VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO.D722/2009

CATCHWORDS

Termination - whether combination of minor breaches of contract constitutes repudiation - quantum meruit claim – fair measure of builder's margin - whether rights that accrue prior to termination survive termination; design and construct – whether builder responsible to design above requirements of BCA; rectification – whether costs to be calculated by reference to the builder's costs;

APPLICANT	Peterson Homes Pty Ltd
RESPONDENTS	Bob Paalep & Prema Paalep
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Hearing
DATE OF HEARING	11, 12, 13, 16, 17 and 18 August 2010
DATE OF ORDER	30 September 2010
CITATION	Peterson Homes Pty Ltd v Paalep (Domestic Building) [2010] VCAT 1599

ORDER

1. The Applicant is to pay the Respondents $3,747.35.

2. Costs and interest reserved with liberty to apply.

3. I direct the Principal Registrar to list any application for costs and interest before Senior Member Riegler (allow 2 hours).

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicant	Mr D Pumpa of counsel
For the Respondent	Mr R Fink of counsel

REASONS

BACKGROUND

1. The applicants are the owners of a property located in Narre Warren North (**'the Owners'**). In May 2007, they approached the respondent (**'the Builder'**) through its sales consultant, Darren Barrett, to enquire about it constructing a residential home based on preliminary drawings and a specification provided by them. The specification comprised 14 pages and the preliminary drawings comprised 8 sheets.

2. On 28 November 2007, the Builder provided a quotation to undertake the proposed building works for $853,529. Further discussion and negotiation followed, which culminated in the parties entering into a building contract dated 8 January 2008 for $868,000 (**'the Contract'**). The documents that comprised the Contract included, in part, architectural drawings comprising 5 sheets (**'the Drawings'**) and a specification comprising 22 pages entitled Project Specification (**'the Project Specification'**). Both the Drawings and Project Specifications were prepared by the Builder, although the design was based on the preliminary drawings and specification that the Owners had previously provided to the Builder.

3. The Contract expressly provided that some of the building work was to be undertaken by the Owners contemporaneously with the building work to be undertaken by the Builder under the Contract.

4. The building works to be undertaken under the Contract (**'the Works'**) commenced on 8 February 2008. The Contract provided that the Works could be completed within a building period of 365 days. Accordingly, the original date for completion of the Works was 8 February 2009. The Works were, however, delayed and the original building period was exceeded.

5. Towards the end of the original building period, the Owners communicated with the Builder in an attempt to narrow down a date for handover of the Works. This was because the Owners had sold their existing home on 27 March 2009. They advised the Builder that they wanted to arrange for a settlement date to be shortly after handover of the Works so that they could move into their new home without having to find alternative accommodation. A number of dates were proffered by the Builder for a proposed date for completion, the last of which was 22 May 2009. The Builder advised the Owners of that proposed handover date by letter dated 1 May 2009.

6. In response to that letter, the Owners re-scheduled the settlement date of the sale of their existing home to occur on 26 May 2009. They advised the Builder of this by e-mail correspondence dated 11 May 2009.

7. On 20 May 2009, the Owners visited the site and observed that Works were still progressing. Mr Paalep spoke with representatives of the

Builder and was advised that the issuing of the occupancy permit was being held up because building work that the Owners were required to complete had not been done. According to the Builder, this work included the installation of splash backs to a bathroom.

8. By letter dated 21 May 2009, the Owners wrote to the Builder regarding the handover date for the Works. The Owners contend that this letter made time of the essence. In particular, the Owners say that this letter required the Builder to complete all Works and obtain the occupancy permit ready for handover by 22 May 2009, being the following day. The Works were not, however, completed by 22 May 2009, nor was the occupancy permit issued on that day.

9. By letter dated 26 May 2009, the Owner's solicitors purported to terminate the Contract on the ground that the Builder had repudiated. By further letter dated 27 May 2009, the Owner's solicitors advised the Builder that access to the building site was no longer permitted. Indeed, on 27 May 2009, employees of the Builder were requested to pack up their tools and leave the site.

10. By letter dated 5 June 2009, the Builder's solicitors advised the Owners that the Builder regarded the actions of the Owners as a repudiation of the Contract and that the Builder had elected to accept that repudiation and determine the Contract at common law.

THE CLAIMS

11. The Builder claims $82,455.77 on a quantum meruit. There is no claim made for damages under the Contract. It says that it is entitled to a fair and reasonable sum representing the work performed by it up to the date that it was refused access to the site. It says that it has lawfully terminated the Contract as a consequence of the Owner's repudiation. The Builder's claim is calculated as follows:

(a)	Cost of the Works to 27 May 2009:	$605,825.09
(b)	*Overhead Margin* (5%):	$30,291.25
(c)	*Builder's Margin* (25%)	$159,029.09
(d)	GST:	$79,514.54
Subtotal:		**$874,659.97**
(e)	Less paid to date:	($792,204.20)
Total claimed:		**$82,455.77**

12. The Owners say that they lawfully terminated the Contract as a consequence of the Builder's repudiation. They claim damages in the amount of $184,962.12 made up as follows:

(a) The cost of completing the Works following termination of the Contract by the Owners in the amount of $44,298.01.

(b) The cost of rectifying defects in the Works in the amount of $115,307.54.

(c) Payment for credits in respect of variation claims made by the Builder, which the Owners say were not justified, either because the "variation" work was not done or because the work was part of the original scope of Works under the Contract. They claim $20,428 under this head of damage.

(d) Liquidated damages for late completion of the Works of $4,928.57.

THE ISSUES FOR DETERMINATION

13. The central issue for determination relates to the question of termination.

14. The Builder says that it has lawfully terminated the Contract and as a consequence:

    (a) it is entitled to claim a fair and reasonable sum for the cost of the Works that it has performed;

    (b) the Owners are not entitled to any compensation for cost over-runs in having to complete the Works themselves;

    (c) the Owner's claim for the cost to repair defects is to be limited to the cost of the Builder undertaking that work, rather than the cost of a third party undertaking that work; and

    (d) the Owners are not entitled to any damages for delay.

15. The Owners say that they have lawfully terminated the Contract and as a consequence:

    (a) there is no basis for the Builder to claim on a quantum meruit;

    (b) they are entitled to be compensated for the reasonable costs of completing the Works, where those costs overrun the original Contract Price;

    (c) the Builder is liable to pay to them for the cost of repairing defects based on a third-party undertaking that repair work; and

    (d) they are entitled to damages for delay.

DID THE BUILDER REPUDIATE THE CONTRACT?

16. The Owners contend that there are two grounds upon which it can be said that the Builder repudiated the Contract. First, they say that the Builder committed a multitude of minor breaches of contract, which in the aggregate constitute a repudiation of the Contract, even though each breach taken in isolation would not amount to a repudiation of the Contract.

17. Second, the Owners say that time was made of the essence and that the Builder was unable to complete the Works by the specified time, which entitled them to terminate the Contract at common law.

Minor breaches of contract

18. The minor breaches of contract which the Owners rely upon to say that the Builder has repudiated the Contract are set out in paragraphs 16 to 24 of the Owners *Amended Points of Defence and Counterclaim*. In particular, the Owners say that the Builder breached the Contract because:

    (a) It failed to act reasonably and cooperate in all matters relating to the Contract and the construction of the Works and that each would avoid obstructing the other in the performance of the others obligations under the Contract and in relation to the construction of the Works.

    (b) It failed to provide architectural drawings and specifications and engineering drawings that stipulated suitable materials and construction methods of the Works.

    (c) It failed to perform the Works and supply materials in order to complete the Works.

    (d) It breached the warranties described under section 8 of the *Domestic Building Contracts Act* 1995.

    (e) It failed to give the Owners a written claim for each progress payment when each stage of construction was complete.

    (f) It demanded or requested final payment under the Contract in circumstances where:

        (i) the Works were not complete; and

        (ii) the Owners were not given a copy of an occupancy permit.

19. The Owners rely upon a decision of the Queensland Supreme Court in *Hudson Crushed Metals v Henry* [1] to support the proposition advanced by them that the combination of minor breaches amounts to a repudiation of the building contract. In *Hudson,* Connolly J stated:

[1] (1985) 1 QD R 202 at 205 – 207.

> There is, in my opinion no reason to doubt that the court may look to the appellant's breaches of the contract as a whole in determining whether it has repudiated. .... This is not a case of two breaches but of 11 and his Honour was amply entitled to conclude that the appellant was prepared to carry out its part of a contract only if and as it suited it.

20. The view taken by the trial judge in *Hudson*, affirmed by the Full Court was that the totality of breaches by the defendant and the fact that some of the breaches continued for considerable periods indicated that the builder was unwilling to perform its obligations under the contract in accordance with its terms.

21. Having considered each of the categories of breach of contract alleged by the Owners, I do not consider that the same can be said in the present case. I have formed this view for the following reasons.

Failing to cooperate

22. The Owners contend that it was an implied term of the Contract that the Builder would co-operate with the Owners to ensure that both were able to undertake their respective obligations under the Contract. In the present case, it was agreed by the parties, albeit orally, that the Owners would undertake certain work in conjunction with the Works carried out by the Builder. The Owners say that the Builder failed to co-operate because:

    (a) It failed to provide an accurate date for completion.

    (b) It placed excavated soil in a location that inhibited the Owner's ability to install the swimming pool, which was part of the Owner's Works.

    (c) It did not prevent rubble from being placed in the swimming pool.

    (d) It did not prevent panels of temporary fencing around the swimming pool from being removed and buried under rubble.

    (e) It installed window and door frames in the wrong positions.

    (f) It failed to fill gaps where the window and doors were repositioned.

    (g) It failed to cover windows during acid washing of brickwork.

    (h) It failed to manage its construction programme to make work fronts available for the Owner's separate contractors.

    (i) It failed to remove rubble which inhibited the Owner's separate contractor's access to the site.

    (j) It failed to complete the roof which prevented the Owners from being able to install solar cells in sufficient time for them to receive a government rebate.

(k) It damaged hydronic heating tails, installed as part of the Owner's Works.

(l) It discarded approximately 30% of the ceramic tiles supplied by the Owners.

(m) It constructed a bulkhead in the ceiling of the theatre room instead of a step in the floor.

(n) It failed to clean and prepare floors before the installation of carpet.

(o) It failed to remedy incorrect installation of plumbing fixtures in a timely manner.

23. Mr Fink, counsel for the Owners, referred me to *John Holland Construction and Engineering Pty Ltd v World Services and Construction Pty Ltd* [2] as authority for the proposition that a party to a contract has an implied duty to cooperate in the performance of acts which are necessary for the performance by them or one of them of the fundamental obligations under the contract.

24. I accept that such an implied term is often found in construction contracts.[3]

25. In *New South Wales v Banabelle Electrical Pty Ltd*,[4] Einstein J stated that if such an obligation of benefit was so fundamental that the relevant party would not have entered into the contract but for assurance of strict or substantial performance, the term was to be implied without anything more. Otherwise, it must satisfy the usual five tests for implication as summarised by the majority judgment in *B.P. Refinery (Westernport) Pty Ltd v Hastings Shire Council*:

> (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no terms will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract. [5]

26. The fact that the Owners and the Builder were to each carry out work contemporaneously leads me to conclude that there must have been an implied term to co-operate in order to give business efficacy to that arrangement. In my view, the obligation to co-operate satisfies the first limb of the test advanced by Einstein J in *Banabelle*. Should that finding be incorrect, I consider that the term easily satisfies the five tests summarised in *B.P. Refinery*.

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[2] (Unreported decision of the Victorian Supreme Court per Byrne J dated 27 August 1993)
[3] *Mackay v Dick* (1881) 6 App Cas 251; *Electronic Industries Ltd v David Jones Ltd* (1954) CLR 288 at 297-298; *Perini Corp v Commonwealth* [1969] 2 NSWLR 53; *Renard Constructions Pty Ltd v Minister of Housing for Public Works (No2)* [1992] 26 NSWLR 234.
[4] (2002) 54 NSWLR 503
[5] [1977] 52 ALJR 20 at 26

27. The question remains, however, whether the actions of the Builder, as alleged, could be said to constitute a breach of its obligation to co-operate.

28. The evidence of Mr Paalep, which is said to illustrate the Builder's failure to co-operate, is set out in paragraphs 60 to 146 of his *Amended Witness Statement* dated 2 August 2010. Mr Fink further referred me to correspondence passing between the parties, which he contended demonstrated a failure to co-operate.[6] In my view, the matters raised by Mr Paalep and in the correspondence referred to me demonstrate some awkward planning, confusion in respect of design issues, incomplete or defective work and some tardiness in maintaining a clean site.

29. However, I consider that a failure to co-operate entails some element of deliberate conduct or at the very least, reckless disregard of a party's obligation to co-operate. I am not satisfied that the evidence demonstrates a failure to co-operate. I am mindful that building is not a precise science. This is particularly the case in circumstances where there is more than one party sequencing the building works, as was the case here. Circumstances arise during the course of the building project that may, with the benefit of hindsight, have been avoided with better planning. That does not, however, mean the party has failed to co-operate. It is inevitable in a project such as this that there will be instances where the Builder's actions may have inconvenienced sequencing of the Owner's works. Similarly, there will be instances where the reverse holds true. Moreover, it is inevitable that a failure to complete the Works within the promised building period may inconvenience or even seriously inconvenience the Owners. I do not, however, consider that these instances constitute a breach of any term to co-operate. Further, I do not consider that the presence of defective work or incomplete work necessarily constitutes a breach of a term to co-operate.

30. I therefore find that the Builder has not breached its contractual obligations by failing to co-operate, even if such a term was implied.

Failure to provide architectural drawings and specifications and engineering drawings that stipulated suitable materials and construction methods of the Works.

31. The Owners contend that the design of the pool house enclosure was inadequate for the intended purpose. In particular, Mr Kosa, an architect and building consultant who was engaged by the Owners, gave evidence that the Colorbond roof cladding was not suitable for a pool enclosure and that the appropriate type of roof cladding material should have been stainless steel. He further said that there was insufficient ventilation within the pool enclosure.

[6] Pages 768, 802, 806-7, 811-12, 816, 820-21 and 836-37 of the Tribunal Book of Documents.

32. Mr Pong, a mechanical engineer, substantiated that the design of the pool enclosure was not entirely appropriate. In particular, he agreed that the pool enclosure should have had some form of mechanical ventilation system and that the roof cladding should be stainless steel, rather than Colorbond.

33. Mr Pong gave evidence that:

> The proper design of a pool room requires that it is constructive with good thermal insulation in its walls, ceiling and floor to eliminate any cold spots. The building envelope should be tightly sealed. Windows should be double glazed and the window frames thermally insulated. In the author's opinion the existing pool room does not meet the above criteria.

34. Mr Pong gave further evidence that currently there are no guidelines for the correct design of building housing an indoor pool. He stated:

> As pointed out in the letter, dated 18 March 2010, by building surveyor Jason Daniels of Advanced Building Strategies, a pool house is classified as a Class 10a building according to the Building Code of Australia. Hence, there is no requirement for ventilation as the building is classified as non-habitable.

35. The as-constructed pool enclosure does not have mechanical ventilation, stainless steel roof cladding or double glazed windows and doors. It has, however, been constructed or substantially constructed in accordance with the Drawings and Project Specifications.

36. The question arises whether the Builder was required to design a pool enclosure that met the design criteria stipulated by Mr Pong or alternatively, whether the obligation was to simply build an enclosure in accordance with the Owner's preliminary drawings and specification.

37. There is no evidence to suggest that the Builder had a contractual obligation to design the pool enclosure to meet any specific design criteria, save and except for the design criteria described in the Owner's preliminary drawings and specification. Clearly, the construction of a pool house that met the design criteria described by Mr Pong would have added considerable cost to the Contract price. There is no evidence of any conversation or documentation requiring the Builder to install any mechanical ventilation system or to design the pool enclosure to meet the criteria described by Mr Pong. Moreover, the Drawings prepared by the Builder were provided to the Owners prior to signing the Contract. Those Drawings do not require the construction of the pool enclosure to meet the design criteria described by Mr Pong or for that matter, any specific design or performance criteria. Further, apart from minor defects, there is nothing to suggest that the as-constructed pool enclosure does not accord with all regulatory requirements.

38. Therefore, I find that the Builder was not obligated to design and construct the pool enclosure to meet the criteria described by Mr Pong.

In those circumstances, the failure to do so does not constitute a breach of the Builder's contractual obligations.

Failure to perform the work and supply the materials in order to complete the Works or complete the Works within the Building Period.

39. Leaving aside the issue whether time was made of the essence, it is contended that the failure to complete the Works within the building period constitutes a breach of contract, which coupled with the other "minor" breaches of contract, amounts to a repudiation of the Contract.

40. The Builder contends that the building period was extended by 33 calendar days to 13 March 2009. Accordingly, even on the Builder's best estimates, the Works were not completed within the building period. That being the case, it is clear that the Builder was in breach of the Contract by failing to complete the Works within the building period. That breach is not, however, a fundamental breach of the Contract, unless time was made of the essence. This is particularly so in circumstances where the Contract expressly provides for agreed damages to be paid to the Owners where the Works are late in completion.

41. The question still remains, however, whether this "minor" breach of contract coupled with any other breach of contract existing at the relevant time together amounts to a repudiation of the Contract.

Failure to complete the works with care and skill.

42. Mr Atchison, an engineer and building consultant who was engaged by the Builder, and Mr Kosa prepared a joint report, describing all defective and incomplete work (**'the Joint Report'**). In the Joint Report, there was common ground that the cost of rectifying and completing defective and incomplete Works was at least $16,491, with $7,224 remaining in dispute. In other words, Mr Kosa estimated the costs of repairing and completing the Works at $23,715, while Mr Atchison estimated this work to cost $16,491. These amounts did not include other expenses incurred by the Owners in completing the Works themselves after the Builder left the site.

43. Consequently, although there is some disagreement between the two experts, it is clear that there is some defective work. In my view, this clearly constitutes a breach of the Contract on the part of the Builder. I consider, however, that the defects are of a relatively minor nature, when comparing the cost to repair against the price of the Contract. Moreover, some of the items constitute incomplete work, rather than defective work.

Failure to comply with section 40 of the Domestic Building Contracts Act.

44. The Owners contend that the Builder claimed and received part payments for the *Lock-up Stage* progress claims, *Fixing Stage* progress claim and further, claimed payment of the *Final Payment* claim in circumstances

where the relevant stages had not been completed. It is said that this is contrary to section 40 of the *Domestic Building Contracts Act* 1995.

45. In my view, a failure to comply with section 40 constitutes a breach of the warranties given under section 8 of that Act. In particular, the warranty that the Works would be carried out in accordance with all laws and legal requirements. Nevertheless, the breach is of a minor nature and no damages are sought as a consequence of that breach.

Request in final payment prior to completion.

46. The Owners contend that the Builder demanded final payment of the Contract some time prior to completion of the Works. The Builder denies this allegation. In particular, Mr Beach gave evidence that the final claim given to the Owners was a draft final claim which he produced for discussion only. His evidence is consistent with documentation produced during the course of the hearing. In particular, I was taken to an e-mail from Mr Paalep dated 19 May 2009 in which he stated:

> *Also, inform as to when I can get a draft of your final payment details for me to study.*

47. In response to that e-mail, the Builder forwarded a progress claim entitled *Final Completion* under cover of an e-mail which stated, in part:

> *We enclose a preliminary final completion account in relation to*

48. Taking those documents into consideration, I find that the Builder did not submit a final progress claim but rather, submitted a draft document for further discussion and comment. This action was taken at the request of Mr Paalep. I do not consider that the Builder breached its contractual or statutory obligations in acceding to that request.

49. Accordingly, I find that the Builder breached the Contract by:

    (a) Failing to complete the works within the building period;

    (b) Failing to undertake the works free of defects;

    (c) Failing to comply with section 40 of the Act.

50. The Owners contend that the combination of those "minor" breaches of contract amounts to a repudiation of the Contract at common law. I disagree. In my view, those breaches of the Contract do not indicate an intention that the Builder no longer intended to be bound by the terms of the Contract or was willing only to perform the Contract in a manner substantially different to what was agreed.[7]

51. In my view, the difference between the present case and the facts in *Hudson* is that the breaches of contract in *Hudson* that gave rise to a repudiation of the contract concerned the defaulting party being

[7] *Laurinda Pty Ltd v Capalaba Park Shopping Centre* (1989) 166 CLR 623 at 646-8; *Sheville & Anor v The Builders Licensing Board* (1982) 149 CLR 620 at 625-6

unwilling to perform the terms of the contract as agreed. Here there is no evidence to suggest that the Builder intended to perform defective works or that it intended to be late in completing the Works; nor is there any evidence of the Builder persistently refusing to rectify defective work.

52. I do not consider that the mere presence of defective and incomplete work constitutes a repudiation of the Contract. There may be occasions, however, where the amount of defective or incomplete work is significant such that it may lead to the conclusion that a builder was unwilling to perform its contractual obligations in a manner agreed between the parties. This is not one of those occasions. Indeed, according to the Owner's building consultant, the cost of repairing and completing the Works is, at the most, $23,715.[8] This represents a very small percentage of the original Contract price and in my view, cannot be indicative of a builder having repudiated its obligations under a building contract.

53. Similarly, as at the date of termination, the Works were, according to the Owners, approximately 3 months late. In other words, the building period was exceeded by 25%. It was conceded by counsel for the Owners that this did not constitute a repudiation of the Contract if considered in isolation. I agree with that.

54. I do not consider however, that adding together the lateness in completing the Works, the defects present as at the date of termination and the fact that the Builder received part payments contrary to section 40 of the Act constitute a repudiation of the Contract. This is not a situation where the Builder has refused to complete the Works or has refused to rectify defective work. Those circumstances distinguish this case from the facts in *Hudson*.

55. I therefore find that the Builder did not repudiate the Contract at common law by breaching those "minor" terms of the Contract.

Was time of the essence?

56. The Owners contend that independent of the claim that the Builder repudiated the Contract by breaching 'minor' terms of the Contract, time was made of the essence by their letter dated 21 May 2009. They further contend that when the Builder failed to complete the Works within the timeframe stipulated in that letter, they were entitled to terminate the contract at common law.

57. Mr Fink referred me to correspondence between the parties relevant to the issue of when the Works were to be completed.[9] In particular, he pointed to the fact that the Builder had on several occasions given commitments as to when the Works would be ready to handover and that the Owners had relied on those commitments in arranging settlement of

[8] As detailed in the Joint Report.
[9] Pages 742, 747, 808, 810, 823-4, 835 and 838-40 of the Tribunal Book of Documents.

the sale of their existing home. Mr Fink contended, quite rightly, that the Builder failed to meet any of those commitments.

58. Mr Fink contended that the failure to meet promised dates for handover of the Works led the Owners to give notice to the Builder making time of the essence. In that regard, Mr Fink submitted that correspondence from Mr Paalep dated 21 May 2009 constituted the notice making time of the essence. The relevant parts of that letter are as follows:

> As per HIA contract clause 34.1, the builder is to give the Owner written notice informing the Owner of the extension of time. The written notice must state the cause and extent of the delay. You have failed to notify me of requests for extensions till a day before the expiry of your committed date. You are playing with our lives as we are unable to plan them due to lack of reliable information. As you have not indicated otherwise, the date of 22nd May 2009 is still valid for completion. Am I wrong in concluding this? Please inform.
>
> You are therefore requested to confirm by 12.00 noon today that the handover date.
>
> I have had to reschedule my contractors as you have failed to maintain the dates for completion of the fronts.
>
> If you fail to provide the fronts (like preparing the floors) required for the carpet layers, then I shall at your cost engage other contractors to complete the work to allow the carpet laying, to proceed.
>
> Awaiting your response by 12.00 noon, today the 21st May 2009.

59. Mr Fink submitted that the words *you are therefore requested to confirm by 12.00pm today that the handover date* should be read as *that the handover date will go ahead*. He said that the document was not prepared by a lawyer and therefore when interpreting the document it was relevant to take into consideration that it was prepared by a lay person.

60. Mr Fink referred me to the judgement of Dean and Dawson JJ in *Laurinda Pty Ltd v Capalba Park Shopping Centre Pty Ltd* where their Honours stated:

> It seems to us, however, that, in modern circumstances, a notice will be adequate to convey such a warning if, but only if, it conveys either that the time fixed for performance is made of the essence of the contract or that the party giving the notice will, in the event of non-compliance, be entitled (or regard himself as entitled) to rescind. A notice, particularly one between solicitors, can convey those matters by implication. [10]

61. I do not consider that the correspondence states that the Works had to be completed by 22 May 2009. In my view, the correspondence seeks information from the Builder as to whether the Works will be completed by 22 May 2009. Moreover, it does not say that the Contract will be terminated in the event that the Works are not completed by that date.

[10] (1989) 166 CLR 623 at 654.

62. Mr Fink submitted that the threat to engage other contractors in the event that the Builder failed to complete work fronts in readiness for the Owner's contractors, should be interpreted to mean that the Contract was to be terminated by the Owners, should the Works not be completed by 22 May 2009. I do not accept the interpretation placed on the letter. It seems to me that the words used in the correspondence relate specifically to preparing the floors in readiness for the laying of carpet and no more. I do not interpret the correspondence as giving notice that the Owners will regard themselves as being entitled to rescind the Contract, in the event that the Works are not handed over by 22 May 2009.

63. Even if I am wrong in my interpretation of the correspondence, it seems to me that insufficient time was given to the Builder to comply. In particular, both Mr Beach, the managing director of the Builder and Mr Brockmuller, the Builder's supervisor, said during cross-examination that there was at least one further week of work required to complete the Works. The 'notice', however, only gave 1 day to complete all of the Works. That was insufficient time. Consequently, I find that the correspondence purporting to make time of the essence was ineffective for that purpose. This finding is consistent with *McLachlan v Ryan*.[11] In that case, Mathews J stated:

> It seems to me that in the absence therefore of the fixing by the appellants of a reasonable time for completion and giving notice to the respondent in that behalf the appellants had no right to allege a breach of the contract entitling them to rescind it.

64. I therefore find that time was not made of the essence and as a consequence, no right to terminate at common law crystallised.

DID THE OWNERS REPUDIATE THE CONTRACT?

65. I find that the Owners had no right to revoke the Builder's license to occupy the site. I find that the Owners have unlawfully denied the Builder access to site and that such conduct constitutes a fundamental breach of the Contract amounting to a repudiation by the Owners. In particular, by letter dated the 26 May 2009 from the Owner's solicitors, the Builder was advised that:

> 5. On behalf of our clients we hereby revoke the licence granted to the Builder under clause 25.0 of the Contract to enter the above property, effective from 12.00 noon tomorrow. The Builder, its employees or agents are not permitted to enter the property, and any such entry will be considered to be trespass.

[11] Uunreported decision of the Queensland Supreme Court Full Court per Mathews, Thomas and Derrington JJ dated 15 October 1987 at page 8.

66. By letter dated 26 May 2009 from the Builder's solicitor addressed to the Owner's solicitors, the Builder denied that it repudiated the Contract. In particular, it stated, in part:

> Firstly, our client denies that their conduct should be considered to in any way reflect a repudiation of the Building Contract over the dwelling at … Narre Warren North. Secondly, the assertion that our client has repudiated the Contract is baseless and without merit and is merely a ploy for the owners to bring this Contract to an end.
>
> If your clients intend to deny our client or its sub-subcontractors access to the property then that will be deemed a breach of the Contract and such a breach would be a repudiation.

67. In response to that letter, the Owners solicitors wrote to be Builder's solicitors on 27 May 2009 stating, in part:

> Kindly advise your client that all his access to site has been denied, and that it is hereby prevented from entering the site without its prior written request, and approval from our clients in writing...
>
> As you are no doubts aware, your client's licence has been withdrawn, and any further entry to site by your client and its employees or officers will be considered to be tresspass and will be dealt by law. We expect that you will explain this to your client to ensure that your client or its staff or agents do not enter the property without our written consent.
>
> Our client will now arrange other contractors to complete unfinished work and rectify defective work of the Builder.

68. By letter dated 5 June 2009 from the Builder's solicitors addressed to the Owner's solicitors, the Builder gave notice that it considered the actions of the Owner to constitute a repudiation of the Contract and it gave notice of its election to terminate the Contract at common law.

69. In my view, the denial of access by the Owners without lawful excuse constitutes a repudiation of the Contract on their part. Consequently, I find that the Contract was lawfully terminated by the Builder at common law by letter dated 5 June 2009.

THE BUILDER'S CLAIM.

70. As a consequence of the Contract having been terminated, the Builder claims on a quantum meruit for the fair and reasonable cost of undertaking the Works by it. There is no claim made for damages under the Contract.

71. In *Pavey & Matthews Pty Ltd v Paul* [12], the High Court held that a builder was entitled to claim on a quantum meruit for the reasonable value of the work and labour performed by it under an unenforceable contract. Similarly, in *Sopov & Anor v Kane Constructions Pty Ltd (No*

[12] (1986) 162 CLR 221.

2),[13] Maxwell P, Kellam and Whelan JJ stated that the entitlement of the builder, following its acceptance of the principal's repudiation, *to sue on a quantum meruit rather than for contract damages is supported by high authority of long standing.*[14]

72. Mr Atchison gave evidence that he had calculated that the cost of the Works undertaken by the Builder prior to termination to be $605,825. He said that he calculated this amount by reference to invoices provided to him by the Builder, which he then cross-checked with quantity surveying principles by preparing a cost analysis sheet.

73. No evidence was given by the Owners as to the cost of the Works performed by the Builder. Accordingly, I accept the uncontested evidence of Mr Atchison and find that the raw cost of constructing the Works up to 27 May 2009 is $605,825. This amount does not include any element of profit or costs associated with administration and supervision of the building works. In *Sopov,* the majority judgement stated:

> [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.

74. Accordingly, I consider it proper that "builder's margin" is to be added to the raw cost of building in order to assess the fair and reasonable price of the Works undertaken by the Builder.

75. The Builder claims a builder's margin of 30% to cover profit, supervision and administration. According to Mr Atchison, a builder's margin for domestic work usually varies from between 15% to 30%. He has adopted the margin claimed by the Builder's of 30% in his calculations, which he adds to the raw cost of building, making a total of $787,572.50. This seems somewhat at odds with the amount that Mr Atchison has allowed by way of builder's margin on the cost of rectifying minor defects and completing the building work, where he has only allowed 10%. He explained that difference on the basis that there would be less supervision required, given that the Works were near completion. Further, I assume that this percentage amount excludes any element of profit, given that the Builder is rectifying its own work.

76. During cross-examination, Mr Atchison admitted that 30% builder's margin was *at the high end of the industry standard.* He said that 20% builder's margin was *within the range* and that he adopted that figure

[13] [2009] VSCA 141
[14] Ibid at paragraph 5. See also paragraph 12 of the judgement.

when he prepared his cost analysis sheet, which he used to cross-check against the Builder's invoices given to him.

77. Mr Kosa gave evidence that the builder's margin to be added to the cost of rectification work was 30%, although he gave further evidence during cross-examination that if the Builder was to undertake rectification work, then the amount of builder's margin that he would add to the cost of rectification would be between 10% to 20%. He said that there was a premium added to rectification work when someone other than the original builder was doing the work.

78. What then is the percentage to be added to the raw costs of building to cover builder's margin?

79. Clauses 19.4 of the Contract provides:

> If this contract is ended under this Clause and the Builder is not at fault, the Builder is entitled to a reasonable price for the work performed, including the costs incurred and an amount for the Builder's profit and overheads being the percentage shown in Item 6 of Schedule 1 applied to the cost of that work.

80. Item 6 of Schedule 1 states that 20% is to be added to the raw costs of building to *cover Builder's overheads, supervision and profit.* Similarly, Clauses, 21.4 12.2, 17.2 and 21.2 of the Contract also allow for the Contract price to be adjusted (upon the happening of certain events). Item 10 of Schedule 1 also states that 20% is to be added to the costs to cover the *Builder's overheads, supervision and profit* in respect of work undertaken pursuant to those specific clauses.

81. In my view, 20 % represents a fair builder's margin to be added to the raw costs of building. This is consistent with what the Builder has specifically nominated in the Contract as being the percentage it adds to work to cover *Builder's overheads, supervision and profit* for variation and other work. That percentage is consistent with the evidence of Mr Atchison given during cross-examination where he conceded that 20 % builder's margin was within the acceptable range. Further, 20% builder's margin is within what Mr Kosa suggests are the lower and upper limits of builder's margin generally seen in domestic building projects.

82. Accordingly, I find that 20% of the building cost represents a reasonable sum in respect of the Builder's overheads, supervision and profit. I therefore find that the Builder is entitled to $726,990 plus GST on its quantum meruit claim. That amounts to $799,689.

83. The evidence before me is that $792,204.20 has been paid to date. That leaves a shortfall of $7,484.80. I will therefore order that the Owners pay the Builder $7,484.80 on the Builder's claim.

THE OWNERS COUNTERCLAIM

Liquidated damages

84. The Owners claim liquidated damages against the Builder for late completion of the Works of $4,928.57. That amount is calculated by reference to Clause 40 of the Contract and Item 9 of the Schedule 1. Clause 40 of the Contract states:

> If the Building Works and have not reached Completion by the end of the Building Period the Owner is entitled to agreed damages in the sum set out in Item 9 of Schedule 1 for each week after the end of the Building Period to and including the earlier of:
>
> - The date the Building Works reach Completion;
> - The date this Contract is ended; and
> - The date the Owner takes Possession of the Land or any part of the Land.
>
> The Owner may deduct the amount from any such damages from the Final Payment.

85. According to the Contract, the daily amount of liquidated damages is $35.62 ($250 per week). It is not entirely clear over what period the Owner's claim liquidated damages. Nevertheless, the amount claimed equates to approximately 138 days.

86. Mr Beach gave evidence that the Works commenced on 13 February 2008. This was confirmed in a *Commencement Notice* dated 22 April 2008. I accept Mr Beach's evidence and find that the commencement date for the Works was 13 February 2008.

87. The Contract specified a building period of 360 calendar days. Mr Beach gave evidence that there were two extension of time claims made by the Builder during the course of the building project. The first was made as part of Variation Notice 4 dated 6 August 2008, where 28 calendar days were claimed. That Variation Notice 4 was signed by the Owners. The second extension of time claim made by the Builder was part of Variation Notice 8, where 5 calendar days were claimed. That Variation Notice 8 was also signed by the Owners. According to Mr Beach, the adjusted date for completion of the Works was 13 March 2009.

88. The Owners deny that the building period was extended by reason of any variation work (paragraph 7 g of their *Amended Points of Defence*). In paragraph 51 of Mr Paalep's witness statement, he states when referring to the Builder's extension of time claim contained in Variation 4, that:

> As work beyond the agreed scope of work was not performed in this Variation, no extension time should be allowed for Variation 4, in my opinion.

89. In my view, that bald statement does not sit well with other evidence given by Mr Paalep relating to this variation claim. In particular, I note

that the variation claim comprised 14 separate items. Of those 14 items, Mr Paalep contends that 6 items were not wholly completed or constituted work that was required to be done under the contract. It would appear, looking paragraph 51 of his witness statement, that the remainder of the items are not in dispute. Mr Beach, on the other hand, states in his witness statement that all the work was completed.

90. I note that the Variation Notice 4 was signed by Mr Paleep. There is no evidence before me that the Owners disputed the extension of time claim at the time when it was issued. Clause 34.1 of the Contract states:

> To dispute the extension of time the Owner must give the Builder a written notice, including detailed reasons why the Owner disputes the claim, within 7 Days of receiving the Builder's notice.

91. No notice disputing the extension of time was given within that period of 7 days. Accordingly, in the absence of any evidence substantiating that the extension of time notice was otherwise unjustified, I find that the building period was extended by 28 calendar days pursuant to the extension of time claim contained in Variation Notice 4.

92. The second extension of time claim was set out in Variation Notice 8. On this occasion, Mr Paalep disputed the extension of time claim. He did so one day after the extension of time claim was made. He stated that *no delay acceptable on account of this variation.* There are no reasons given why no delay was acceptable. The variation work was approved by Mr Paalep and this was evident by him signing the variation notice. Further, he states in paragraph 55 of his witness statement:

> This claim was for painting the cornices a different colour from the walls and deletion of feature walls. The amount of the Variation was $4314.00. I agree to pay this amount.

93. It is not clear on the evidence before me why the extension of time for painting the cornices a different colour was disputed by Mr Paalep. There is no evidence before me to explain why Mr Paalep disputed that extension of time claim. In those circumstances, I find that the extension of time claim was justified and that the building period was extended by a further 5 calendar days.

94. Accordingly, the adjusted dated for completion is 12 March 2009. The Owners took possession on 27 May 2009. As at that date, the Works were 76 days late. Accordingly, I find that the quantum of liquidated damages calculated at $35.62 per day is $2,707.12.

95. Mr Pumpa argued that the Owners had no entitlement to any liquidated damages because Clause 40 only allowed liquidated damages to be deducted from the Contract price. In other words, he submitted that Clause 40 only entitled the Owners to set-off against amounts owing under the Contract but did not give rise to a debt in favour of the Owners. Consequently, he argued that there was no entitlement to any liquidated

damages under Clause 40 because the claim made against the Owners was on a quantum meruit basis and not as a claim for payment of the Contract price. In other words, there was no *Final Payment* to be made under the Contract from which agreed damages could be deducted.

96. I do not agree with that interpretation of Clause 40. In particular, the relevant part of Clause 40 states that the Owner may deduct the amount from any such damages from the *Final Payment.* There is nothing in the Contract, which makes the entitlement to liquidated damages conditional upon there being a *Final Payment* due under the Contract. In my view, the use of the word "may" is to be construed such that the Owners have the option of setting-off liquidated damages against a *Final Payment*. It does not, however, mean that an owner loses his or her right to liquidated damages if no *Final Payment* claim is ever made. In my view, Clause 40.0 stands separate to clause 40.1. Accordingly, an Owner under this type of contract has the option to either sue separately for the liquidated damages sum or set-off that amount against the *Final Payment* due under the Contract.

97. Therefore, I find that the entitlements, which accrued prior to the Owners repudiating the Contract survived after repudiation. That proposition is entirely consistent with the majority judgement in *Westralian Farmers Limited v Commonwealth Agricultural Service Engineers Ltd*.[15] In that case, Dixon and Evatt JJ stated:

> We are concerned only with a liability to pay a liquidated demand. In general the termination of an executory agreement out of the performance of which pecuniary demands may arise imports that, just as on the one side no further acts of performance can be required, so, on the other side, no liability can be brought into existence if it depends upon a further act of performance. If the title to rights consists of vestitive facts which would result from the further execution of a contract but which have not been brought about before the agreement terminates, the rights cannot arise. But if all the facts have occurred which entitle one party to such a right as a debt, a distinct chose in action which for many purposes is conceived as possessing proprietary characteristics, the fact that the right to payment is future or contingent upon some event, not involving further performance of the contract, does not prevent it maturing into an immediately enforceable obligation. [16]

98. *Westralian Farmers* supports my view that the right to liquidated damages had crystallised prior to the Owners repudiating the Contract. Their entitlement to those damages survives termination. Accordingly, I find that the Owners are entitled to $2,707.12 by way of liquidated damages for delay.

[15] (1936) 54 CLR 361
[16] Ibid at pages 379-380

Defective and incomplete works

99. In my view, damages sustained by the Owners relating to the cost to repair defective work falls within the same category as damages for delay, in that the right to damages crystallises irrespective of whether the Contract has been repudiated and subsequently terminated by the builder. The same cannot, however, be said in respect of losses sustained in having to complete the building project post termination. In my view, *Westralian Farmers* makes it abundantly clear that there is no entitlement to any cost overrun resulting from a builder's failure to complete a building project in circumstances where the contract has been repudiated by the owners and the builder has elected to accept that repudiation and terminate the contract.

100. In the present case, the experts retained by each of the parties have prepared the Joint Report wherein they set out points of agreement and disagreement. The Joint Report quantifies the cost to complete and rectify work. It reports on the items of incomplete and defective work previously identified in Mr Kosa's report filed in this proceeding. Where there is agreement between the experts, they have assessed the total cost to complete and rectify work at $16,491. This cost is inclusive of GST and includes a builder's margin of 30%. There are some items where the experts have not reached agreement, either because Mr Atchison disagrees that the Builder is liable or the experts are unable to agree on the reasonable cost of rectification or completion. The amount in dispute is $7,224. In other words, Mr Kosa has assessed the cost to complete and rectify work at $7,224 higher than Mr Atchison.

101. As I have already indicated, having found that the Contract was repudiated by the Owners, there is no entitlement to the cost of completing incomplete work. The Owners are, however, entitled to the cost of rectifying defective work, given that this entitlement accrued prior to the date that the Contract was terminated.

102. A further issue arises, however, as to how the cost of rectification is to be quantified. According to Mr Pumpa, I should assess the cost of rectification based upon the Builder's cost, rather than based upon what it would cost another independent builder to undertake the same work.

103. There is an authority for that proposition. In *Pearce and High Ltd v Baxter and Baxter*, [17] the Court of Appeal (UK) held that the assessment of the cost to repair defects in circumstances where a contractor has been denied a contractual right to repair should be calculated by reference to the cost to that contractor, rather than what it would cost to employ a third party repairer to carry out that work.

104. In that case, Evans LJ stated:

[17] [1999] BLR 10.

> The cost of employing a third party repairer is likely to be higher than the cost to the contractor of doing the work himself would have been. So the right to return in order to repair the defect is valuable to him. The question arises whether, if he is denied that right, the employer is entitled to employ another party and to recover the full cost of doing so as damages for the contractors original breach.
>
> In my judgement, the contractor is not liable for the full cost of repairs in those circumstances. The employer cannot recover more than the amount which it would have cost the contractor himself to remedy the defects. Thus, the employer's failure to comply with clause 2.5, whether by refusing to allow the contractor to carry out the repair or by failing to give notice of the defects, limits the amount of damages which he is entitled to recover. This result is achieved as a matter of legal analysis by permitting the contractor to set off against the employers damages claimed the amount by which he, the contractor, has been disadvantaged by not being able or permitted to carry out the repairs himself, or more simply, by reference to the employers duty to mitigate his loss.[18]

105. *Pearce* was followed by this Tribunal in *Ryan v EJ Lowe trading as Urbane Builders*.[19]

106. In my view, the assessment of damages for the cost to repair defects must take into account a failure to mitigate. Under the Contract, there existed a defects liability period. This gave the Builder a contractual right to rectify defective work. That right was taken away as a result of the Owners denying the Builder access to complete the Works. In accordance with *Pearce*, I find that the Owners are only entitled to the cost of repairing defects based upon what it would have cost the Builder to undertake that rectification work. In my view, that would mean the raw costs of undertaking the rectification work excluding GST and some of the builder's margin normally added to the cost of building work. In that respect, I consider that some builder's margin still needs to be added to cover the cost of administration and supervision.

107. As indicated above, Mr Kosa and Mr Atchison gave evidence that the Joint Report assessed the cost of rectification based on a 30% builder's margin for a 'rectifying builder'. Mr Atchison gave further evidence that in his own report, he assessed the cost of rectifying and completing work based on 10% builder's margin, assuming the original builder undertook that work. He indicated that his assessment of such a low margin was because the Works were at a near complete state and therefore required less supervision.

108. Mr Kosa gave evidence during cross-examination that if an original builder undertook rectification of its own work, then the amount of builder's margin would be somewhere between 10% to 20%. That is consistent with the evidence of Mr Atkinson.

[18] Ibid at page 104.
[19] [2005] VCAT 2031. See also *Turner Corporation Limited (Receiver and Manager Appointed) v Austotel Pty Limited* (1997) 13 BCL 378

109. I accept the evidence of Mr Atchison that the work to be undertaken would require less supervision, given its near complete state. Therefore, it is my view that it is appropriate to attribute 10% builder's margin to the raw cost of rectifying the Works as being appropriate amount to cover supervision and administration costs.

110. It is, however, necessary to distinguish what work falls under the category of incomplete work from that work which falls under the category of defective work. For the reasons outlined above, the Builder is not liable for incomplete work but remains liable in relation to any defective work.

111. Further, in assessing the cost of rectification, I have taken the raw cost of rectification work and then added 10% to cover Builder's supervision and administration costs. In order to calculate the raw cost of rectification work, I have adopted the agreed cost described in the Joint Report and deducted the GST component before further deducting 30% for builder's margin from that amount. My findings are set out below.

Articulation joints (Item 5.1)

112. Both experts agree that the articulation joints are not continuous and are not constructed in accordance with the Drawings. In the Joint Report, both experts agree that the cost to undertake that rectification work is $2,603, which includes GST and builder's margin of 30%. As I have already indicated, I find that the appropriate margin to add to the raw cost of rectifying work is 10%. Therefore, I find in favour of the Owners for $1,893, which reflects the raw cost of rectification plus 10% builder's margin and excludes GST.

Junction to eave (Item 5.2)

113. Mr Kosa gave evidence that the upper floor walls have been rendered, however a gap exists between the wall and the eave junction. He suggests that a quad is required to seal the junction and weatherproof the area. Mr Atkinson gave evidence that although the installation of the quad could be considered incomplete work, the painting to the area had been completed and he therefore considered it to be an omission and as such, a defect that the quad had not been installed. I therefore find in favour of the Owners for $288.70.

Brick piers (Item 5.3)

114. This item relates to a section of brick pier adjacent to the garage which has not been fully supported on a concrete footing. Both experts agree this constituted defective work. I therefore find in favour of the Owners for $825.45.

Watertank installation (Item 5.4)

115. Mr Kosa gave evidence that the water tanks, which are in position, have not had the down pipes connected. In addition there are no stop valves,

plumbing connections or pumps installed. Both experts agree that this is incomplete work. There is no evidence before me that the Builder did not intend to complete that work. I therefore dismiss this claim, given that it is incomplete work, rather than defective work.

Rainhead diverter not installed (Item 5.5)

116. There was some confusion in the evidence given by both experts in relation to this aspect of the Owner's claim. Mr Atchison gave evidence that diverters were not part of the design of the rainhead. Mr Kosa disagreed. Ultimately, however, it is of no consequence because Mr Kosa considers that this is incomplete work. Accordingly, I dismiss this aspect of the Owner's claim.

Mortar to brick sills (Item 5.6)

117. Mr Kosa gave evidence that the brick sills had been repaired at an earlier stage, with the result that excess mortar had been left on the brick face. His evidence was that this did not match the existing mortar. In addition, he said that the bricks had jagged edges. Mr Atchison states in his report that the mortar colour match is within reasonable tolerance, although he does not cite any applicable standard or guide. Further, it would appear that Mr Atchison may have reconsidered his position as he recommends further cleaning of the brickwork in the Joint Report. I have considered the photos in the report prepared by Mr Kosa. It would appear that there is some mismatch in the colour of the mortar. I find this to be defective work and therefore find in favour of the Owners for $266.90.

Back door not painted to all edges (Item 5.7).

118. It is alleged that the back door has not been painted on all edges. Mr Atchison agrees but says in his report that this is a completion item as the door had previously been fully painted but had subsequently been planed to adjust the closing margin. I do not agree that this is a completion item. In my view, the door should have been repainted soon after it had been planed. I therefore find in favour of the Owners for $94.55.

French doors to pool area (Item 5.8).

119. It is alleged that the French doors to the pool area had not been fitted with self closing mechanisms, as required by the *Building Code of Australia* (**'the BCA'**). At a time when Mr Atchison inspected the Works, the doors had been fitted with a self-closing mechanism, presumably by the Owners. Mr Atchison states in his report that this is work that the Builder would have done prior to hand over. I agree. This item constitutes incomplete work. I therefore dismiss this aspect of the Owner's claim.

French doors not opening outwards (Item 5.9)

120. A second aspect of the complaints relating to the French doors is that they open inwards. Mr Kosa gave evidence that the clause 3.9.3.4 (a) of

the BCA required the doors to open outwards from the pool area. Mr Atchison gave evidence that the relevant clause relates to pool gates. In my view, that interpretation is too narrow and does not reflect the intent of the BCA. Indeed, the performance requirements for pool barriers states that they must restrict access of young children to the pool and the immediate pool surrounds. It seems to me that the requirement for outward opening doors reflects that performance criteria. In my view, that requirement should be no different whether the entry into the pool area is through a gate or through a door.

121. In the Joint Report, Mr Atchison states that the Builder advised that the doorframe was removed and replaced with doors opening outwards prior to the Builder leaving the site. That statement is inconsistent with what Mr Kosa states in his report. However, Mr Kosa's report states that he inspected the works on the 26 May 2009. Mr Beach gave evidence that the Builder reversed the door opening on 26 May 2009. This may have occurred after Mr Kosa visited the site. I find that on the balance of probabilities, the Builder did undertake this work prior to leaving the site. I therefore dismiss this aspect of the Owners claim. That seems consistent with what Mr Paalep states in paragraph 61 xi of his *Amended Witness Statement.*

Plaster damage to garage wall (Item 5.10).

122. It is alleged that there is a small dent on the inside of the garage wall that had not been patched prior to painting. Mr Atchison considers this to be completion work. I disagree. In my view, patching should have been carried out prior to painting. I therefore consider this to be defective work and I find in favour of the Owners for $218.20.

Stormwater connections above ground (Item 5.11).

123. Mr Kosa states in his report that the stormwater connection is level with the ground but should have had a minimum cover of at least 300 mm. Mr Atchison agrees that the bottom leg of the storm water pipes are above ground level by approximately 50 mm. He suggests that this work could be rectified by installing 15 mm compressed sheet covers over the stormwater pipes in the garden. In the Joint Report, the experts agree that the installation of some form of mechanical protection is appropriate. I therefore find in favour of the Owners for $296.

Flashings to front windows (Item 5.12)

124. Mr Kosa states in his report that the window flashings to the front windows are damaged. He states that render has been splashed over the rubber seal flashings and the sill flashings have been ripped short. Mr Atchison states that based on the photographs in Mr Kosa's report and the Owner's advice, it appears that the sill flashings were damaged and but have since been rectified by the Owner. I therefore find in favour of the Owners for $280.

Weep holes not 10 mm and not clear (Item 5.13)

125. Mr Kosa states in his report that the weep holes under the rendered areas of brickwork are not clear of debris and were not sufficiently wide enough. Mr Atchison states in his report that the weep holes are not effective and therefore defective. I therefore find in favour of the Owners for $177.45.

Garage slab-water not cleaned off from concrete (Item 5.14)

126. Mr Kosa states in his report that the garage concrete slab has mortar debris on the surface. He states that the garage slab has not been cleaned or protected during construction and that it is considered good building practice to ensure that finished surfaces are protected and kept clean. Mr Atchison states in his report that the cleaning of the slab was not completed prior to the Builder leaving the site and that it is incomplete work. I prefer the evidence of Mr Koza in relation to this particular item. In my view, good building practice dictates that finished surfaces are kept clean during construction. I therefore find in favour of the Owners for $89.45.

Pool ventilation (Item 5.15)

127. This item relates to the design of the pool enclosure. For the reasons stated above, I do not consider that the Builder was responsible for the ultimate design of the pool enclosure. Moreover, the expert evidence given during the course of the proceedings does not indicate that what the Builder constructed was contrary to the Drawings, Project Specification or any regulatory requirements. Accordingly, I dismiss this aspect of the Owner's claim.

Pool roof replacement (Item 5.16)

128. This item also relates to the design of the pool enclosure. For the reasons that I have already given, I do not consider the Builder responsible for the installation of a stainless steel roof. Moreover, there is no evidence before me that the as-installed Colorbond roof is defective or corroding. It is simply a question of its longevity. Accordingly, I dismiss this aspect of the Owner's claim.

Pool windows not restricted in opening width (Item 5.17)

129. Mr Kosa states in his report that the pool windows are sliding windows that have no stoppers or restrictors which are required under Clause 3.9.3.3 (g) of the BCA. Mr Atchison agrees that no stoppers have been installed but suggests that limiting the opening of the windows will restrict ventilation. Neither expert has provided a price to install window stoppers. Accordingly, I dismiss this aspect of the claim, given that there is no evidence as to quantum.

Tile junctions not sealed (Item 5.18)

130. Mr Kosa states in his report that the wet area tiled junctions have not been properly sealed but rather, have been grouted. He suggests that the tiled junctions require having the grout removed and then an approved sealant installed. Mr Atchison agrees that the joints need to have an approved sealant installed but suggests that the work is incomplete. I disagree. In my view, grouting the tile junctions indicated what the Builder was prepared to do. There is nothing to suggest that the Builder was going to do anything further. I therefore find that the work undertaken is defective. Accordingly, I find in favour of the Owners for $584.

Floor tile expansion joints (Item 5.19)

131. Mr Kosa states in his report that the expansion joints to the floor tiling to all main living area is incomplete and has varying widths of 1 mm to 8 mm. He says the joints are not sealed and that there are pitted and hollow sections of grout. Mr Atchison opines that this is incomplete work. Again, it appears that the work undertaken by the Builder is the work that was proposed to be handed over. There is nothing to suggest that any further work was to be undertaken by the Builder in respect of this particular item. I therefore consider this work to be defective. Mr Kosa estimates that the reasonable cost to rectify this work is $451. Mr Atchison says that the cost to undertake that work is $97. In my view, there is little work to be done to seal the expansion joints. I therefore accept Mr Atchison's costing of $97 over that of Mr Kosa. I find in favour of the Owners for $97 (this amount already includes 10% margin).

Plaster finish around rafter (Item 5.20)

132. Mr Kosa states in his report that the plaster to the junction of the rafter has not been finished, with gaps appearing around the framework. This is apparent in the photographs attached to his report. Mr Atchison opines that this is incomplete work. However, it would appear that both the walls and the rafter have already been painted. In my view, this indicates that the Builder was prepared to hand over the works in that state. I therefore consider that this is defective work and I find in favour of the Owners for $32.70.

Mirrors not install (Item 5.21)

133. Mr Kosa states that not all of the mirrors required in the Contract specifications have been installed. Mr Atchison states that this is incomplete work. I agree with Mr Atchison. The photographs in Mr Kosa's report show the area ready for the installation of mirrors. There is no evidence to indicate that the Builder was not going to undertake this work. I therefore dismiss this aspect of the Owner's claim.

Door hardware not installed (Item 5.22)

134. Mr Kosa states in his report that not all door handles and associated hardware have been installed. He further states that the work is incomplete but then states that a defect is noted. Mr Atchison says that this is incomplete work. I agree with Mr Atchison. There is no evidence to suggest that the Builder would not have supplied and installed all relevant door hardware before handing over the building project.

135. This claim was, however, re-modelled during the course of the hearing. Mr Kosa gave evidence that the door furniture supplied and installed by the Builder was marked. Mr Atchison agreed. Mr Atchison stated in the Joint Report that the door furniture *appears to have been tarnished due to inappropriate cleaning/handling.* There is no evidence before me that the Builder undertook cleaning of the door furniture before leaving the site. Indeed, it seems unlikely because some of the complaints made against the Builder relate to its failure to clean the site or parts thereof. Moreover, there is nothing in Mr Kosa's report that suggests that the door furniture was tarnished when he visited the site on 26 May 2009. I find, therefore, on the balance of probabilities that the Builder did not cause the tarnishing of the door furniture and I dismiss this aspect of the Owner's claim.

Doorframe in pool area bowed (Item 5.23)

136. Mr Kosa states in his report that the main access doorframe to the back porch area is bowed by 10 mm in its height. Mr Atchison agrees. I consider this to be defective work and I find in favour of the Owners for $176.70.

Title bench Junction (Item 5.24)

137. Mr Kosa states in his report that the tile and bench junctions to all bathrooms have been grouted rather than sealed. He states that this is contrary to Clause 3.8.1.2 of the BCA. Mr Atchison agrees that it is proper building practice to provide flexible sealant between benches and wall tiles. I therefore consider that this is defective work and I find in favour of the Owners for $165.80.

Brick cell bed joint exceeds 10 mm in width (Item 5.25)

138. Mr Kosa states in his report that the brick sill mortar joint to the doors leading into the pool area measure up to 45 mm in width. He states that AS 3700-2001 Table 11.1 states that the maximum deviation from the specified bed joint is plus or minus 3 mm. He further states that the bed joints are nominally 10 mm unless specified otherwise. Accordingly the bed joint is greater than the allowable with of 13 mm. Mr Atchison says that the bed joint cannot now be observed as paving has been laid above the joint. I was shown a photograph of this area. In my view, the fact that the bed joint has now been covered effectively extinguishes any loss or

damage suffered by the Owners. Accordingly I dismiss this aspect of their claim.

Window reveal cracks (Item 5.26)

139. Mr Kosa states in his report that the painted window reveals have surface cracking and bare surfaces. Regrettably, the window reveals had been repainted before Mr Atchison could view the same. I therefore accept the uncontested evidence of Mr Kosa and find in favour of the Owners for $2,837.10.

Nails visible to window reveals (Item 5.27)

140. This item has been covered in Item 5.26.

Slab edge (Item 5.28)

141. Mr Kosa states in his report that the doorframe to the rumpus room is not fully supported by the slab edge as it hangs slightly over the edge of the slab. Mr Atchison says that the small section of slab edge has now been covered by carpet and there is no evidence that the frame is not being fully supported by the rebate. During cross-examination, Mr Kosa conceded that there was no bowing of the doorframe when weight was placed on it. In my view, that indicates that the doorframe is adequately supported. There being no visible defect, I therefore dismiss this aspect of the Owner's claim.

Insulation in roof space incomplete (Item 5.29)

142. Mr Kosa notes in his report that the insulation to the roof space has not been completed. He further notes that there were unopened packets of batts still located on the ground floor living area. In my view, this work clearly constitutes incomplete work. There is no evidence to suggest that the Builder was not intending to complete this work before handover. Accordingly, I dismiss this aspect of the Owner's claim.

Installation around low voltage lights (Item 5.30)

143. Mr Kosa states in his report that insulation batts have not been installed around low voltage lights and that this may not be possible because the fittings did not have covers to insulate the lights from the insulation batts. In other words, the builder has simply left an area of space around each low voltage light. Mr Atchison states that this is completion work. Given that the insulation batts have not been fully installed, I agree. There is nothing to suggest that this work would not have been completed during the course of completing all of the installation of the insulation batts. I therefore dismiss this aspect of the Owner's claim.

Sarking to roofing incomplete (Item 5.31)

144. Mr Kosa states in his report that the sarking did not extend across the underside of the roof ridge to form an effective blanket and so to ensure that any condensation was directed to the gutter. He states that it has not

been installed in accordance with the manufacturer's specifications. Mr Atchison states in his report that this is incomplete work. I disagree. Looking at the photographs in Mr Kosa's report, it seems clear that the installation was defective in that there are gaps between each side of the roof sheet. I do not accept that this is work that would have been completed prior to hand over. Accordingly I find in favour of the Owners for $197.80.

Laundry chute incomplete (Item 5.32)

145. Mr Kosa states in his report that the laundry chute construction is incomplete. He says that there are bare edges and framing around the door opening which have been left bare. He states that architraves and trims are neither filled, sanded or painted. Mr Atchison states in his report that the installation of the joinery was undertaken by the Owners after termination of the Contract. That evidence is supported by Mr Beach. In my view, irrespective of who constructed the laundry chute, it constitutes incomplete work. Accordingly, I dismiss this aspect of the Owner's claim.

Wall bow in kitchen (Item 5.33)

146. Mr Kosa states in his report that the kitchen wall adjacent to the oven is bowed. Mr Atchison, on the other hand, gave evidence that the wall was straight but that the joinery installed by the Owners was not plumb. This issue could not be resolved between the two experts when they conducted a joint inspection and prepared their Joint Report. Looking at the photographs in Mr Kosa's report, it appears that the gap in the joinery only occurs on the left-hand side of the nib wall. There is no gap between the joinery fixed to the right-hand side of the nib wall. Moreover, the joinery fixed to the right-hand side of the nib wall appears to be parallel with the horizontal cornice above it. That being the case, I am of the view that it is more likely than not that the wall is true and that the gap between the joinery on the left-hand side of that wall has not been installed plumb. Accordingly I dismiss this aspect of the Owner's claim.

The pipe clamp (Item 5.34)

147. Mr Koza states in his report that the downpipe to the north side of the pool area has not been clamped to the wall. Looking at the photograph, it appears that one side of the clamp has been fixed to the wall but the other side has not. I regard this as defective installation of the clamp and I find in favour of the Owners for $4.35.

148. Accordingly, I find that the total amount of damages sustained by the Owners as a result of defective building work is $8,525.05.

Disputed Variations

149. The Owners dispute a number of variation claims made by the Builder throughout the course of the building project. Schedule 1 attached to the *Amended Points of Defence and Counterclaim* dated 16 August 2010

lists what the Owners say should be credits made to the Contract price, either because the work comprising the variation was work under the Contract or not fully completed. The total amount of credits claimed by the Owners is $20,428.

150. The difficulty with this aspect of the Owner's claim is that my finding on the question of termination has resulted in the Builder being entitled to payment on a quantum meruit basis. In other words, the Builder is entitled to be paid a fair and reasonable sum for the work completed by it, irrespective of whether the work was work under the contract or variation work. The assessment of that value of work takes into consideration work that was completed but excludes work that has not been completed. Consequently, whether work was or was not variation work; or has or has not been completed is of little consequence. What is relevant is the value of the work performed and the amount paid by the Owners to date. It makes no difference whether the amount charged for variation work is excessive or justified. When work is assessed on a quantum meruit basis, all work, including variation work and work under the contract, is consolidated and valued as one.

151. Accordingly, given my finding on termination and the Builder's right to claim on a quantum meruit basis, the Owner's claim in respect of credits is dismissed.

152. Accordingly, I assess the Owner's damages that have crystallised prior to termination of the Contract to be $8,525.05 in relation to the cost to repair defects plus $2,707.10 (rounded down) in relation to liquidated damages for delay, totalling $11,232.15.

153. Accordingly, I determine the Owners counterclaim by finding that the Builder is to pay the Owners $11,232.15.

CONCLUSION

154. I consider it appropriate to set-off the Owner's counterclaim assessed at $11,232.15 against the Builder's claim assessed at $7,484.80. I will order that the Builder pay the Owners the difference between these two amounts of $3,747.35.

155. I will reserve the question of interest and costs for later argument, should either party wish to agitate the same.

SENIOR MEMBER E. RIEGLER