since one expert is as likely to be right as the other I will allow $775. With margin and GST that becomes $815.00.

The 14 November 2015 Lorich report

462. This report related to the credit to be allowed to the Owners with respect to the construction of the rear decking, porch and roof. Mr Lorich costed this part of

the work done by the Builder at $22,235.00, Mr Pitney costed it at $31,860.00 and Mr Campbell costed it at $24,027.67. Since the claim is for a quantum meruit, it is the actual value of the whole of the work and materials provided by the Builder that is relevant and there is no credit due with respect to what would have been a provisional sum item under the Contract.

The engineering evidence

463. In answer to a general question from Mr Laird, the engineer called on behalf of the Owners, Mr Gibney, agreed that, when walking around and viewing the two units, there was no indication of any form of structural failure and that both buildings looked nice from the outside. However he raised the following issues on behalf of the Owners and they were responded to by Mr Blackwood on behalf of the Builder.

(a) The spiral staircase and structural framing $2,454.65

Mr Gibney said that a significant amount of timber framing in the kitchen subfloor area around the circular staircase to the cellar had been cut away and that the existing particle board had been removed to expose the underside of the hardwood flooring. He said a series of floor joists had been totally removed to allow the support mechanism to be placed and that the mechanism was inadequately supported. He said that, without pulling off the ceiling lining or removing the floor above it was not possible to ascertain what framing had been used and whether any modifications and structural steel had been inserted in the subfloor space. In his evidence he said that the framing around the mechanism was incomplete and that there was significant work to do.

Mr Blackwood agreed that some of the framework needed attention but said that it was only a couple of square metres that needed to be addressed and that it would only require a couple of hours work for a carpenter. Mr Gibney said that the torsional loads of the hatch were taken by the floor but Mr Blackwood pointed out that the mechanism was bolted to the core filled block work walls and that the majority of the load went into the block work. The photographs produced confirmed that, at least one side of it was connected to the wall.

Mr Gibney pointed to a loose screw but there was a dispute as to whether it was in that condition when the Owners took possession of the site. Certainly, when I inspected it the mechanism worked satisfactorily but it appears that some work was done to the floor after the Builder left the site and both before Mr Gibney's inspection and between then and the time of Mr Blackwood's inspection. The state of the floor at the time the Owners took possession of the unit is impossible to assess with any confidence because others have worked on it in the meantime. That is always the problem when rectification work has been carried out before all parties have had the opportunity to have the site inspected and recorded by an independent expert in the state the Builder left it. The earliest experts' report that I have does not mention these matters.

In considering the structural capability of the floor, Mr Gibney had assumed that the strip flooring was a floating floor placed over the underlying yellow tongue sheeting. However Mr Paterson was recalled and he gave evidence that the strip flooring was in fact glued to the yellow tongue below it.

On this state of the evidence I am satisfied there is some work to be done by a carpenter but that it is not as extensive as Mr Gibney initially believed. As to the scope of rectification, I prefer Mr Blackwood's opinion.

Mr Gibney said that he was informed that the metal component supporting the access lid to the cellar had cracked and had to be replaced. That had already been done by the time the experts saw it. The Owners paid $481.25 to replace the metal component that is claimed to have cracked and failed.

In her witness statement, Mrs Mann said that the Owners also paid $2,906, to their landscaping contractor, Four Seasons Landscaping & Paving, in respect of "necessary rectification works" to the cellar but in the absence of some evidence as to what was done, the reasonableness of the amount charged and whether it was to address an identifiable defect, no claim for that sum is established.

Mr Gibney suggested that the spiral staircase was only tack-welded to the surrounding collar. Mr Blackwood disagreed. I was shown photographs by the experts and I had a careful look at it on site. I saw one tack weld but I also saw the areas that Mr Blackwood pointed out which he said were proper welds. I prefer Mr Blackwood's opinion and I accept that the welding is sufficient and that no further work is required in regard to that. Apart from the cost of the welding, the major consequence of that, and the finding in regard to the floor structure, is that the ceiling of the cellar does not have to be removed in order to carry out the limited scope of works that are required to the subfloor.

In regard to the rectification of the cellar opening I accept the opinion of Mr Blackwood and the costing of his scope of works of $1,380 which, with margin and GST, is $1,973.40. In addition, the amount paid by the Owners of $481.25 will be allowed, making a total figure for this item $2,454.65.

(b) <u>The boundary wall</u> $3,732.30

A note on the plans required that retaining walls below ground level be tanked. The wall on the eastern boundary forming part of Unit two is a cavity brick wall that has not been tanked. It is also not been core filled, which Mr Gibney said was necessary. He said that the cavity should be filled with concrete with a waterproofing admixture in it. Mr Blackwood agreed that the cavity should be filled but said that there was no requirement for base brickwork to be tanked.

In his report of 10 June 2016, Mr Lorich costed the rectification of the boundary wall, only with a much wider scope of works that I have found is warranted. From his calculations in Attachment 'B' to this report, I find

that the cost to fill the cavity with mortar is $2,610 which, with builders margin GST becomes $3,732.30.

(c) The eastern wall *Not established*

Mr Gibney said that the wall within the property should also be tanked because it is below ground level. Mr Blackwood said that tanking a subfloor is not common practice and there was no requirement that this wall be tanked. Mr Gibney suggested the possibility of edge heave if there should be any water penetration into the soil beneaththe footing. Mr Blackwood pointed out that the wall is supported on piles because of the angle of repose of the walls of the cellar. On this state of the evidence I am not satisfied that it has been demonstrated that this wall needs to be tanked.

It was not suggested that the masonry code requires such a wall to be tanked. The general note on drawing A00 to which Mr Gibney refers relates to requirements for waterproofing. It deals with internal wet areas, balconies, perimeter floor drains and other applications that one would expect to be waterproofed and then states that for "retaining walls and walls below ground level" a named waterproofing agent is to be installed.

Mr Gibney interpreted that as meaning that any wall at all that was below ground level needed to be tanked which would have included all base brickwork. As a matter of interpretation, I think that the note provides the manner of waterproofing that is to be adopted for retaining walls and walls below ground level where those walls need to be tanked but it does not intend to impose a requirement that all walls below ground level necessarily need to be tanked. As a consequence I prefer Mr Blackwood's opinion.

There was a dispute between the two engineers as to whether this wall needs to be tanked. Mr Blackwood pointed out that the site slopes to the rear boundary and that as a consequence, water will not pond against the wall. Mr Gibney pointed to a photograph showing dampness on the inside of the wall but it appeared that the bricks in the photograph were sitting on the strip footing so that if anything were to be tanked it would only be the bottom one or two courses. Mr Blackwood said that when he was under the floor he found the ground was dry. Mr Gibney said that he found that it was wet. I am not satisfied that it has been demonstrated that this wall will need to be tanked.

(d) An additional stump *Not established*

Mr Gibney suggested in his report that a prop under the floor should be replaced with a proper stump. It appears however that it was a piece of timber left there by mistake. It is non-structural and can simply be removed. Mr Gibney agreed in evidence that an additional stump was not required.

(e) The floor joists *Not established*

There was an area where some floor joists were notched over bearers, which Mr Gibney said was structurally inadequate. He said that it might involve about six or seven joists. In forming his opinion, Mr Gibney assumed that the joists were 90 mm x 45 mm but Mr Paterson said that in fact they were 140 mm x 45 mm.

Mr Blackwood said that it was a standard joist carrying a small amount of load and he would imagine that it is almost certainly not going to be a problem. He said that it was quite common to notch joists a small amount over bearers and that a 90 mm joist would definitely work. Both engineers said that calculations would be required but none were available at the time. Mr Gibney said that if it were a 90 mm joist and it were checked, it would not work as a continuous joist but Mr Patterson's evidence is that it is a 140 mm joist. I am not satisfied that a defect has been demonstrated.

(f) Base brickwork *Not established*

Mr Gibney pointed out that some of the internal bricks in the base brickwork were wire cut bricks lying on edge. He did not say that there were structurally inadequate for the task but he said that they this was not in accordance with the Code. Mr Blackwood said that they were very lightly loaded and there was no problem. Since this is base brickwork and it is structurally sound I am not satisfied that it has been demonstrated that there is a defect.

(g) Protective board around the cellar *Not established*

Mr Gibney produced a photograph to the effect that the protective board has moved away slightly from the tanked wall of the cellar. He acknowledged that it was "a fairly minor thing" but said that the board should be continuous to protect the tanking. It was acknowledged that there were no signs of the membrane having been breached and no indication that any of the scoria has fallen down between the protective board and the wall.

Mr Blackwood acknowledged that it is possible that, over time, pieces of scoria could fall down between the wall and the protective board and could penetrate the membrane but he also pointed out that there was a drain at the bottom of the outside of the wall connected to a pit, designed to take away any water and that there was also the scoria to direct water away from the wall. He said that the photographs show a very wide scoria section which water would have to somehow get through. Since this is apparently a fairly minor thing and there is no evidence that there is in fact any scoria between the board and the wall I am not satisfied that a defect has been demonstrated.

(h) Front retaining wall *Not established*

At the front porch area of unit two there is a low brick wall of a few courses of bricks separating the porch from the driveway. The height of the driveway is above the height of the porch and it is suggested that water is penetrating through the wall. Water tests by the experts show that the fall of the concrete

of the driveway is away from the wall and so it directs surface water away from the wall but Mr Gibney said that the issue is not just surface water but rather, water in the soil behind the wall because the wall is not tanked.

Mr Gibney said that a segment of concrete in the driveway should be cut out and the wall should be excavated to the base of the footing and be tanked and backfilled and a trenched grate should be put around it to pick up any surface flows.

I asked about the wall of the unit which this low wall abuts, which is also not tanked. Mr Paterson said that there was an agricultural drain there. If there is an agricultural drain and I do not understand why there would be any sub-soil water to be concerned about.

Reference was made to efflorescence said to be on the bricks. Mr Blackwood said that he could not see any. A faint white mark on a brick was pointed out to me on-site that might have been efflorescence but it was too faint for me to be sure what it was. Mr Gibney acknowledged that there was no efflorescence in the mortar.

Mr Blackwood did not agree that there was any requirement for a trench drain for this section of wall. He said that the whole area was covered by a roof and that all the water went into drainage. Since there are agricultural drains behind the wall to take away any subsoil moisture and the driveway is graded away from the wall I am not satisfied that it has been demonstrated that this wall should have been tanked.

(i) The jack joists *Not established*

Mr Gibney said that one of the joists above the cellar is acting as a beam rather than a joist. He said that the joists run parallel across the cellar and then one of them picks up the jack joists spanning at right angles to it.

Mr Blackwood said that these joists are cantilevered and the connection was made to avoid any local differential movement. He said that the fact they were joined did not mean that they were not cantilevered.

Mr Gibney agreed that, as a cantilever, the jack joists would have sufficient capacity but he said that as soon as you fix them to another member they are not a cantilever anymore. I find it difficult to understand why the floor structure would be sufficient if the joists were unconnected and yet deficient simply because they were connected. I prefer the opinion of Mr Blackwood because it appears to me to make more sense.

The 11 April 2016 Lorich report

464. This report dealt with the following two alleged defects:

(a) Cellar ceiling

This matter is dealt with in part (a) of the last paragraph.

(b) Void under the rear of the Unit two garage floor slab *Not established*

There is an opening at the rear of the garage to Unit two. According to the plans there were to be mass concrete steps formed in this location but the landscaping was excluded from the Contract. There is a small void under the edge of the slab that Mr Lorich said was due to the absence of a retaining wall, allowing some washing and falling away of the underlying gravel and sand fill. He said that rectification will require the construction of a concrete formed edge to act as a retaining wall and he has assessed the cost of that, including margin and GST at $2,337.00. Mr Campbell costed rectification $1,523.00 including margin and GST.

This matter was not identified as a defect in Mr Lorich's initial report. Mr Campbell agreed that the face edge of the slab is not neatly finished but said that there is no evidence showing any subsidence or erosion. He said that the landscaping of the area behind the rear of the garage remains incomplete and the matter is purely aesthetic.

The complaint is really about the absence of a retaining wall but the construction of such a wall was not within the Contract scope of works. I think that the Builder was entitled to assume that the area would be landscaped in accordance with the plans by the Owners. It seems to me that if that had been done the escape of the underlying gravel and sand fill could not have occurred. I note that no landscaping has been included in Mr Pitney's valuation of the work. Since the construction of the steps in accordance with the plans was the responsibility of the Owners I do not find that the construction was defective.

The 21 June 2016 Lorich report

465. This report deals with the following additional alleged defects:

(a) Door - wall junction outside powder room $1,414.00

Mr Lorich said that there was a bow in the wall around the corner from the powder room. The wall has been straightened but the acute angle of the skirting board is noticeable. Mr Lorich proposes to strip off the architrave and skirting, pack the plaster out and refit and repaint. Mr Campbell said that only the skirting needs to be removed which he costed at $303.73 with margin and GST.

I prefer Mr Lorich's opinion and will allow his figure of $1,080.00. That figure includes painting but this item is not included in Mr Campbell's painting assessment and so there should be no deduction. With margin and GST the figure becomes $1,414.00.

(b) Walk-in robe and door- bedroom one $1,050.00

The two architraves were not quite at the same level although the difference is not easy to see. When Mr Campbell put a 2 metre level on them they appeared to be level. Mr Lorich said that that was because they were level in the centre. Mr Campbell said that there was a slight kick in

the left-hand side and that it would only be necessary to adjust the architraves. Mr Lorich said that it was unsightly and would require demolition of the door to the walk-in robe unit as well as the inbuilt robe shelving and the removal of plaster linings. Mr Lorich has reduced his costing of this item to $800 for one side only. I accept that assessment. He indicated that he was prepared to reduce it further to take account of the painting but that seemed to be on the basis that I allowed his costing for repainting the unit and I have not done that so I should allow the whole $800. With margin and GST it becomes $1,050.00.

(c) Robe drawers and shelving - bedroom one *Not established*

This is an addition to Mr Lorich's earlier assessment of the cost of replacing the drawers and shelving because, he said, some very expensive quotations had been received by the Owners. Since I have not allowed this item in the first place there is no allowance to increase.

(d) Brickwork repair and loose trim $193.05

There were holes in the brickwork from where the heating system was relocated. There is also a loose piece of material to be removed. This was agreed at $135. With margin and GST that becomes $193.05.

(e) Control joint and trim $243.10

There is a small piece of trim hanging off the bottom of a window upstairs and an articulation joint needs to be caulked. Mr Lorich has assessed a gross cost of $1,705 for this item, $1,200 of which is for a scaffold. It was acknowledged that, if the roofing items are to be allowed, that figure can be saved because the roof will be scaffolded already. As a result, I can remove that from the calculation which reduces Mr Lorich's assessment to $505. It was also suggested that it might be possible to do the job from the window. On this item I accept Mr Pitney's assessment of $170 which, with margin and GST becomes $243.10.

(f) Leaking tank and the patio *Not established*

Mr Lorich said that when he was there, the area around the tank was flooded. It appears that it was necessary for it to be installed with flexible connections. The tank holds 2000 litres and is seated on crushed rock.

Mr Campbell said that he found a small amount of water there but found that the pump had been disconnected and that the water appeared to come from where the pump had been.

According to Mrs Mann's witness statement, the toilets were blocking up and they suspected that the filtration and pump system were not working properly. I do not have enough evidence to find a defect in regard to this item.

(g) Subfloor insulation *Not established*

This issue has already been dealt with. I am not satisfied that the insulation used is insufficient.

Further claims by the Owners

466. In updated particulars of loss and damage dated 7 October 2016 the Owners made a number of further claims. The following claims were based upon the Contract and, because I find that the Owners repudiated the Contract and the Builder brought it to an end by accepting that repudiation, these claims are not available. They are:

(a) Liquidated damages of $8,500.00;

(b) Rental of $24,500.00 for alternative accommodation while Unit two was completed;

(c) Storage costs of $4,611.90;

(d) Removalist's costs of $3,072.50;

(e) Security company to secure premises before the Owners moved in of $426.44;

(f) Loss of six weeks' rental for Unit one until 26 May 2015 while it was inspected by Mr Lorich and while some rectification work was carried out. The Owners had possession of Unit 1 from 18 March, which was well before the termination of the Contract. It is not established on the evidence that the period between handover and contract termination was insufficient to rectify the minor matters referred to in paragraph 235 of Mrs Mann's first witness statement.

(g) Various prime cost and provisional sum adjustments totalling $44,327.20.

467. Other amounts are claimed to have been paid by the Owners to various suppliers and tradesmen to rectify things said to have been wrong with the work. Insofar as these are contractual claims, they cannot be brought. However insofar as they relate to defective workmanship and can be said to have reduced the value of what the Owners have received, as valued by Mr Pitney, they should be allowed. These amounts are said to total $102,326.13. The particulars are as follows:

(a) Repairs to stormwater pit and blockage in Unit one shower wastes and the shower tap in Unit two $676.50.

This has already been dealt with and allowed.

(b) Repairs to plaster in Unit two by Mr Frogley, $3,718. *Allow $300.00*

The invoice and proof of payment have been produced and the invoice contains some detail but insufficient to determine what should be allowed. The plastering over of the power point blanks seems to have been a substantial item but the evidence established that this should not have been done. The only one of the items of work that was referred to in expert evidence was the straightening out of the plaster wall near the powder room

in Unit two but although this was referred to in connection with the powder room, no evidence was given as to how much that work should reasonably have cost. Nevertheless it ought to have cost something and doing the best I can I will allow $300.00. Since this was done by someone hired directly by the Owners there was no margin.

(c) Basin plumbing service $594.00 *Allow $400*

This was with respect to undetailed repairs to a shower screen and sink in Unit one and a mixer tap and sump pump and commissioning of the gas appliances and the water connection to the fridge in Unit two, all for a total cost of $594 including margin and GST. The connection of the sump pump has already been disallowed and the other items in regard to Unit two are probably completion items. However since I am allowing the value of the completed work then the cost of commissioning the appliances should be allowed.

It is impossible to ascertain how this invoice should be apportioned but doing the best I can I will allow $400.00 for the remaining items.

(d) Spiral staircase balustrade $2,695.00 *Allow nil*

This is already been dealt with and allowed

(e) Missing window latches $50.00 *Allow nil*

This is already been dealt with and allowed.

(f) Supply/replacement of remote controls $950.00 *Allow nil*

This is already been dealt with.

(g) Heating/cooling repairs $1,245.00 *Allow nil*

There was a report from a contractor called Coldflow dated 15 May 2015 that makes some criticisms of the installation and recommendations for improvement. There is an invoice for $750 for replacing the "condensate kit, flue, thermister and vent" but no expert evidence to the effect that this resulted from any defect. I cannot find any evidence to substantiate the balance of this amount. It appears to have been a charge made for inspecting the system rather than rectify any defect.

(h) Paintwork to front fence $1,630.76 *Allow nil*

The valuation of the work did not include paintwork to the front fence and so there is no allowance that needs to be reduced.

(i) Repainting of Unit two $35,484.48 *Allow nil*

This is already being considered above.

(j) Electrical repairs Dean Mack $3,700.00 *Allow $50.00*

This claim is supported by a detailed invoice dated 17 June 2015. It shows that virtually all of this work was for substantial upgrades to what had been provided by the builder. No expert evidence has been led to the effect that

any of this work was done in order to rectify any defect and that does not appear to be the case on the face of the invoice. The only allowable item is the connection of the wall oven and no separate charge has being made for that in the invoice. In the absence of any evidence as to an appropriate allowance I will allow $50.00. This item is allowed because Mr Pitney's valuation assumed that the oven would be connected.

(k) Replacement hinges $65.85 *Not established*

All I have in support of this claim are two cash register invoices from Bunnings but I have no explanation of why the hinges were required. This claim is not established.

(l) JA Fullerton floors $460 *Allow nil*

According to the invoice, this is for sanding and coating the flooring in Unit two. That complaint has already been dealt with and allowed.

(m) Faulty bi-fold door seals $137.50 *Allow $137.50*

This was for the provision of four bi-fold door seals on 30 July 2015 to replace those that had been painted over. That amount will be allowed.

(n) Replacement of air-conditioning unit $8,130.00 *Allow nil*

This is a claim for the split system air-conditioner the Owners purchased for Unit one because they claimed that the system installed by the Builder did not have sufficient capacity. This has already been considered above and rejected for the reasons given.

(o) Defective vacuum system $1,433.00 *Allow nil*

This claim comprises a service call on 30 October 2000 of $198 including GST to locate the cause of the low suction in the pipe. An amount of $130 was subsequently paid to the supplier. I have no evidence to explain the balance of the claim. This claim has already been allowed above.

(p) Landscaper $4,950.00 *Allow nil*

Landscaping was not included in Mr Pitney's valuation of the work, perhaps because landscaping was excluded from the scope of works under the Contract. The total paid to Mr Korke, the landscaper, was $9,900.00. In paragraph 400 of Mrs Mann's witness statement in reply, she says that his invoice included charges he had made for assisting the Owners to identify defects and for liaising with experts. She acknowledged that some of that was not appropriate to claim from the Builder in this proceeding and so the Owners only claimed half of the amount they paid him. This seems a rather arbitrary claim without any expert evidence to establish that it represents a loss the Owners have suffered as a result of any defect in the work and materials that Mr Pitney has valued. There does not seem to me to be any basis for reducing Mr Pitney's valuation on this account.

(q) Seal/paint garage Unit one $310.00 *Allow nil*

The sealing and painting of this floor was excluded from Mr Pitney's valuation. He only made an allowance for sealing and painting the garage floor of Unit two. There is therefore no figure to reduce.

(r) Access gate Unit one $540.00 *Allow nil*

This item has already been allowed.

(s) TV antenna Unit one $339.50 *Allow nil*

This item has already being allowed.

(t) Cellar Bluestone tiles $4,290.00 *Allow nil*

This item has already being considered and rejected.

(u) Balustrade to cellar opening $2,970.00 *Allow nil*

This item has already being considered and rejected.

(v) Seal spiral staircase treads $660.00 *Allow nil*

This item has already been allowed.

(w) Cellar hatch works $481.25 *Allow nil*

This item has already been allowed.

(x) Glass balustrade $4,200.00 *Allow nil*

This was the balustrade for the alfresco area in Unit two that the Owners installed when they took possession of the site. The contract documents did not provide for the installation of a glass balustrade and no allowance for that cost was included in Mr Pitney's valuation of the work. Accordingly, there is nothing to be deducted on this account.

(y) Retractable fly screens bi-fold door $2,501.40 *Allow nil*

These have not been included in Mr Pitney's valuation. All that he has allowed for are screens for the windows.

(z) Velux in stairwell – remote & programming $734.80 *Allow nil*

This item has already being considered and rejected.

Additional claims

468. Apart from alleged defects and incomplete work, the Owners claim the following further sums:

(a) Tim Gibney & Associates $1,815.00 *Allow nil*

According to Mrs Mann's witness statement, part of this claim relates to Mr Gibney's charge for the certification of the retaining wall and the rear fence and part relates to advice that he gave them in regard to the operating mechanism of the cellar hatch.

In paragraph 236 of her first witness statement Mrs Mann refers to an invoice from Mr Gibney dated 11 June 2015. I have found Mr Gibney's certifications of the design and construction of the fence and retaining wall which bear that date in the Tribunal Book but I cannot find any invoice from him to show me how this amount is divided.

It is apparent from the certification that both the design and the construction of the fence and retaining wall that was erected by the Builder were sound and no defect is suggested. In discussions with the Builder at the time of construction the Owners undertook the responsibility of attending to any requirements of the Council and also, obtaining any permits that might have been necessary. That would have included any certifications the Council might have required.

As to advice given by Mr Gibney in regard to the cellar hatch mechanism, that might have been a disbursement to be included in any claim for the costs of this proceeding but there is no evidence establishing that it is an amount claimable against the Builder by way of damages or reduction of the valuation of the works.

(b) Heather Coppens $7,548.75 *Allow nil*

This amount was said to be the cost of preparing the as-built plans. Since these were the necessary result of Owner variations I do not think that this was payable by the Builder. The Contract was also determined before the expense was incurred and it is now at an end. I cannot see any contractual basis for this claim and the cost of preparing such plans has not been included in Mr Pitney's valuation so I cannot see any reason to deduct it from his valuation.

(c) Proteck building surveying $1,650.00 *Allow nil*

This was said to be the amount charged by the building surveyor for carrying out further inspections and issuing a conditional permit on 1 September 2015. Again, this expense was incurred after the termination of the Contract and there is no evidence establishing that it is an amount claimable against the Builder.

(d) Whitehorse City Council $102.00 *Allow nil*

This amount was said to have been charged by the Council for a secondary consent on 21 June 2015. It was after the Contract came to an end and there is no evidence establishing that it is an amount claimable against the Builder.

(e) DT Electrical & Data $750.00 *Order to produce*

According to Mrs Mann, the Owners have obtained a quotation from a company, DT Electrical & Data, of "approximately $750" in order to provide a certificate for the solar panels that the Builder installed so that they would be able to claim a solar rebate. It does not appear that any such

expense has been incurred to date. She said that the Builder gave the Owners no paperwork relating to the installation.

Mr Paterson said that the Owners never requested any solar power paperwork. He said that other certificates, which were requested, were provided to them through their solicitors. In the Tribunal's order of 18 August 2015, there is a list of certificates that the Owner's solicitors had sought and the Tribunal ordered the Builder to provide them if they were in its possession. It appears that these were provided.

There is no clear evidence as to what the documents that are sought would be. I think the appropriate course is to make an order that any certificates relating to the solar panels that the Builder installed that are in its possession or control must be provided to the Owners.

(f) Matthew Shepard Plumbing $1,520.00 *Not established*

Mrs Mann attached to her witness statement in reply, a letter from a plumber, Matthew Shepard, quoting an amount of $1,520 for a scope of works directed to replacing the pump from the water tank to the toilets, installing a filtration system, installing a pump cover with a sound deadening cover to eliminate noise and commissioning the new pump to the toilet system. There is no accompanying report from Mr Shepherd to explain why this work is necessary and he was not called to give evidence.

Mrs Mann said that the Owners had experienced blockages and Mr Shepherd had told her that the reason was that the pump and filtration system from the tank were defective. There is no expert evidence to establish that is the case. In his opening, Mr Hellyer said that the Owners had to pay $583.00 to rectify the toilet. He said that the tank had been disconnected from the toilets because they kept "blocking up".

Mr Paterson said that he tested the toilets before he left the site and that they were all working. He said that any adjustment would have been a maintenance item. Mr Laird complained that this was a late inclusion in the claim that the Builder's advisers had not had an opportunity to look at and consider.

There is insufficient evidence to establish this claim.

Repudiation

469. Underlying the approach that I have taken in determining this proceeding is the finding that the Contract was determined as a result of the Owners' having wrongfully repudiated it and the Builder having accepted that repudiation and elected to treat the Contract as being at an end. The act of repudiation was the Owners purporting to treat the Contract as having been repudiated by the Builder when that was not the case and persisting in their refusal to treat the Contract as being still on foot after the Builder offered to elect to affirm it and complete the construction.

470. It is well-established that repudiation of a contract is not easy to establish. It must be shown that the party said to have repudiated the contract has evinced an intention no longer to be bound by it or has shown that he will only fulfil it in a manner that is substantially inconsistent with his obligations (see Cheshire & Fifoot *Law of Contract* 9th Australian Edition para 21.12 and the cases there cited).

471. In *Shevill v. Builder's Licensing Board* [1982] HCA 47 Wilson J said (at para.8):

> "Repudiation of a Contract is a serious matter and is not to be lightly found or inferred: *Ross T. Smyth & Co., Ltd. v. T.D. Bailey, Son & Co*. (1940) 3 A11 ER 60, at p 71. In considering it, one must look to all the circumstances of the case to see whether the conduct "amounts to a renunciation, to an absolute refusal to perform the Contract*": Mersey Steel and Iron Co. v. Naylor, Benzon & Co.* (1884) 9 App Cas 434, at p 439."

472. The conduct said to amount to repudiation must be looked at objectively. In *Laurinda Pty Ltd v. Capalaba Park Shopping Centre* [1958] HCA 23, Brennan J. said (at para 14):

> "Repudiation is not ascertained by an inquiry into the subjective state of mind of the party in default; it is to be found in the conduct, whether verbal or other, of the party in default which conveys to the other party the defaulting party's inability to perform the Contract or promise or his intention not to perform it or to fulfil it only in a manner substantially inconsistent with his obligations and not in any other way."

473. I will consider the acts of repudiation asserted by the Owners' solicitors, first individually and then collectively.

Delay

474. It was asserted that the work ought to have completed four months earlier and that no claims for an extension of time pursuant to Clause 15.1 of the Contract had been made. It seemed to be agreed that, without any extensions, the work was due to be completed by 17 December 2014. There had been no claims for an extension of time but that in itself does not evince an intention no longer to be bound by the Contract. It is quite clear on the evidence that the work was delayed for the reasons set out above which were due to the acts and omissions of the Owners. I accept the evidence of Mr Paterson that the Builder would have completed on time but for those matters.

The building notices

475. There were two such documents from the Council relied upon, both relating to the rear boundary fence referred to above. The first was the notice served on 20 January 2015. I accept Mr Paterson's evidence that he advised the Owners of the need to keep the fence below two metres and that they instructed him to proceed and undertook the responsibility of sorting out any problem themselves. Ultimately the problem of the first notice was resolved with Mr Paterson's assistance. In any case, it does not seem to me that the service of this notice or the circumstances leading to its service evidences any intention on the part of the

Builder to refuse to be bound by the Contract. It should also be noted that the Owners contend that the work relating to the boundary fence was not part of the Contract, although I have found that it was a variation.

476. The second document was a building order dated 9 April 2015 that was served upon the Owners. The Owners did not show this to Mr Paterson and he did not know of it until it was referred to in the Owner's solicitors' letter purporting that purported to determine the Contract.

477. The order required certification of the rear fence that the Builder had constructed, including the retaining wall component, and that was done by Mr Gibney in May 2015. Again, it does not seem to me that the service of this notice by the Council or the circumstances leading to its service evidence an intention by the Builder no longer to be bound by the Contract.

The final claim for Unit one

478. The final claim made by the Builder with respect to Unit one did not, it was said, comply with the requirements of Clause 10.4 of the Contract, there was no occupancy permit issued in respect of Unit one and the Builder had not issued a notice of completion.

479. The clause in the Contract referred to provides how the final claim should be set out. By section 42 of the Act, the Builder was prohibited from demanding final payment before the work was complete and an occupancy permit had been issued.

480. In the present case, the claim was made on 16 February 2014. The occupancy permit was issued on 3 March and sent to the Owners the same day. According to Mr Paterson, the Owners were demanding full payment of the credit for the cabinetry, notwithstanding that he had not received payment of this money from the bank. He was also concerned about their capacity and intention to pay the Builder. Although he provided the claim on 16 February, it does not appear that he demanded that the Owners pay it immediately. He said that it was agreed that the final claim could not be paid by the bank until such time as the occupancy permit had been obtained and they had carried out an inspection.

481. There was a final inspection and the final payment was not made until 19 March, well after the occupancy permit had been issued. Although I am satisfied that the sending of the final claim was premature and, insofar as it was a demand for payment, contrary to the Act, I do not find that it amounted to a repudiation of the Contract.

The alleged suspension

482. The allegation was that Mr Paterson, on behalf the Builder, told the Owners that the Builder would not carry out any more work until its claim for variations with respect to Unit one was paid. Mr Paterson denied that he told the Owners that and I prefer his evidence to that of the Owners.

483. It was also alleged that, by a letter dated 10 March 2015 addressed to the Owners, the Builder said that, due to non-payment of the final claim dated 16

February 2015 in respect of Unit one, the Builder suspended the works and that this was "…wrongfully and in breach of the building contract";

484. Mr Hellyer submitted that the term "close the site" meant "suspend the works". The evidence does not support that interpretation.

485. Although the Owners had previously enjoyed unfettered access to the site there was no such entitlement under the Contract and so restricting such access to what they were entitled to cannot amount to a repudiation. The Builder was asserting what Mr Paterson contended were its rights under the Contract. The letter of 10 March 2015 did not say that works were suspended. In fact, the Builder continued work on Unit two. In the letter Mr Paterson noted that the occupancy permit had been forwarded to the Owners a week before, on 3 March 2015, and that, under the terms of the Contract, the period for payment was five days after completion. He said the site was closed and that there would be no access to the site by anyone until payment has been processed and cleared in the Builder's bank account. Until handover, the Builder was entitled to exclusive possession of the site subject to the Owners' right to reasonable access to view the works upon request, pursuant to Clause 7.6. of the Contract. It does not appear that any such request was denied. Indeed, by a letter of 17 March to the Owners, Mr Paterson notes three inspections that had been carried out by the Owners since they received the final claim and the occupancy permit.

The claim for variations to Unit one

486. It was said that, on or about 17 March 2015, the Builder purported to raise an undated invoice claiming variations and/or extras in the sum of $48,844.92 in respect of Unit one. It was said that this document was sent in breach of clauses 12 and 13 of the Contract and contrary to the requirements of sections 37 and 38 of the Act. The clauses and sections referred to relate to the manner in which variations are to be documented and claimed as referred to above. Complaint is also made that the Builder failed to provide supporting documentation for the variations claimed, notwithstanding "repeated requests".

487. The mere fact that the Builder makes claims for variations without following the procedure set out in the Contract and the Act does not evince an intention by the Builder no longer to be bound by the Contract.

E & S trading

488. It was said that the Owners were advised by E & S Trading on about 17 March 2015 that it would not supply kitchen white goods until its trading account with the Builder was "regularized".

489. The goods selected by the Owners at E & S Trading cost considerably more than the equivalent goods that had been allowed for in the Contract. The Owners refused to pay the extra cost to the Builder and only admitted their liability to do so at the hearing under cross-examination.

490. The statement alleged to have been made to the Owners by E & S Trading does not evince any intention on the part of the Builder no longer to be bound by the Contract.

The pre-final inspection

491. On 19 March 2015 the relevant building surveyor issued an inspection notice identifying 10 outstanding items in respect of the works. According to the inspector, Mr Pettis, this was a pre-final inspection called by Mr Paterson to identify what needed to be done in order to obtain an occupancy permit so that the Owners could move in to Unit two.

492. Mr Pettis identified the matters that were required to be attended to in his report of 19 March. The items concerned were all the subject of variations and the matters were attended to apart from the as-built drawings and the cellar balustrade and handrail, which required instructions from the Owners.

493. Neither the existence of the report nor anything in it indicates any intention on the part of the Builder no longer to be bound by the Contract.

Payment for the dumbwaiter

494. The Builder was said to have "…failed and neglected to pay the sum of $7,000 in respect of Dumbwaiters Australia's outstanding invoice in the sum of $16,300". That amount was owed by the Owners, not by the Builder. A failure to pay this sum could not have been a breach of the Contract by the Builder or be evidence of an intention on its part not to be bound by it.

Installation of the roof

495. It was claimed that the installation of the roof to the units was not carried out by a suitably qualified and licensed plumbing sub-contractor.

496. I am satisfied that Mr Paterson and Mr Knecht did some of the work on the roof although I am unable to determine how much they did. Nevertheless, the work was done under the supervision of a licensed roof plumber who provided a certificate of compliance for the job and undertook responsibility for it.

497. If a builder assists a roof plumber, that does not evidence an intention by the builder no longer to be bound by the Contract. The builder remains contractually responsible to the owner for the quality of the work and the roof plumber is responsible to the builder and to the regulatory authorities for the suitability and quality of the work.

Other defects

498. I am not satisfied that the nature and extent of the defects that have been established, evidence an intention on the part of the Builder no longer to be bound by the Contract. An unusually large number of complaints were made and the work and materials have been gone over with an unusual attention to detail. It would be a rare building project that was entirely free of faults. The major defects relate to the roofs and the painting but I cannot find in regard to these or any of the other defects that they evidence an intention on the part of the Builder

that it would not construct the two units in accordance with the Contract documents.

Conclusion concerning the alleged repudiation by the Builder

499. None of the foregoing matters on its own constitutes a repudiation of the Contract by the Builder. Even viewing them all together it is not possible to say that they evidenced an intention on the part of the Builder no longer to be bound by the Contract. Indeed, it is quite clear on the evidence that the Builder was attempting to complete both units as soon as possible in accordance with the Contract documents and the instructions received from the Owners.

500. Even if the Builder had evinced an intention no longer to be bound by the Contract, that would not of itself have brought the Contract to an end. Until accepted, a repudiation of a contract is said to be "a thing writ in water and of no value to anybody" (*Howard v Pickford Tool Co Ltd* (1951) 1 KB 417 at 421 per Asquith LJ). The innocent party can elect to accept the repudiation and bring the contract to an end or, save in certain cases, leave the contract on foot and seek to enforce it. Until the election is made, the contract remains on foot. Once an election to affirm the contract is made, the right to accept the repudiation is lost.

501. As to affirmation, in *Majik Markets Pty Ltd v Motor Repairs Pty Ltd (No 1)* (1987) 10 NSWLR 49 Young J said:

> "When a party commits a breach going to the heart of the contract or repudiate his obligations then the situation arises under which the so-called innocent party has to elect whether or not to put an end to the contract. The time for making an election will not arise until a reasonable time has elapsed for the matter to be properly considered... After that time the innocent party must do one of two things, either elect to affirm the contract or to put an end to it. That election can be made by an intentional statement or by action or by conduct. That election must be communicated and is not complete until it is communicated.... All that is meant by "communication" is that the fact of election must come to the repudiating party's attention. It matters not whether the communication came from the innocent party or from a third party."

502. The election to affirm the contract must be communicated to the defaulting party. It may be express and it can also be implied from the conduct of the innocent party (*Halsbury: Laws of England* 4th Ed. Vol. 9 para.537); where, for example, the innocent party conducts himself in a fashion that is justifiable only on the footing that an election had been made to affirm the contract.

503. Mr Laird submitted that the Owners continued with the performance of the Contract after each one of these alleged acts of repudiation occurred and, in doing so, they affirmed the Contract.

504. Arrangements were sought to be made by the Owners with the Builder up to the time of termination for access by KDC to Unit two for them to finish the installation of the cabinetry and by an email dated 8 April 2015 the Owners requested the Builder to provide access to Unit 2 on 10 April so that their carpet layer could lay carpet in the storage areas. In both cases, the Builder's consent would only be required if the Contract were still on foot.

505. A clearer affirmation is found in a letter dated 1 April 2015 from the Owners' solicitors to the Builder's solicitors, in which the former made a list of demands, including a demand for access, and threatened "…a default notice under the contract…" if their demands were not met. Such a notice could only be served if the Contract were still on foot.

506. I find that, if there was any breach of the Contract amounting to a repudiation that occurred, at least before 1 April 2015, the Owners have elected to affirm the Contract with respect to it. It is unnecessary to consider whether there were later acts of affirmation because I have not found that any of the conduct of the Builder that was relied upon was repudiatory.

507. As a consequence, there was no repudiation by the Builder for the Owners to accept and it was not open to them to seek to determine the Contract in the manner they did. Their purported termination and their refusal to allow the Builder to return to the site, notwithstanding the Builder's initial affirmation of the Contract, amounted itself to an act of repudiation which the Builder finally accepted by the letter from its solicitors dated 28 April 2015.

The claim for quantum meruit

508. In their letter to the Owners' solicitors seeking to affirm the Contract following the initial repudiation by the Owners, the Builder's solicitors warned that the Builder would be entitled to commence proceedings in this tribunal for damages for breach of Contract or alternatively, for payment for the works on a quantum meruit on the principles discussed by the Court of Appeal in *Sopov v. Kane Constructions Proprietary Limited (No.2)* [2009] VSCA 141; 24 VR 510.

509. In that case, the Court of Appeal said (at paragraph 12):

> "12 The right of a builder to sue on a quantum meruit following a repudiation of the contract has been part of the common law of Australia for more than a century. It is supported by decisions of intermediate courts of appeal in three States, all of which postdate *McDonald* and two of which postdate *Pavey & Matthews*. If that remedy is now to be declared to be unavailable as a matter of law, that is a step which the High Court alone can take."

510. As to the manner in which the claim should be assessed, Mr Laird referred me to paragraphs 25 and 26 of the judgement, where the Court said:

> "25 The proper approach to assessment of a quantum meruit claim is, as the trial judge said, to ascertain the fair and reasonable value of the work performed. Axiomatically, the measure of the restitutionary remedy is the value of the benefit conferred on the party which received it. Once it is accepted that the quantum meruit claim is available independently of the contract, then it follows – as Meagher JA said in *Renard* - that it would be 'extremely anomalous' if the defaulting party could invoke the contract which it has repudiated to impose a ceiling on the amounts recoverable. [*emphasis added*]
>
> 26 Nor is the contract price 'the best evidence' of the value of the benefit conferred. As counsel for Kane pointed out, the contract price is struck prospectively, based on

the parties' expectations of the future course of events. The quantum meruit, on the other hand, is assessed with the benefit of hindsight, on the basis of the events which actually happened."

and also to paragraph 35, where the Court said:

"35 The existence of the entitlement to a profit margin seems entirely consistent with the restitutionary objective of measuring the value of the benefit conferred. The inclusion of a margin for profit and overhead means that the calculation approximates the replacement cost of the works. As we have said, it is an appropriate index of value to ascertain what it would have cost the Principal to have had these works carried out by another builder in comparable circumstances. The answer to that question must necessarily include that other builder's margin." [*emphasis added*]

Variations

511. It would seem the variations are taken into account in the assessment of a quantum meruit claim and indeed, that will be necessary if the full value of the benefit conferred is to be ascertained. In this regard, the Court said at paragraph 43:

"43 If the work the subject of the variations has been carried out – and there was no dispute here that it had been – the only question is the fair and reasonable value of the work. It is irrelevant whether or not the work fell outside the original contractual scope. All that matters is that the performance of the work has conferred a benefit on the owner, for the reasonable value of which the Builder should be remunerated."

The valuation of the work

512. The value of the work has been assessed by the quantity surveyor, Mr Pitney. In his report he said that he based his cost rates on construction costs prevailing at the date of the commencement of the works, which was March 2014. He assumed that the works would be carried out by a registered builder under a fixed price building contract, that quantities were measured " net" fixed in position, that the rates assumed that normal industry trade discounts would be available, cost rates included a mark up for delivery charges, wastage and fixings as applicable and goods and services tax was included.

513. He said that he considered that a mark up of 20% would be fair and reasonable for the builder's expertise in managing the works, acceptance of warranty responsibilities and the contractor's overhead costs and profit. He estimated that the works could be completed in 48 working weeks but he said that he estimated the impact of the variations on the critical path of the project resulted in a delay of completion of 10 to 12 working weeks. He said that the purpose of his estimate was to calculate the value of the building works that were completed by the Builder.

514. Mr Hellyer argued that a number of items allowed for in Mr Pitney's costing were not actually supplied because of a difference in methodology. For example, safety harnesses were used for the roof and not scaffolding and a site supervisor was not employed. Mr Paterson was both builder and supervisor. However it

must be borne in mind that Mr Pitney's assessment is of the value of the work, not what it cost to perform. If the Builder had carried out the work using a more costly methodology it would only be able to claim its value. Conversely, if it carried it out with great economy and it cost it less than another builder might have expended, it is nonetheless entitled to the value of what it has done.

515. During the hearing, Mrs Mann produced a spreadsheet of the invoices discovered by the Builder. Those that she attributed to the construction of the units totalled $721,793.01. Mr Pitney reviewed this spreadsheet before he prepared his final report on 15 August 2016 and thereafter reduced his valuation of the work to $1,722,611.

516. Parts of the work were also valued by Mr Lorich but he did not cost the whole scope of works or purport to assess its value. He is a competent and well respected expert with extensive experience in pricing rectification and completion work but he is not a quantity surveyor. I cannot cherry pick items between the reports of one expert and another because the methodology adopted by each expert is not the same. I must choose which expert opinion to accept and I think on this issue I would have to prefer the evidence of the quantity surveyor.

517. The spreadsheet prepared by Mrs Mann is not a valuation of the whole job but rather, a setting out of most of the documents that have been discovered relating to labour and materials supplied. It appears from Mr Pitney's evidence that invoices for some of the work are missing from the list and that other items are to be added.

518. It is the final conclusion of Mr Pitney that is probative.

Deductions of defective and incomplete work

519. The valuation prepared by Mr Pitney is on the basis that the work was complete and not defective. The value of the benefit conferred on the Owners must be the fair and reasonable value of the work performed. To arrive at that I must therefore deduct the cost of completing the work that is included in his valuation and also deduct the cost to the Owners of rectifying any defects in that work. I have assessed that cost at $116,297.59 as detailed above, which includes a builder's margin of 30% plus GST. The following amounts have been allowed:

General	
Roof defects	$42,000.00
Heating and cooling defects	$ 8,787.35
Unit one	
Front fence	$ 722.15
Brickwork holes nails	$ 143.00
Front door	$ 2,073.50
Alfresco	$ 68.50
Gable cladding	$ 1,801.80

Front entry	$ 536.25
Bedroom one	$ 335.00
Bedroom one ensuite -	$ 608.00
Family/living	$ 464.75
Kitchen/meals	$ 357.50
Pantry	$ 500.50
Powder room	$ 965.25
First floor bathroom	$ 2,216.50
First floor family room	$ 1,101.10
Toilet room	$ 460.46
Bedroom 2	$ 421.85
Bedroom three	$ 361.79
Garage	$ 2,130.70
Deck at rear	$ 1,001.00
Unit two	
Garage/store	$ 200.20
Laundry	$ 673.00
Lounge room	$ 1,122.55
Cellar	$ 5,219.66
Kitchen	$ 922.35
Scullery	$ 302.50
Bar area	$ 1,960.00
Powder room	$ 469.04
Entrance	$ 357.50
Bedroom one	$ 117.98
Bedroom one en suite	$ 160.85
Staircase handrail	$ 429.00
Play area first floor	$ 679.25
Storeroom	$ 1,018.16
Bedroom two	$ 1,212.50
Bathroom	$ 776.50
Bedroom three	$ 78.65
Other	

Painting	$18,014.05
Ducted vacuum pipe	$ 255.00
Connect pump to cellar/subfloor	$ 607.75
The gate to Unit one	$ 660.00
Floor sanding	$ 1,287.00
Downpipe blockage	$ 308.00
Reseal shower wastes	$ 322.00
Floor junctions	$ 985.00
Skirtings in Unit one	$ 990.80
Drummy plaster in laundry	$ 321.75
Privacy screens rusty	$ 815.00
Spiral staircase/structural framing	$ 2,454.65
Boundary wall	$ 3,732.30
Outside powder room	$ 1,414.00
Walk-in robe door bedroom one	$ 1,050.00
Brickwork repair and loose trim	$ 193.05
Control joint and trim	$ 243.10
Plaster in Unit two Mr Frogley,	$ 300.00
Basin plumbing service	$ 400.00
Electrical repairs Dean Mack	$ 50.00
Bi-fold door seals	$ 137.50
Total	$116,297.59

520. Mr Laird said that I should assess the cost of completing any incomplete work on the basis of what it would have cost the Builder to complete it, because its obligation to complete the various items of incomplete works ceased at the time of termination. That submission misunderstands the nature of the exercise I have to undertake. What I am assessing is the value of the benefit conferred on the Owners and that is properly assessed by taking into account what it will cost them to complete the work and bring it to the standard appropriate its valuation. That is the value of the benefit conferred upon them by the Builder.

521. Mr Laird also said that the Builder ought to have had the opportunity to rectify the defects which it could have done without cost, in many cases, by calling back the relevant trades to fix their defective work. However I am assessing the value of the benefit conferred on the Owners and the Builder has no right to augment what is to be valued by carrying out further work.

522. If I were assessing the Builder's entitlement under the Contract, that would be an entirely different exercise and the approach and the result would be quite different.

Delay costs

523. In his final submission, Mr Laird submitted that the Builder was entitled to delay costs of $9,000, being 18 weeks at the Contractual rate of $500 per week.

524. This claim is made under the terms of the Contract. However, the Contract has been terminated. Generally at common law, termination of a contract will not affect rights that have accrued under it before termination (see *McDonald v Dennys Lascelles Ltd* [1933] HCA 25; *Bot v Ristevski* [1981] VR 120 and the cases there cited).

525. However, as was pointed out in *Sopov v. Kane* , it is now well established that, in the case of a building contract, when one party repudiates the contract and the other party brings it to an end by accepting the repudiation, the contract is avoided ab initio. The situation might be thought illogical but, as the Court of Appeal said, this apparently anomalous situation can only be remedied now by the High Court. A claim under the Contract for delay costs cannot be maintained for the same reason that the Builder is now entitled to claim a quantum meruit for the work that it has done.

526. Further, since the Contract is at an end, I cannot see how I can extend the Contract period or adjust the price as Mr Laird invited me to do.

The net amount paid

527. The Builder received $1,008,000.00 from the bank but has paid back to the Owners the amount of the credit for the cabinetry, which was $54,221.00. The net amount received is therefore $945,787.00.

Conclusion

528. The amount to be paid by the Owners of the Builder with respect to the benefit that it has conferred upon them is calculated as follows:

Value of the work assessed without defects	$1,722,611.00
less rectification of defects as above	$ 116,297.59
Value of the benefit conferred upon the Owners	$1,606,313.41
less net amount paid	$ 945,787.00
Amount due to the Builder	$ 660,526.41

Interest

529. The Builder claimed interest pursuant to the Contract. I cannot see how any claim can be made pursuant to the Contract for interest since the primary claim, which was successful, was not brought in contract but as a quantum meruit.

530. Power to order the payment of damages in the nature of interest in a domestic building dispute is found in section 53(1)(2)(b)(ii) of the Act and by section

53(3), the rate the Tribunal can award is the interest rate fixed from time to time under section 2 of the *Penalty Interest Rates Act* 1983 or on any lesser rate it thinks appropriate.

531. However the claim for interest in the Points of Claim was expressed to be made as part of the alternate claim in contract. That part of the pleading is then followed in the document by the alternate claim in restitution and the pleading of that claim contains no claim for interest.

532. In those circumstances I do not believe that I can award damages in the nature of interest on the restitutionary sum because, although this is not a court of pleading, that claim has not been made. Moreover, I am ordering restitution, not payment of damages.

533. I might add that, by succeeding in a claim for a quantum meruit, the Builder has recovered considerably more than it might have recovered had the claim been confined to the Contract.

Orders to be made

534. The following orders will be made:

    (a) Order that the Respondents spoke of the Applicant the sum of $660,526.41.

    (b) Order that any certificates relating to the solar panels that the Applicant installed in Unit two of the subject premises that are in its possession or control be delivered to the Respondents' solicitors within 14 days of the date of this order.

535. Costs will be reserved for further argument.

SENIOR MEMBER R. WALKER