

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D666/2006

CATCHWORDS

Terms of settlement – whether ‘accord executory’ or ‘accord and conditional satisfaction’ – terms of settlement frustrated – whether owners can enforce the terms of settlement - cost of rectification

APPLICANTS	Baba Afireen Hafis Preena, and Wawage Millika Dap Preena
RESPONDENT	Pryda Developments Pty Ltd t/as Pryda Homes
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Hearing
DATE OF HEARING	15-17 March 2010
DATE OF ORDER	15 April 2010
CITATION	Preena v Pryda Developments Pty Ltd (Domestic Building) [2010] VCAT 434

ORDER

- 1 The respondent shall pay the applicants \$13,038.12 forthwith.
- 2 Costs and interest reserved with liberty to apply. I direct the principal registrar to list any such application before Deputy President Aird for 2 hours.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For Applicants	Ms C Kirton of Counsel
For Respondent	Mr R Andrew of Counsel

REASONS

- 1 Building a new home can be emotionally demanding for all, but particularly for the owners. If things do not go to plan it often becomes difficult for parties to adopt an objective approach to resolving their differences. Litigation is fraught with difficulties and building and construction litigation, in particular, is expensive. In this case, the costs I anticipate the parties have incurred seem to be completely lacking in proportionality to the amount of any possible award of damages. At its highest, the owners' claim is for \$62,612.93 plus interest and costs. There has been a mediation and two compulsory conferences on-site in Bendigo. This proceeding was initially set down for a five day hearing, but with the co-operation of counsel and the experts it was completed in three days including a day for a view in Bendigo.
- 2 Both parties were represented by very experienced counsel: the applicant owners by Ms C Kirton and the respondent builder by Mr Andrew. Dr Preena gave evidence on behalf of the owners, and Terrance Pearce, who is the sole director of the builder, gave evidence on its behalf. The owners relied on expert evidence from Gerard Brandrick, an architect, Robert Styles, an engineer and Michael Cordia, a quantity surveyor. The builder relied on expert evidence from Ray Martin, a building consultant.
- 3 With the exception of Mr Cordia, who gave evidence on the first day of the hearing, the experts attended the view in Bendigo following which they met and were able to agree a number of smaller items. On the third day of the hearing I heard the expert evidence concurrently. Mr Brandrick was the only expert cross-examined at length for reasons which will become apparent.

BACKGROUND

- 4 In February 2004 the owners purchased the land from, and entered into a contract with the builder for the construction of a new home in Bendigo for \$329,000. Mr Pearce of the builder lives directly behind them. During construction, and following completion of their home, the owners noticed a number of items which they considered to be defective. After they were unable to resolve their concerns with the builder they commenced these proceedings, on 21 September 2006, claiming a credit of \$9,697.21 for prime cost items they alleged had not been carried out, and \$63,300 for rectification of alleged defective works.
- 5 At that time the owners relied on an Archicentre report dated 20 December 2004 which was prepared by Geoff Dawson, architect and a Building Commission Report prepared by Gerard Brandrick, architect, following an inspection on 5 December 2005.
- 6 The proceeding settled at mediation and terms of settlement ('the terms'), dated 1 December 2006, were signed by the parties.

THE TERMS OF SETTLEMENT

- 7 Under the terms the builder was to pay the owners \$3,500, and return to site to carry out, at its cost, the works set out in lists which were attached.
- 8 The builder did not complete the works and the owners applied to have the proceeding reinstated. Consent orders reinstating the proceeding were made in chambers on 21 July 2008
- 9 There were two lists attached to the terms: the first was prepared by Mr Pearce ('the builder's list'), and the second was the Building Commission report, prepared by Mr Brandrick. The agreed works were to be completed by 31 March 2007. The builder paid the \$3,500 as required, but did not complete all of the agreed works. Relevantly, the terms provide:
 3. The parties agree to appoint Geoff Dawson of [address] as an expert to inspect the premises and verify the works have been satisfactorily attended to, to set a figure for the cost of satisfactorily completing any works which have either not been completed or have not been completed satisfactorily, which amount will be paid by the Respondent within seven days of the report of the expert in lieu of completing the work. The fees of the expert shall be paid by the parties equally.
 4. Subject to the performance of these terms the parties hereby mutually abandon and release each other from all claims and demands arising out of this dispute. This release does not apply to any rights claims and entitlements the Applicant have or may have in respect of future defects, including any further deterioration of the driveway, arising after the date hereof in respect of the building works carried out by the Respondent under the Building Contract (sic)....
8. If the Respondent does not comply with these terms of settlement the Applicant may apply to the List to reinstate the proceedings and obtain an order for the agreed sum and the amount which is determined by the architect in accordance with Clause 3 hereof plus costs of reinstating the action and obtaining the order (to be fixed by the List) plus any statutory interest which has accrued between the date of these terms and the date of the order.
- 10 Although the parties agreed to appoint Mr Dawson as an expert under the terms to inspect the premises and identify any incomplete works (including those which required further work), and to set a figure for the cost of completion, he was apparently unavailable to accept the appointment. The parties agreed to vary the terms including the appointment of an alternative expert. The terms were varied by an exchange of correspondence between the parties' lawyers.
- 11 On 4 May 2007 the owners' lawyers wrote to the builder's lawyers:

We refer to your facsimile dated 27 April 2007 [I do not have a copy of this] and advise that Dr & Mrs Preena would be prepared to resolve outstanding issues on the following basis:

1. That your client attend to completion of the outstanding works within 35 days.
2. That your client attend to payment of the shortfall in respect of the air conditioning claim in the sum of \$7,920 within 30 days.
3. That your client attend to payment of Dr & Mrs Preena's legal costs in the sum of \$4,735.00 within 30 days.
4. That paragraph 3 of the Terms of Settlement between the parties be amended to delete the words "Geoff Dawson of [address]" and to replace those words with the words "an architect or a builder nominated by Archi Centre" (sic)

We look forward to hearing from you as soon as possible.

12 The builder's lawyers responded by facsimile dated 16 May 2007:

We refer to your letter of 4 May 2007 and the offer contained therein. We are instructed to respond as follows (adopting your paragraph numbering):

1. Agreed subject to our client being given 5 days notice to start the works (and hence the 35 day period) and subject to rain delays not being included.
2. Our client will agree to pay your client within 30 days the difference between the price they paid our client for the airconditioning unit and the amount of insurance ultimately received by your clients. The 30 days is to start running from when you supply us with appropriate evidence of the amount of the insurance claim admitted in favour our your clients; (emphasis added)
3. Our client will either provide landscaping to the value of your clients' legal costs from the front of the house to the fence line or alternatively will pay your client \$2,370.00 in 60 days and \$2,370.00 in 90 days.
4. Agreed

Please let us have your reply at your earliest convenience.

13 The owners' lawyers responded by letter dated 18 May 2007

We refer to your facsimile of 16 May 2007 and now respond as follows:

1. Agreed
2. This is agreed subject and conditional upon the amount which your client paid for the airconditioning unit being fixed in the sum of \$12879.00
3. Agreed

We look forward to hearing from you.

- 14 And finally, the builder's lawyers once again responded by facsimile on 23 May 2007:

We refer to your letter of 4 May 2007, our letter of 16 May 2007 and your letter of by facsimile received 22 May 2007 but dated 18 May 2007 ("your 22 May fax"). Our client agrees to the matter in your 22 May fax and in consequence all matters are agreed and this matter may now be concluded. (sic)

- 15 The builder did not complete the works and the owners' lawyers contacted Archicentre who arranged for Mr Brandrick (who prepared the first Building Commission report) to inspect them.

Mr Brandrick's role

- 16 It seems that Mr Brandrick does not have a clear appreciation and understanding of the different capacities in which he has been engaged to provide advice in relation to this project. His first involvement was as an inspector appointed by the Building Commission to inspect and prepared a report in December 2007.
- 17 Subsequently, he was appointed by Archicentre in accordance with the terms 'as varied' to inspect the premises and identify any incomplete works (including those which required further work), and to set a figure for the cost of completion. Then, by reference to correspondence passing between him and the owners' lawyers dated 11 February 2009, he was apparently engaged directly by the owners' lawyers to inspect the premises, prepare a report identifying any defective works and the cost of rectification and to attend the hearing which was then scheduled to commence on 16 March 2009.
- 18 Following receipt of correspondence from the builder's then lawyers expressing concern that he was not acting independently as contemplated by the terms (and in which the functions of the expert appointed under the terms were clearly set out) Mr Brandrick wrote to the owners' lawyers on 4 March 2009:

Further to receipt of the letter from Tony J Chay, barrister and solicitor acting on behalf of Pryda Developments Pty Ltd., we have considered the contents of this letter and whilst not agreeing with many of the claims made by Mr Chay, it is clear from the tone of Mr Chay's letter that he is clearly unreasonable.

I have a busy and successful architectural practice in Echuca and do not wish to nor have the time, to become embroiled in litigation between two parties.

I therefore have to advise that **I do not wish**, nor shall be, employed further in this matter.

We trust that you will advise all parties of this course of action.

- 19 The owners' lawyers responded by letter dated 13 March 2009 in which, after setting out their understanding of his function under the terms, they indicated that if he did not provide the costings as contemplated by the terms, the

owners would either apply to join him as a party to these proceedings or commence separate proceedings against him for *'damages for breach of your retainer to properly perform the work you were engaged by Dr and Mrs Preena to perform...'* Thereafter, Mr Brandrick arranged for MP Cordia & Associates to prepare the costings report.

Mr Brandrick's reports

- 20 Mr Brandrick's reports are undated. On the front cover of his 'first report' appears January 2008 (his file reveals this report was sent to Archicentre on 11 January 2008) and on his second report 'January 2008, updated and supplementary report added February 2008'. In the Forward to his first report he records

This report is prepared as an inspection and comments on the rectification works undertaken by the contractor

An inspection was undertaken by Gerard Brandrick, a registered architect and member of the Archicentre inspection team on 13 December 2007.

Referenced documents were:

- Building Commission report
- Letter from Terrance Pearce dated 27 November 2007.

- 21 In the Forward to the second report he records

This report is prepared following an inspection on previous building and repair works and comments on these works undertaken by the contractor.

An inspection was undertaken by Gerard Brandrick, a registered architect and member of the Archicentre inspection team on 13 December 2007. A second visit was undertaken on 22 February 2008 to review the additional items as listed in the reported prepared by Mr Stuart McLennan.

Referenced documents were:

- Building Commission report undertaken by Gerard Brandrick [December 2005]
- A further report undertaken by Stuart McLennan on behalf of the Building Commission on 16 May 2008 and presented to ourselves following the inspection on 13 December 2007. [emphasis added to show change from first report]

- 22 The schedule following his first inspection (January 2008) is undated and is headed "Initial inspection of items outlined in Building Commission Report prepared by Gerard Brandrick". The schedule prepared following his second inspection is headed 'Supplementary items referred to in report prepared by Stuart McLennan and inspected on 22 February 2008'.

- 23 At the end of the second report he includes a cost estimate for the first schedule of \$5,900 - \$8,150 + GST (excluding item 23: the air conditioning) and for the supplementary list: \$31,150 - \$39,950 + GST; a total of \$37,050 - \$48,100. This costing estimate is undated.

24 In cross examination Mr Brandrick said he had not seen the terms, and that he did not understand he had been appointed to perform a specific task as contemplated by the terms. He thought he was preparing a 'standard' Archicentre report.

25 A copy of the terms were sent to Archicentre by the owners' lawyers under cover of a letter dated 28 November 2007 together with a copy of the correspondence between the parties' lawyers set out above. Relevantly they confirm:

We should be pleased if the architect would inspect the property with a view to determining whether the rectification works as detailed in the Terms of Settlement and the Accompanying documents as to the Terms of Settlement [the two lists] have been carried out in a satisfactory manner.

To the extent that works have not been completed or have not been completed satisfactorily we should be pleased if you would arrange for the architect to set a figure for the cost of satisfactorily completing those works.

26 Counsel for the builder called upon Mr Brandrick to provide his file during the hearing. A copy of the terms is in his file stapled to a copy of the facsimile from the owners' lawyers to Archicentre dated 28 November 2007 referred to above.

27 Following a ruling by the tribunal that an indication of a range of estimated costings was not in accordance with the terms, the owners reverted to Archicentre and Mr Brandrick. Mr Brandrick advised that he was not qualified to prepare detailed costings and recommended the engagement of a quantity surveyor to perform this task. Michael Cordia of MP Cordia & Associates Pty Ltd was engaged and prepared a detailed costing. Although Mr Brandrick said he co-ordinated the engagement of Mr Cordia, Mr Cordia's report is headed 'Trade Breakup by Head1'; records the Job Name as 'Preena' and the Client's Name as Cahills Solicitors (the owners' lawyers). Mr Cordia estimated the cost of rectification at \$38,373.84. As I noted on the last day of the hearing, a review of his report reveals that Mr Cordia has costed a scope of works which, in respect of a number of items, is quite different to that seemingly contemplated by Mr Brandrick.

PNVCAT 2 statement

28 The following statement is included in Mr Brandrick's reports:

**VCAT2 – EXPERT EVIDENCE STATEMENT
REGARDING GERARD BRANDRICK**

DATE: 21 JANUARY 2008

This report complies with the Practice Note VCAT2 – Expert Evidence as set out by the Victorian Civil and Administrative Tribunal Act 1098 (sic)

1. Expert Evidence

1.1 Introduction and Background

Further to a request from the owners to Archicentre to provide an Architect's Advice Report on [property address] for Dr and Mrs Preena to assess the owners' concerns regarding the quality of workmanship and acceptable standard of finishes for works completed and ensure that the terms and conditions of the VCAT hearing. [sic]

- 1.2 Archicentre Report No 142821 is enclosed. The inspection was undertaken on 13 December 2007 and the report completed following this inspection.

...

The inspection report is as a result of works completed by the contractor to comply with a VCAT ruling and in accordance with a Building Commission report Reference C/0/51182

- 29 In response to a question from me Mr Brandrick said he was not familiar with PNVCAT 2 – Expert Evidence and had simply included this statement in his report as required by Archicentre. It seems from his file that he faxed this statement to Archicentre on 22 January 2008.

The Addendum

- 30 Mr Brandrick has added the following addendum to his reports. The addendum is dated 15 May 2009 ('the third Brandrick report'):

Further to our earlier report, Archicentre Pty Ltd was asked to provide a definite cost for the completion/rectification of the items listed in this report.

We as architects believe we did not have sufficient specialist knowledge to provide current updated costings for the satisfactory completion of the works and therefore recommended utilizing the services of a qualified quantity surveyor.

The firm appointed to undertake these costings was MP Cordia & Associates Pty Ltd.

A copy of their detailed costings is attached to this addendum.

We believe that the costings outlined by MP Cordia & Associates Pty Ltd should taken precedence over our initial range of costings due to the more detailed nature and expert knowledge of this company.

- 31 However, there is a second addendum, also dated 15 May 2009, which is in identical terms save for the final paragraph for which the following has been substituted, at the request of the owners' lawyers by letter dated 20 May 2009:

I have reviewed the costings outlined by MP Cordia & Associates Pty Ltd and consider these costings to be fair and reasonable and I adopt the costings in respect of the proper cost of rectification works as outlined in my reports.

- 32 It is apparent from his file that Mr Brandrick constantly sought advice and guidance from Archicentre including about withdrawing his services. At the hearing it was clear that he believed he was there to give evidence on behalf of the owners, not in his capacity as an independent expert under the terms.

Can the owners sue 'on the terms'?

- 33 Counsel for the owners contends the terms constitute an 'accord and conditional satisfaction' and has prepared very detailed submissions as to the differences between an 'accord executory' and an 'accord and conditional satisfaction'. The release specifically provides that it is '*is subject to the performance of these terms...*'. Counsel for the builder confirmed it accepts the terms are properly characterised as an 'accord and conditional satisfaction' but submits they have been frustrated and cannot be enforced. The builder, however, accepts that the owners' alternative claim under the contract is competent.

Have the terms been frustrated?

- 34 Although not pleaded in its Points of Defence, Mr Andrew submitted on behalf of the builder that the terms have been frustrated because of the failure of Mr Brandrick to perform the task required of him under the terms. In particular, he submitted, Mr Brandrick failed to set a figure for the cost of completing the works. Rather, he recommended that a quantity surveyor be engaged to perform this task.
- 35 I do not agree that the terms prohibited the expert appointed pursuant to the terms calling in the assistance of another expert, providing he verified the task carried out by that expert was the one he was required to perform under the terms.
- 36 Mr Cordia has not prepared a separate expert report or a witness statement. His costings were simply attached to the Addendum to the third Brandrick report. On the first page of the document headed 'Trade Breakup by Head1' he records that his report is based on the second Brandrick report incorporating the first Building Commission report following an inspection carried out by Mr Brandrick on 13 December 2007, and the supplementary report prepared by Mr McClelland following an inspection on 22 February 2008. He does not appear to have been provided with a copy of the terms.
- 37 The difficulty here is that in respect of many items, Mr Cordia has identified and costed a different scope of works from the one recommended by Mr Brandrick. Mr Brandrick simply accepted these costings. He did not satisfy himself that Mr Cordia had estimated the cost of carrying out of the works he had identified as being necessary.
- 38 I am satisfied that the terms have not been frustrated. The clear unequivocal agreement of the parties was that the builder should first be given an opportunity to rectify, and that if it failed to do so, or failed to do so

satisfactorily, it would pay the owners the cost of having those works carried out by another builder.

- 39 Subsequent to entering into the terms they were varied such that the builder agreed to reimburse the owners the difference between what it had paid for the air conditioning unit and the amount they recovered from the insurer; to carry out landscaping or pay the owners \$4,740 for legal fees; and an architect or builder, appointed by Archicentre, was substituted for Mr Dawson as the expert to identify the works to be carried out and fix the figure for such works. The failure of the expert to perform the intended task, whether because of a miscommunication from Archicentre, which does not seem to be the case, or his lack of appreciation of his function under the terms, does not, in my view, mean that the terms have been frustrated.
- 40 I am satisfied there was an accord conditional as submitted by counsel for the owners, and that the owners could elect to sue on the terms as they have done.

THE OWNERS' CLAIM

- 41 The owners seek to enforce the terms and also claim the cost of rectifying the additional defects which have been identified since the terms were entered into. Their claim is calculated as follows (inclusive of GST):

Cost of rectifying defects from the original terms	\$27,436.35
+ Half of the costs associated with the appointment of the expert under the terms	\$ 5,005.78
- Archicentre invoice 25 January 2008	\$ 1,295.00
- Archicentre invoice 4 April 2008	\$ 590.00
- Brandrick Architects 31 March 2009	\$ 254.38
- Brandrick Architects 31 March 2009	\$ 305.25
- Cordia & Associates 7 May 2009	\$ 2,992.00
- RJ Styles & Associates 2009	<u>\$ 4,574.90</u>
	\$10,011.55
+ Owners' legal costs in accordance with varied terms	\$ 4,740.00
+ Reimbursement of additional costs for air conditioning	\$ 8,757.00
+ Cost of rectification of additional defects	<u>\$16,673.80</u>
	\$62,612.93
+ Statutory interest from 1 December 2006	
+ Costs of enforcing the terms	

42 Alternatively, they seek damages for breach of contract, or alternatively for negligence/breach of duty of care (inclusive of GST):

Cost of rectifying defects from the original terms	\$27,436.35
+ Cost of rectification of additional defects	<u>\$26,308.67</u>
	\$53,745.02
+ Costs of the proceeding since issue in 2006	
+ Interest	

43 The owners rely on two schedules: the first sets out the items which are yet to be completed under the terms and the second sets out the additional items. I will respectively refer to the items in schedule 1 as 1.1, 1.2 and so on, and in schedule 2 as 2.1, 2.2 and so on.

44 The amount claimed by the owners for each item is by reference to Mr Cordia's report. For the reasons discussed earlier in these reasons, these are of little assistance. Mr Martin has also provided costings for each of the items.

Schedule 1

1.1 Garage floor - \$1,505.28

45 This is an additional handwritten term numbered item 1 in the builder's list:

Repair shrinkage cracks in concrete floor of garage. Build up floor on south side of overhead door to eliminate gap under door seal.

46 No work has been carried out to the garage floor. There is some shrinkage cracking but it is not extensive. It is also out of level by 30mm over 1.2m. The garage door has been adjusted so the uneven levels of the garage floor are no longer as obvious as in the photographs taken by the experts and the owner. There is evidence of water ponding in the front corner of the garage adjacent to the house.

47 I am satisfied that the installation of a 15mm x 15mm angle across the opening as suggested by Mr Martin is a practical solution at a cost of \$210. I find the application of a levelling compound in the corner, as suggested by Mr Martin during the hearing, is reasonable. He suggested the cost of doing this would be \$100. I consider it appropriate to allow \$400 in total.

1.2 Render - \$9,315.88

48 Under the terms the builder agreed to arrange for the renderer to apply another coat to the front wall. There are two areas of render which are of concern: the render on the front of the house where the brick profile is visible, and the poor standard of application of render to the beam on the front of the garage. At the view the brick pattern was clearly visible on one large panel on the front wall, and intermittently at other points particularly on the lower part of the pillars.

49 There is some disagreement between the experts as to the products and render method contemplated by the contract. The specification simply refers to render. I accept that it is common practice to use a proprietary product. The application of a further coat is all that is contemplated by the terms and I allow \$3,842 (\$3,210 for the front wall, and \$632 for the beam).

1.3 Poor paint finish on replacement front door - \$134.40

50 The front door has been replaced as contemplated by the terms. Mr Brandrick had identified poor paint finish to the new door as a defect. Following the view, Mr Brandrick concedes this is not a defect, and no allowance is made.

1.4 Insulation in roof space over low voltage downlights - \$808.56

51 The experts agree this is a defect. Mr Brandrick conceded that Mr Martin's costing of \$500 was reasonable. Mr Martin said he estimated the works would take 7 hours at \$50 per hour plus GST and margin and that he had rounded this to \$500. I accept this and allow \$500.

1.5 Plaster in main bedroom

52 This relates to two items: cracking in the cornice and peaking in the plaster ceiling. In his report prepared for the Building Commission Mr Brandrick identified the cracking in the cornice as a defect. Following the view he revised his opinion and concedes this is not a defect.

53 As I understand it the second item refers to the slight peaking. Mr Martin suggests this can only be seen with the light on and is therefore not a defect under the relevant 'Guidelines to Standards and Tolerances'. However, although not glaringly obvious I observed the peaking before the light was turned on and accordingly allow this item. The only evidence I have about the cost of rectification of this item is as set out in Mr Cordia's report where he has allowed \$458.20 to sand and repair the joints, and repaint the ceiling which I find is reasonable and allow.

1.6 Garage pillar - \$10,408

54 The owners rely on the expert evidence of Mr Styles who is an engineer. The builder has not arranged for an independent engineer to inspect the column although Mr Pearce said the column had already been rebuilt and approved by the project engineer, who was not called to give evidence. Mr Styles freely admitted that he was not sure what was causing the movement. He agreed with me that the column is not showing any sign of distress. It is clearly out of plumb and the beam is showing signs of movement. Mr Styles said that, although he does not consider it presently dangerous, his calculations reveal it does not comply with the structural requirements of AS 3700.

55 Mr Martin is not an engineer but speculated that any movement was due to seasonal fluctuations. Mr Martin said he thought any necessary works including the re-rendering could be done for \$1,000.

- 56 In the absence of any engineering evidence to the contrary I accept Mr Styles' evidence. Although he confirmed he is not expert in providing costings he said he thought the cost of replacing the column would be approximately \$5,500. (The cost of re-rendering is allowed for under 1.2).
- 57 In the circumstances, and accepting that the column does not comply with the structural requirements of AS 3700, and being satisfied Mr Styles estimate is reasonable, I find the column should be replaced and allow \$5,500.

1.7 Crack in wall near corner of dining room and hallway - \$2,308

- 58 There is a small crack near the corner of the dining room and hallway. On close inspection it is noticeable. However, I am not persuaded that the cutting in of a control joint would be aesthetically pleasing. I find this should be scraped out, patched and repainted. Mr Martin gave an oral estimate of the cost of carrying out this work of \$500. Mr Brandrick said he was unable to provide an estimate but thought \$500 was 'marginally light'. I am satisfied \$500 is a reasonable estimate which I allow.

Schedule 2

2.1 Driveway – cracks to concrete on driveway and coloring has faded - \$12,590.08

- 59 The driveway was recoated by the builder in accordance with the terms.
- 60 There are numerous hairline cracks which, following the view, Mr Brandrick agreed are not a defect. As I observed during the view, there is significant scratching on the surface of the driveway, particularly adjacent to the garden and lawn. No claim is made for these and it is obvious they have occurred following the recoating works.
- 61 In May 2009 the owners obtained a further inspection report from the Building Commission – prepared by Stuart McLennan. Although Mr McLennan inspected the driveway and reported at item 3 that the builder's work was not defective, the owners have maintained their claim that the driveway should be replaced. Perhaps not surprisingly, as it does not support their claim, a copy of Mr McLennan's report was not filed by the owners. However it was tendered by the builder on the last day of the hearing. Irrespective of the owners' reasons for not filing a copy of Mr McLennan's report, it was as a direct result of this report that Schedule 2 – the supplementary issues, were identified and included in the owners' claim. Further, this report formed the basis for the second Brandrick report and is specifically referred to by Mr Brandrick as a reference document. In those circumstances it should have been filed.
- 62 There are two cracks which, although the experts agree are not a defect, I find are unsightly and should be repaired. The crack in front of the garage can be repaired by cutting in a control joint, which Mr Martin agreed, on reflection, would have been prudent, as the crack is almost in the centre of a long narrow strip between the grate and the garage floor.

63 I accept the second crack in the vicinity of the verandah can be filled. Mr Martin suggested a cost of \$200 to repair both cracks. I consider \$300 to be more realistic, which I allow.

2.2 Cracking in wall junction in bulkhead in bedroom 3 - \$282.90

64 Following the view Mr Brandrick conceded this is not a defect, and I make no allowance for it.

2.3 Manhole covers are plasterboard - \$88.30

65 Mr Brandrick concedes this is not a defect but submits that the price of the house is relevant in considering whether the manhole covers should have been of a non-destructible material such as plywood. I accept that plasterboard is the norm and make no allowance for this item.

2.4 Latch side of entry door into WIR in main bedroom not planed - \$141.42

66 Following the view Mr Martin revised his estimate and accepts the owner's estimate, which I allow - \$141.42.

2.5 Airconditioning - \$8,757

67 This seems to be the owners' primary concern. Dr Preena gave evidence that the owners always wanted to have the ability to regulate the air conditioning in two areas of the house – the living areas and the bedrooms. There was no provisional sum allowance for the air conditioning and the specification is of little assistance. It simply provides:

Mequay Split system heating & cooling unit zoned to two areas
supplier All systems (sic).

68 Mr Pearce said it was always agreed and understood that the same system as the one in the builder's display home would be installed. After the contract was signed the owners had some discussions with All Systems – the supplier and installer of the air conditioning unit, who gave them a drawing marked with different highlighters showing what I understand to be the anticipated airflows.

69 Unfortunately, the air conditioning system did not work properly from the time it was installed. Initially it would only heat, but not cool, in the living areas. Item 23 on the builder's list attached to the terms provides:

Air-conditioning – doesn't operate properly, doesn't cool in all rooms – lounge heats only.

Builder to arrange for a suitable system with not less than the same capacity and with similar features as the existing system to be installed.

70 Subsequently, the owners made a claim on All Systems' insurance through the Plumbing Industry Commission. This took the better part of two years to resolve, seemingly because of the owners' reluctance to accept the offer made to them by the insurer.

71 The claim was processed through N.R. Thomas Loss Adjustors and copies of correspondence between Mr Thomas and the owners has been included in the tribunal book (copies of any correspondence from the owners to N.R. Thomas has not been included). On 20 November 2006 the insurer agreed to replace the McQuay Air Conditioning system with a Daikin system Model FDY250 (27.5kW Cool, 29.6kW Heat) as quoted by Sandhurst Air Conditioning & Plumbing at a cost of \$12,870. The offer was conditional on the owners surrendering the existing unit. On 12 December 2006 N.R. Thomas wrote to the owners advising:

As indicated verbally, you cannot expect to receive payment for the cost of a more expensive air-conditioning unit than the one purchased originally and if you wish to install a more expensive unit you would need to meet any additional cost yourself.

72 There is further correspondence in a similar vein. On 2 April 2007 N.R. Thomas advised the owners' lawyers that if the offer was not accepted within 14 days it would be withdrawn by the insurer, GIO. In the same letter, they say:

This matter has now been dragging on since August 2006, incurring very considerable fees and we have it on good authority that Dr & Mrs Preena have "had every air-conditioning firm within 100km of Bendigo inspecting, quoting and giving advice on alternative equipment" according to what we have been told. We must conclude therefore, that they are being quite unreasonable about the whole matter...'

73 The release was finally signed by the owners on 1 June 2007. Subsequently, they purchased two units and now seek to recover from the builder the difference between the amount they received from the insurer and the cost of the two units - \$8,757.

74 The owners contend that the agreement with the builder, as varied [as set out above], was that it would reimburse them the difference between what they recovered from the insurer and what they paid for the replacement unit. This might well have been their intention, and is certainly reflected in their offer as set out in their lawyer's letter of 4 May 2007 in relation to item 2:

That your client attend to payment of the shortfall in respect of the air conditioning claim in the sum of \$7,920 within 30 days.

75 However, this offer was not accepted by the builder. The builder's counter-offer was set out in its lawyers' facsimile of 16 May 2007: that it would pay the difference between what the owners paid it for the air-conditioning unit and the amount they recovered from the insurer. This was accepted on the owners' behalf by their lawyers on condition that the amount paid by the builder for the unit be fixed in the sum of \$12,879 [the amount offered by the insurer].

76 This was accepted on behalf of the builder by its then lawyers by the facsimile of 23 May 2007. Importantly, these negotiations and variations to the terms of

settlement occurred prior to the owners signing the release required by the insurer.

- 77 Whether the agreement, as evidenced by the exchange of letters between the parties' lawyers, accurately reflects the owners' understanding or their instructions is a matter between them and their lawyers. The correspondence and ensuing agreement is quite clear: the builder agreed to reimburse the owners the difference between what it paid for the unit, fixed in the amount of \$12,879 as insisted upon by the owners through their lawyers, and the amount the owners recovered from the insurer - \$12,879. Accordingly, there is no difference to be reimbursed.
- 78 If I am wrong, and the terms are not enforceable, I would still not allow the owners' claim for reimbursement of the additional amount they paid for the airconditioning system. Whilst it is clear that the McQuay unit was faulty and needed to be replaced there is no evidence at all that an alternative single unit would not have operated effectively. To the contrary, Sandhurst Airconditioning & Plumbing provided a quotation dated 23 October 2006 in which they proposed three alternative solutions, including the installation of a new Daikin Model FDY250 at a cost of \$12,879 which formed the basis of the insurance settlement. The cost of the most expensive alternative was \$15,939. Other cheaper options were suggested, including the repair of the existing unit at a cost of \$4,356. I have heard no evidence that the Daikin Model FDY250 was unsuitable.
- 79 As noted above, the specification is vague. It simply provides for the supply and installation of McQuay split system zoned to two areas. The model and capacity was not specified. Although a provisional sum was not allowed for the airconditioning I am satisfied the specification provided for the installation of a one unit, dual zoned system. The installation of a two unit system is clearly betterment, and the owners are responsible for the additional cost. This claim is therefore dismissed.

2.6 Atrium walls – some hairline cracking - \$192

- 80 Following the view Mr Brandrick conceded this is not a defect and no allowance is made.

2.7 Hairline cracks in external verandah ceiling - \$138

- 81 Following the view Mr Brandrick conceded this is not a defect and no allowance is made.

2.8 Significant gaps in pergola - \$1,727.27

- 82 At the view the cracking and caps in the pergola ceiling and cornices were apparent. Both experts agree this is a defect and agree that the appropriate method of rectification is to backblock, seal and cut in additional control joints. They agree that removal and replacement is not required. Mr Martin has estimated the cost of this work at \$759 which I allow.

Conclusion

83 I will therefore order the builder to pay the owners the sum of \$12,400.62 calculated as follows:

1.1	Garage floor	\$ 400.00
1.2	Render	\$ 3,842.00
1.4	Insulation in roof space over low voltage downlights	\$ 500.00
1.5	Plaster in main bedroom	\$ 458.20
1.6	Garage pillar	\$ 5,500.00
1.7	Crack in wall near corner of dining room and hallway	\$ 500.00
2.1	Driveway	\$ 300.00
2.4	Latch on entry door in WIR in main bedroom	\$ 141.42
2.8	Gaps in pergola	<u>\$ 759.00</u>
		\$12,400.62

84 The owners also claim reimbursement of 50% of the costs of the reports prepared by Mr Brandrick as set out in paragraph 39.

85 The terms clearly provide the parties will share equally the cost of the expert appointed under the terms to inspect and verify the works were complete, and to identify any outstanding or incomplete works and fix the cost for the carrying out of those works. The only appointment that could be said to have been in accordance with the terms was the initial appointment of Mr Brandrick, including his inspection on 15 December 2007 and preparation of the first report. The cost of this seems to be \$1,275 – the first Archicentre invoice, and I find the builder is obliged to pay 50% of that cost, even though Mr Brandrick appears to have misunderstood the task he was engaged to perform. I allow \$637.50.

86 The second Archicentre invoice was rendered in April 2008, apparently after Mr Brandrick inspected the further items identified by Mr McLennan in February 2008, and prepared the supplementary report. These are disbursements incurred by the owners in relation to the Schedule 2 items and were not incurred under the terms. They, together with the following disbursements, are otherwise included in the owners' costs of the reinstated proceeding.

87 The invoice rendered directly by Brandrick Architects are not directly connected with his appointment under the terms.

88 The costs of Cordia & Associates are not costs incurred pursuant to the terms. Cordia & Associates were engaged by the owners on the recommendation of

Mr Brandrick. Their engagement was not discussed with the builder or its representatives. Further, as discussed above, in respect of many items, Mr Cordia has estimated the cost of carrying out a different scope of works to the one identified by Mr Brandrick including Schedule 2 items which are additional to those the builder was obliged to rectify under the terms.

- 89 R J Styles & Associates – Mr Styles was engaged directly by the owners, not pursuant to the terms.

Interest

- 90 The owners claim interest from the date of the terms relying on clause 8 which provides they are entitled to the costs of reinstating the proceeding and interest from the date of the terms. I accept they have not incurred the cost of carrying out the works. Further, at the time the proceeding was reinstated, by consent, the cost of the works had not been fixed by Mr Brandrick as anticipated by the terms. In such circumstances, I am not persuaded it is appropriate to make any order for payment of interest without hearing further from the parties and accordingly I will reserve interest.

MR BRANDRICK'S COSTS

- 91 Mr Brandrick attended the hearing in response to a Summons to Appear issued at the request of the owners. Before he left the witness box counsel for the builder explained to him that he could ask the tribunal to order payment of his fees for responding to the summons. He said he would be seeking \$6,000 – based on a rough calculation done in the witness box.
- 92 Mr Brandrick lives in Echuca. He carried out a further inspection of the property on the Friday prior to the hearing, he attended the tribunal on the first day of the hearing, the view in Bendigo and the tribunal again on the final day to give his evidence.
- 93 Section 104(4) of the *Victorian Civil and Administrative Tribunal Act 1998* provides:
- A person who attends in answer to a summons is entitled to be paid the prescribed fees and allowances (if any) or, if no fees and allowances are prescribed, the fees and allowances (if any) determined by the tribunal.
- 94 It seems to me that before any claim for payment of his fees can properly be considered Mr Brandrick should prepare a properly particularised tax invoice. This should be forward to the owners, in the first instance, for payment. If the owners do not pay, it will be then be a matter for him and his advisors as to the steps he takes to recover payment.

CONCLUSION

- 95 This has been a most unfortunate situation for the parties, not assisted by the failure of the expert appointed under the terms to perform the functions contemplated by them.
- 96 I will order the builder to pay the owners the sum of \$13,038.12 and reserve interest and costs with liberty to apply.

DEPUTY PRESIDENT C. AIRD