

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP60/2016

CATCHWORDS

Domestic Building Contracts Act 1995 – rectification work of another builder – scope of works – whether rectification works were defective – credibility of witnesses -evidence

APPLICANT	Raniti - CBMS Pty Ltd (ACN 082 771 122)
RESPONDENT	David Ryan and Margaret Ryan
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	30 - 31 October, 1 -2 November and 13 November and Submissions received 8 December 2017
DATE OF ORDER	27 February 2018
CITATION	Raniti–CBMS Pty Ltd v Ryan (Building and Property) [2018] VCAT 281

ORDERS

1. Order that the Respondents pay to the Applicant the sum of \$9,617.14 plus damages and the nature of interest calculated at \$1,978.24, making together the sum of \$11,595.38.
2. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Mr D. Noble, Solicitor
For the Respondents	Mr J.A. Silver of Counsel

REASONS

Background

1. The Respondents (“the Owners”) are the owners of a semi-rural property (“the Property”) in Gisborne upon which they had a dwelling house constructed between 2010 and 2011 (“the House”). The Applicant (“the Builder”) is a registered builder.
2. The House was largely constructed by another builder (“the Original Builder”) but the Owners became dissatisfied with the work and so they terminated the contract with the Original Builder and completed the House themselves.
3. The Owners obtained an award of damages in this Tribunal against the Original Builder but it went into liquidation and the award was not satisfied. The Owners then made a claim on a policy of domestic building insurance that had been issued by Calliden Insurance Ltd (“the Insurer”) with respect to the construction by the Original Builder.
4. The principal problem with the House was that it had substantial drainage problems, largely because it had been constructed at too low a level, and water was ponding around it.
5. The Insurer sent out a number of experts to inspect the House. These included Mr Rodwell, a consulting engineer, a building consultant, Mr Simpson, and two plumbing consultants, Mr McNees and Mr Dower.
6. In his report to the insurer, Mr Rodwell noted that the House had been built too low into the ground which he said had created drainage problems. He prepared some designs for remedial work that he said ought to be undertaken to resolve the situation. Following some discussions with the Owners, he subsequently prepared three further alternate designs.
7. Apart from the drainage problem there were items of defective work claimed. The Insurer accepted for some of these, but denied liability for others. The principal defect was a blocked sewer pipe under the laundry floor.
8. A document entitled “Inspection Summary” (“the Inspection Summary”) are, setting out a scope of works was prepared by the Insurer’s consultant, Mr Simpson, to rectify all the defects with respect of which the Insurer accepted liability, including the drainage and the sewer pipe.
9. At the invitation of the Insurer, the Builder tendered for the work, offering to rectify the defects for \$66,216.70 and complete the incomplete works for a further \$14,542 (“the Builder’s Works”). The tender was accepted by the Insurer and an agreement was thereafter entered into between the Owners and the Builder to carry out the Builder’s Works.
10. While the builder was carrying out the drainage work, the Owners requested a number of changes from Mr Rodwell’s original design. In

particular, Mr Ryan did not want the Builder to construct outfall drains that were intended to take water away from the House towards the eastern boundary of the Property.

11. By November 2015 the Builder claimed to have completed the Builder's Works and submitted an invoice to the Owners for the final payment of \$16,151.60, less a credit of \$1,150 for work that had been omitted at their request.
12. A dispute then arose between the Owners and the Builder. On 16 December the Builder served upon the Owners a notice of intention to terminate the contract for failure to pay the final invoice and for refusing it access to the Property. Following further correspondence the Builder served a notice of termination on the Owners on 12 January 2016.

The hearing

13. On 20 January 2016 the Builder commenced these proceedings, seeking recovery of the sum of \$15,001.60 plus various other sums that it claimed to be owed. On 30 November 2016, the Owners counterclaimed, alleging defective work and seeking damages and other relief.
14. After a number of interlocutory steps, the matter came before me for hearing on 30 October 2017 with four days allocated. Mr D Noble, Solicitor, appeared on behalf of the Builder and Mr J.A. Silver of Counsel appeared on behalf of the Owners.
15. The time allocated was insufficient and so the matter was adjourned part heard to 13 November 2017 when the evidence concluded. Directions were then given for the filing and service of written submissions and these were received by 8 December 2017.

Witnesses

16. As to factual matters, I heard evidence from Mr Raniti for the Builder and Mr Ryan for the Owners. Expert building evidence was given by Mr Simpson, a building consultant, for the Builder and by Mr Price, a building inspector, for the Owners. Expert engineering evidence was given by Mr Rodwell for the Builder and by Mr Carlin-Smith for the Owners. I also heard from Mr Pitney, a quantity surveyor, whose report was filed on behalf of the Owners.
17. It was submitted on behalf of the Owners that Mr Rodwell was not independent because his designs had been criticised and that the sufficiency of his designs was one of the issues that I had to determine. I do not accept that submission.
18. Although it was suggested that his designs lacked some detail, that was acknowledged, but as Mr Rodwell pointed out, they were done for the Insurer to enable a scope of works to be prepared to rectify the problems on the site. No error in his designs was demonstrated although he agreed that

he ought to have included catch drains on either side of the driveway to collect run-off.

19. I thought Mr Rodwell was an impressive witness who gave clear evidence and a readily comprehensible account of how the site was to be drained. I thought the observations and opinions that he expressed in his evidence were measured and sensible.
20. I am satisfied that, had any of Mr Rodwell's designs, or even the hybrid solution that was eventually adopted, been constructed in accordance with his drawings, the drainage system would have worked.
21. I was not impressed by the evidence of Mr Ryan. His initial witness statement was prepared by a woman who described herself as a consumer advocate and is somewhat emotive. He acknowledged that the final statement was written partly by her, partly by himself and partly by his wife. It is difficult to know from his evidence how much of his witness statement was his own recollection and what was the contribution of others.
22. Mr Ryan ignored advice given to him by Mr Rodwell in regard to the drainage and also advice not to use a tap until the sewer pipe was repaired. Of most significance, he would not allow the swale drain to be constructed, although that was an essential part of the drainage system.
23. Much of the case turned upon instructions given by Mr Ryan to Mr Raniti not to carry out various items of work. Mr Silver submitted that I should not be satisfied with the evidence of Mr Raniti and Mr Rodwell in this regard unless I should find that there was a degree of precision sufficient to enable me to be reasonably satisfied that the words were in fact spoken. He referred me to the case of *Watson v. Foxman* (1995) 49 NSWLR 315 at 319 per McClelland J. I am satisfied that there was such a degree of precision in the evidence given and Mr Ryan's denials that the conversations occurred or that he was even present reflect adversely on his credit.

The expert evidence

24. Mr Rodwell said that he first visited the site on 6 August 2014 accompanied by a representative of the Insurer and a plumbing consultant, Mr Dower. He said that he took levels of the site as well as photographs in order to investigate the nature and extent of the drainage problem. He found that the site sloped slightly from the driveway entrance in the northwest towards the southeast.
25. He prepared a report dated 6 August which contains a design for:
 - (a) the lowering and re-levelling of the ground around the House;
 - (b) an agricultural drain to the north of the House;
 - (c) the construction of a series of pits connected by underground drains to collect the water from the agricultural drain, the downpipes and surface water around the House;

- (d) a swale drain and an underground drain to direct the water that was collected away from the House downhill in a south-easterly direction towards the eastern boundary of the Property to discharge some distance to the southeast of the House. According to the expert evidence, this type of downhill discharge is called “daylighting”; and
 - (e) a catch drain to be constructed to the north of the House to intercept any overland flow from the north and direct it towards the eastern boundary of the site and another catch drain to the west of the House to intercept overland water from that direction and discharge it below the House.
26. The report also contains a design for the repair of the broken sewer pipe under the laundry floor.
 27. The drainage system in this original report was not designed to run to a dam. Rather, it was to run onto the surface of the Property to the south-east of the House near the eastern boundary.
 28. On 12 August Mr Rodwell received a request from the Insurer to consider a future dam that the Owners intended to construct in order to receive the stormwater. He then prepared a second report, which was also dated 6 August, to take such a dam into consideration. It set out three alternative designs.
 29. The first alternative was similar to the original design but extended the outflow swale drain and discharge from the underground piping system further down the eastern boundary to the site of a future dam to be constructed well to the south and slightly in from the eastern boundary, with a spillway in the south-eastern corner of the dam.
 30. The second alternative was similar to the first except that the underground stormwater pipes and agricultural drains would no longer discharge down an underground pipe towards the eastern boundary. Instead, the above-ground swale drain would carry only surface water and the underground pipes would be connected to a sump pit adjacent to the south-east corner of the House. From there it would be pumped to the site of a future dam with a spillway, which was to be constructed directly to the south of the House. The swale drain towards the eastern boundary was included in this design, but only to take surface water.
 31. The third alternative was similar to the second except that it provided for the sump pit that was to take the underground drainage to be located to the south of the middle of the House. The water would then be directed by gravity along an underground pipe to the site of a future dam to be constructed well to the south of the House at a lower level than the invert level of the sump pit.
 32. The drawing of each of these three possible future dams incorporated a spillway to ensure that the top water level of the dam was kept below the inlet level from the House.

33. All three alternatives relied upon the same swale drain to carry surface water away from the House in a south-easterly direction towards the eastern boundary of the Property and had the two catch drains described above. The differences between them related to what was to happen to the water collected by the stormwater pipes and agricultural pipes in each of the systems that Mr Rodwell designed.
34. Mr Rodwell's conclusion in this second report was as follows:

“The outfall proposals shown in the report 3532 [*the original design*] I recommend as the most practical method of addressing current problems.

The alternative proposals in this report are however provided for consideration.”
35. Mr Carlin-Smith criticized what he said was a lack of sufficient detail in the designs. In particular, he said:
 - (a) There had been no calculation of the flows the system would have to cope with;
 - (b) The underground pipes should have been specified to be 150 mm diameter;
 - (c) The pits were too small; and
 - (d) There was insufficient fall between the pits;

The contract

36. The form of contract to carry out the Builder's Works was a Master Builders Association Home Improvement Contract. Mr Raniti said that he gave it to the Owners on 28 October 2014 and collected it from them on 1 December 2014, which is the date that has been written on the document.
37. The contract describes the work as “RECTIFICATION WORKS TO BATHROOM & OTHER AREAS”. In the spaces provided for the insertion of details of specifications, plans and other documentation, the words “AS PER RODWELL CONSULTING REPORT” have been inserted.
38. The Builder's tender had been made on the basis of the Inspection Summary, which was provided by the Insurer on 17 September 2014 and it was acknowledged during the hearing that this was the work that was to be done. Mr Raniti said that the contract included the terms identified in the Inspection Summary. There is no reference to this document in the contract but evidence is admissible to establish what the rectification works “to other areas” was.
39. Mr Silver referred me to s.31 of the *Domestic Building Contracts Act 1995* (“the Act”) which provides that a builder must not enter into a major domestic building contract unless it sets out in full all the terms of the contract, has a detailed description of the work to be carried out and

includes plans and specifications of the work that contain enough information to enable a building permit to be obtained.

40. In the present case the drainage system was to be constructed and the sewer pipe was to be repaired in accordance with Mr Rodwell's designs. The remaining work which was the subject of the contract was rectification work. Although the drainage plans were criticised as lacking detail in some respects, I think that there was sufficient detail there to obtain a building permit if one were required.
41. As to the rectification work, I am satisfied that the Builder's Works were those set out in the tender that the Builder had submitted to the Insurer. That is what the Builder agreed to do for the price and what the Insurer agreed to pay for. It paid that money to the Owners in order to have that scope of works carried out.
42. At the time the contract was signed, there were two reports from Mr Rodwell in existence, both dated 6 August 2014, although the second was actually prepared on 12 August. The contract document does not identify which of the three alternatives in the second report is to be constructed by the Builder. This was something that was agreed upon afterwards on site.

No building permit

43. Mr Silver submitted that the Builder ought to have obtained a building permit for the work. The contract documents stated that a building permit was not required. Mr Simpson said in his report that, by s.19 of the *Building Act* 1993 a building permit is not required for drainage work if it is done in accordance with an emergency order. He also pointed out that, by Schedule 8 of the *Building Regulations* 2006, a building permit was not required for the repair, renewal or maintenance of part of an existing building in certain circumstances set out there, none of which applied to the present case.
44. It seems to me that a building permit was not required, but in any case, it was not suggested that any loss was suffered by the Owners because a permit was not obtained.

The progress of the work

45. Following the execution of the contract there was some delay, apparently due to a dispute between the Owners and the Insurer.
46. Work commenced on 25 March 2015. According to Mr Raniti, this including lowering and shaping the ground around the House and removing topsoil. Although initially it had not been decided which of the three alternatives designed by Mr Rodwell was to be constructed, the earthworks were the same for each of the three designs.

Variations

47. The contract price for carrying out the Builder's Works was \$80,758.00. As the work progressed, further work was found to be necessary which the Insurer agreed to pay for.

48. The first of these related to the repair to the sewerage pipe under the floor. When the top of the slab was removed it was found that the internal beam was in a different position from that indicated in Mr Rodwell's design, requiring an amended design by Mr Rodwell and additional work by the Builder. On 16 September 2015 the Builder invoiced the Insurer the further sum of \$8,520.00. That sum was paid to the Builder directly by the Insurer.
49. On 18 May 2015 the builder provided a quotation to the insurer for the following additional works:
- (a) Replace and stain the garage side timber door: \$590.00;
 - (b) Remove the door sliding panels in the living and dining rooms, repair all panels and jambs, allowing them to operate freely and stain accordingly: \$850.00;
 - (c) Re-render all external walls to make the colour uniform throughout: \$15,000.00;
 - (d) Remove fly screens check for dry rot or any other imperfections, sand all windows and doors back to raw timber and clean up, apply two coats of paint according to manufacturer's specifications: \$6,480.00;
 - (e) Remove French doors to master bedroom supply and install new set of doors ordered by the Original Builder (balance of \$1,000.00 owing), paint to match existing doors and reinstate hardware: \$1,850.00.
50. These amounts total \$24,770.00 and with a 20% margin and GST, the quotation amounted to \$32,696.00. The quote was accepted by the Insurer. In addition to this work, the following extra charges were made by the Builder which the Owners paid:
- (a) Lowering downpipes: \$203.00
 - (b) Cost of late cancellation by Owners of sewer works: \$933.00
 - (c) Staining windows and doors: \$895.00
- When these amounts, together with a margin and GST, were added, a total of \$35,377.00 was invoiced and paid.
51. Mr Silver submitted that the builder was not entitled to charge an additional amount for these variations because the requirements of s.37 of the Act were not complied with. However, since the work was requested by the Owners, the relevant provision is s.38 and, as Mr Noble pointed out, the amounts in question were less than 2% of the contract price and it is not suggested that carrying out this work caused any delay or was likely to do so when they were requested to down. Since the work was requested the Owners should pay for it. Moreover, they have paid the Builder and it is not suggested that the payment was made under any mistake.
52. On 30 September 2015, the Builder invoiced the Insurer an additional \$2,092.00 to paint the eaves of the House. This was paid directly to the Builder by the Insurer.

53. On 24 November 2015, the Builder invoiced the Insurer for the cost of repairing a valve on the Owners' Hot Water Service and also for a camera inspection of the repaired sewer. This amount was paid to the Builder directly by the Insurer.

The 27 April meeting

54. A meeting took place on site on 27 April 2015 between Mr Raniti, Mr Ryan, Mr Rodwell and the plumber, Mr Colenso.
55. Mr Silver pointed out that the Builder had not called either the plumber or Mr Colenso to verify what was said and, in reliance upon the rule in *Jones v. Dunkell* (1959) 101 CLR 298, he submitted that I should infer that their evidence would not have assisted the Builder. I do not think that it is appropriate to draw such an inference. That rule does not necessarily require every available witness to be called.
56. Both Mr Raniti and Mr Rodwell said that, in the course of that meeting, Mr Ryan said that he was not prepared to allow the construction of the swale drain that was to extend to the eastern fence line because he did not want water accumulating against the fence or running onto his neighbour's property. He was also concerned about flooding on top of the septic tank outlet for the House, which was located just to the south of where the swale drain was to be constructed.
57. In addition, they said that the Owners wanted to construct a dam to the south of the House towards the centre of the site and they wanted the water directed to that dam.
58. After discussion, it was agreed during the meeting that a hybrid of alternatives two and three in the second report would be constructed, comprising a sump pump at the location shown in alternative 3 to take all of the underground water and pump it to the location of the future dam to the south.
59. Mr Ryan said that the evidence of Mr Raniti and Mr Rodwell concerning this meeting was "a complete fabrication". He denied that there was any meeting that took place on 27 April and said that the only meeting that he had with Mr Rodwell was in August. I prefer the evidence of Mr Raniti and Mr Rodwell. There is no reason why Mr Rodwell would invent a meeting that never took place. Moreover, it is likely that the meeting that decided upon which design to construct would have been held early because the invert levels of the pits as designed were different from those that were constructed to suit the hybrid design. That decision could not have been made without input from the Owners and it had to be made before the pits were built.
60. The dam was constructed by the Builder. It was not part of the Builder's Works but the Owners requested it and the Builder made no charge for it. Mr Raniti said that he told Mr Ryan that he would not dig a spillway and that Mr Ryan agreed to do that himself. No spillway has ever been

constructed as a result of which, according to the expert evidence, the water level in the dam is too high. Although concerns were expressed that there may be a back-flow from the dam to the House, it was not finally established whether or not that was occurring.

The 13 May meeting

61. A further meeting took place on 13 May 2015 between Mr Raniti, Mr Ryan, Mr Rodwell and a Mr Molcik from the Insurer.
62. At that time the earthworks were in progress and during the meeting, Mr Rodwell said that it was critical that the levels should be followed and that, due to wet weather, the catch drains to the north and west of the House should be constructed as a matter of urgency.
63. Mr Raniti said that Mr Ryan told him at that meeting that he was not to complete the catch drains on each side of the House. The one to the north was intended to catch overland flow from the North but as a consequence of Mr Ryan's instruction, it is between 5 and 10 metres shorter than the design required, which would have extended it down towards the eastern boundary. Instead, it extends to near the end of the House and no further.
64. Mr Raniti said that Mr Ryan then blocked off the drain by piling soil and garden refuse there. The other drain to the south of the House was not constructed. Mr Raniti said that Mr Ryan did not want it dug because it would have cut across a grass driveway that runs from the garage of the House to a nearby shed.
65. The amount of excavation involved in completing the swale drain and the two catch drains was said to be not significant.
66. On the day after the meeting, being 14 May 2015, Mr Rodwell wrote to the Insurer, saying:

“It does not appear that the works to date are closely following the design drawings prepared by this office in August 2014 – to be confirmed. A detailed discussion was held with Mr Raniti in relation to the design and the works to date, along with a strategy for ensuring a suitable result is obtained.”

Later in the letter he said:

“Earthworks on this site at this time of the year may be difficult and delayed by wet weather so it may be best to install the catch drains as per the design as a matter of some urgency; to deflect overland flows around the house location – as discussed with the Builder. These catch drains could be made continuous with the table drains that will be required along the sides of the driveway (to establish a proper drained formation) prior to crushed rock surfacing”.

The 3 August 2015 meeting

67. A further meeting took place on 3 August 2015 between Mr Rodwell, Mr Raniti, Mr Colenso, Mr Ryan and a labourer.

68. Mr Rodwell said that, at that meeting he noticed that most of the earthworks had been done but the daylighting was still to be done, and the catch train was not finished as per the plan. He said that he was told by Mr Raniti that the Owners had said to him that they did not like the surface outflow daylighting down the hill away from the House heading east and south. Mr Rodwell said that it had to be done and that it was critical, otherwise the water from the batter around the House would not be able to discharge naturally. He said that Mr Raniti agreed, and that he (Mr Rodwell) said to Mr Ryan, who was present at the time:

“if [you] choose not to take my advice, I will not be held responsible.”

69. An email concerning this meeting was sent by Mr Rodwell to the Insurer on 14 August which concludes as follows:

“As also discussed, I have some concerns about the owners’ lack of cooperation with this project. They are refusing to allow the contractor to complete the earthworks in accordance with my design/instructions – I fear this may impact on the effective drainage of the site.”

The sewer repair

70. Mr Raniti said that when his workmen cut through the slab in order to expose the broken sewer pipe they found that an internal beam from the slab was in a different position from that anticipated and that a greater scope of works was required.
71. At the request of the Insurer, Mr Rodwell attended the site on 14 August 2015 and observed that it was necessary to partly cut the beam in order to effect the repair. He prepared a design for the work and reinstatement of the slab which, according to Mr Raniti, was subsequently carried out. Mr Ryan denied that Mr Rodwell attended site on that day but I prefer Mr Rodwell’s evidence that he was there. Apart from his greater credibility, the Insurer had requested him to attend and was to pay him for attending, he needed to be there to look at the state of the excavation of the sewer and it is unlikely that he would have drawn his amended design without an inspection.

The balance of the work

72. In comparison with the drainage and the sewer repair, the other items to be done were comparatively minor.
73. On 6 November 2015, Mr Raniti gave to Mr Ryan an invoice for the final payment of \$15,001.60, being the final payment due under the contract less a credit for plastering that the Owners did not want done. No payment was received.
74. Shortly afterwards complaints were made by the Owners. The first such complaint concerned water in the backyard of the House, which was found to be due to a leaking hot water service. It was fixed by the Builder’s plumber at no charge to the Owners, although Mr Ryan said that it was the plumber who had broken it in the first place. Whether or not that was true was not explored in the evidence and nothing turns on it. The Owners also

complained of paint drops and some other matters that Mr Raniti said were minor. He said that when he attended the Property on 18 November 2015 to look at these matters Mr Ryan refused him entry.

75. On 7 December 2015 the Builder purported to suspend work on the ground that it was excluded from the site.

Termination

76. On 16 December the Builder sent a further notice to the Owners purporting to determine the contract on the ground that the Builder was denied access to the site in order to do the final clean and that the final payment had not been made, although it was then one month overdue. I note however that, if the work had not been completed, the final payment would not have been due. By an email dated 12 January 2016 the Builder purported to terminate the Contract. I note however that it claimed to have already completed the work and had invoiced for the final payment.

Defence and counterclaim

77. The Owners claimed that the work was carried out defectively and seek the cost of having it carried out by another contractor.
78. The defects alleged are as follows:

The drainage system

79. Mr Silver submitted that, by s. 8(f) of the Act, the Builder warranted that the work and material would be reasonably fit for the purpose, in this case, to drain water away from the House.
80. There are two aspects to the drainage system. The first is the re-levelling of the ground around the House and the second is the system of pits, pipes and aboveground drains that were to collect and carry away the water.
81. The Inspection Summary provided for the following scope to be undertaken by the Builder in regard to the drainage:

“Re-grade the ground levels to the perimeter of the Property to provide adequate drainage and eliminate accumulation of water around the dwelling.

Works may include but not be limited to those works detailed in the Rodwell Consulting reports dated 06 August 2014 and Hail or Shine report dated 12 August 2014, e.g.:

- Perimeter regrading of the site.
- Installation of strip and cut of drains, provision of agricultural and stormwater pipe work as well as the various associated grates, taking special attention to accurately comply with all levels, inverts and outfalls.
- Protect all existing services being retained, make good any associated damage and alter any encountered services to the extent required.

- Remove, seal or cover any redundant or unnecessary existing stormwater drainage lines.
- At the owners' discretion, stockpile, spread and/or remove any surplus soil created as a direct result of the works.

NOTE: The provision of the proposed dam and any overflow or extended outfall pipe work beyond the dam's intended location is not a contractual obligation of the Builder and is to be provided and/or paid for by the Owners."

82. An issue in the case was whose responsibility it was to top-dress and seed the ground areas after they had been reshaped by the Builder. Neither the Owners nor the Builder did that and there has been some erosion of the ground surface which has altered to an unknown extent the ground levels as the Builder constructed them. There is no evidence as to whether landscaping was included in the contract the Owners had with the Original Builder or whether it was within the scope of the indemnity provided to them by the Insurer to provide landscaping but in any case, I am not satisfied that it was within the scope of the Builder's Works.
83. Mr Carlin-Smith produced a plan that he prepared showing the top and invert levels of each of the six pits in the drainage system around the House that the Builder had constructed. In particular:
- he described it as "common practice" to use 150mm diameter stormwater drains where there were "well documented drainage problems". He said that these larger pipes were less likely to be blocked by material entering through the grates on the pits and that they required less fall. He did not say that the use of 100 mm drains by the Builder was a defect. He did not say that he had calculated that the wider drain was necessary. Indeed, one of his complaints was that no calculation as to the flows the system would have to cope with were done;
 - he described the PVC pits the Builder installed as "relatively flimsy" but did not say that they were defective on that account. He said that "for such a drainage problem", minimum depths of 450 to 600 mm "would be expected" with concrete pits 450 x 450 mm minimum size with steel grated lids. Again, he did not say that any regulation required pits of that description. No such pits are noted on Mr Rodwell's designs which seem to have left it up to the Builder to install pits suitable for the design.
 - he pointed out that the top of Pit No. 4 was 30 mm higher than the adjacent concrete slab in the garage and this was acknowledged by the Builder to be a defect;
 - he said that it would have been "preferable" to have a strip drain 200 to 230 mm wide at the garage entrance instead of the drain which was supplied, which was 150 mm wide. However he did not say that the strip drain supplied was defective on that account.

- (e) he said that the agricultural drain, where it was exposed near pit 6, was only approximately 300 mm deep and not 450 mm deep which he said is a "...depth normally associated with such drains". He did not say that that was a defect.
 - (f) he said the agricultural drain had no geotextile sock and that the backfill had mud mixed with the screenings. He did not say that a geotextile sock was required or that mud mixed with the backfill screenings indicated defective work but he said that, once the aggregate becomes clogged with silt and mud, the drain the becomes totally ineffective. He did not say that it had become clogged.
 - (g) He said that, although the grading on the northern side of the Property was "...generally along the lines of..." Mr Rodwell's report, the levels beside the slab were consistently 80 mm below what Mr Rodwell had suggested. He said that the result was "...a very flat fall..." from the House in the order of one in 50 instead of one in 30 as suggested by Mr Rodwell.
 - (h) He described the western end of the batter as being over excavated but he did not say by how much, or what the consequence of the over excavation was.
84. He concluded by saying: "...the grading and drainage have been both inept and under capacity." He said that a proper grading and drainage plan should be prepared by a qualified civil engineer and the works carried out in accordance with it which would, he calculated, cost \$46,320.00.
85. He produced a number of photographs to support his observations, some of which were taken by his office but the majority of which had been taken by the Owners. Some of the photographs taken by the Owners were taken during construction and they indicate the depth of some of the excavations.
86. Mr Price inspected the Property on 25 August 2016 and took levels of the slab, the pit heights, the pipe invert levels and ground service levels immediately adjacent to the House.
87. He said that the results of the site levels showed that the surface water drainage had not been constructed to catch and drain surface water and convey it to the silt pits which were required to dispose of it to the legal point of discharge. There are photographs forming part of this report which show water ponding some distance away from the House, which indicates that the ground does fall away from the House, although it is not possible to see from the photographs what the fall was.
88. Mr Price said that in some places, the silt pits were higher than the surrounding soils which he said accounts for the surface water ponding in the front and rear sections of the House. It was apparent on the site visit that the only pit that was above ground level was the one near the garage (Pit No. 4). At the time of this inspection the pits were all full of water and the pump that was intended to drain them was not connected.

89. He said that the invert levels and size of the inlet and outlet pipes did not comply with Australian Standard AS3500.2, in that they were required to be 20 mm lower on the outlet side. The section of the standard that he set out in his report shows a difference of 20 mm. It states:

“Sump pits shall have a flat floor but a fall of at least 20 mm between pipe inverts as shown in figure 8.4(b).”

There is no evidence concerning the consequences of failing to achieve that fall. No such fall is specified in any of Mr Rodwell’s designs.

90. He said that the minimum gradient of a stormwater drainage should be one in one hundred. He said that the soil around the House was not graded to flow into the silt pits. He provided two photographs showing what he said was a fall of only 1 mm away from the House.
91. He said that to remove the existing drainage system and put in another one would cost an estimated \$48,550.00 and to grade the surrounding soils would cost an estimated \$16,250.00.
92. Mr Simpson inspected the Property on 23 January 2017. He noted that one pit on the north side of the garage (Pit No. 4) was installed above the natural ground level and should be lowered but said that otherwise the ground fell away from the dwelling except in three areas, namely:
- (a) a fenced garden area forming the south-east corner courtyard, where he said the Owners had raised the ground level. He said this area appeared to be heavily watered:
 - (b) the area on the north-west corner of the House where it appeared that the Owners had recently planted some trees and raised the levels of the soil; and
 - (c) the courtyard outside the family room where the Owners had had concrete paving installed that had a fall towards the House.
93. He said that the work done by the Builder was completed generally in accordance with the Rodwell Report (where possible) and that the external finished ground levels graded away from the House in accordance with Section 3.1.2.2(b) of the Building Code of Australia. On this issue, he concluded as follows:
- “Other than works undertaken by the owner, the placement of the sump pit outside the garage and the restrictions placed on the Builder by site constraints, such as required to discharge to a legal point of discharge, it would appear that all works have been completed in accordance with the Schedule of Works dated 27 July 2014.”
94. Mr Rodwell made the following observations when he attended the Property on 6 June 2017:
- (a) the long gravel driveway to the House is only roughly formed and the associated surface drainage was poorly defined. He said that if the driveway were to be properly formed it could include side drains

(“table drains”) to take water run-off from the driveway and direct it around the House via the catch drains.

- (b) The top of the pit near the garage was too high and the pit needed to be lowered.
- (c) The failure to grass the newly shaped batter to the north of the House has resulted in some erosion of the surfaces as formed by the Builder. Mr Rodwell said that it had made the surface uneven and the area needs top dressing and seeding and some surface treatment. He said the invert drainage was also obstructed by rocks placed there by the Owners.
- (d) The catch drain to the north of the House was found to be overgrown and poorly maintained. The eastern end of it was missing or had been filled in and was converted to lawn by the Owners. He said that it needed re-cutting to daylight it to the east.
- (e) A fenced area on the east side of the House had moist soil and poor drainage. He said this was close to the area where the sewer pipe was broken.
- (f) The pit on the north east corner was holding water. He said the underground drainage system was not working because the pump was not operating.
- (g) The pit on the south-east corner of the House was holding water. He said that the invert extension from the south-east corner of the House had not been constructed and that it was a major concern that such a critical part of the surface drainage system was missing. He said that the whole of the area around the House had been graded to have a surcharge pathway to the east, which was essential to protect against major flooding.
- (h) The sump pump pit on the south side of the House was almost full of water and the pump had been disconnected sometime previously by the Owners due to an electrical problem.
- (i) The area to the south of the House was wet with some ponding of water. The main ponding was where there has been some minor subsidence that occurred of the backfill over the drainage pipes. He said that the area was flat and had been disturbed with works by the Owners, including paving stones and a large planter box. He said that the whole of the south side of the House needed top dressing and reshaping to ensure that surface drainage was reinstated or improved;
- (j) the dam was close to being full and the pipe discharging from the sump pit into the dam was below water level which he said was a concern because back-feeding to the House might occur. He said that no spillway had been constructed to reduce the water level to below the pipes.

(k) The catch drain to the south of the House had not been constructed.

Mr Rodwell concluded that the drainage system was not working because of various actions, inactions or decisions made by the Owners. He said that the larger pipes and pits suggested by Mr Carlin-Smith were unnecessary and were outside the scope of the Builder's Works.

95. Mr Rodwell said that some further works were required to make the site drainage effective, including:
- (a) completing the catch drains as designed;
 - (b) re-cut further inverts and "daylight" them to the east as per the design;
 - (c) topsoil and top-dress all areas around the House and stabilise with grass or paving;
 - (d) ensure all areas drain to pits;
 - (e) clean silt out of pits and pipes;
 - (f) ensure the pump is working; and
 - (g) check that the pump line outfall to the dam is operating and that the pipe is above the top water level of the dam.
96. The experts agreed that the construction of the swale drain was essential in order to remove water from around the House, although Mr Carlin-Smith did not mention this in his report.
97. I note that the failure to complete cut-off drains and the swale drain was not alleged by the Owners as a defect in their Points of Defence and Counterclaim. Rather, it was suggested that the excavation of the dam was in compensation for the Builder not having to construct the swale drain. I accept the evidence of Mr Rodwell and Mr Raniti that these drains were not completed on Mr Ryan's instructions.
98. The ground to the north of the House has been excavated so as to slope away from the House and a batter has been constructed. The agricultural drain has been installed below ground at the toe of this batter. Sometime between 16 January and 16 June 2016, the Owners placed a row of stones along the toe of the batter directly above the agricultural drain but these have since been removed. Mr Rodwell said that silt from the soil which was being eroded would be collected by the stones which would reduce the effectiveness of the agricultural drain.
99. The photographs tendered which show water on the ground around the House show it ponding away from the House, indicating that a fall from the House was achieved.
100. Mr Silver submitted that the farm dam and spillway were essential elements of the Rodwell design, without which the drainage issues would not be solved, given that the water would have nowhere to go. He said that it would make no sense to undertake the drainage works without them. I do not accept that submission. The scheme in each of the designs was to direct

the water away and downhill from the House. Moreover, each of the Rodwell designs that includes a dam has the word “(FUTURE)” on the indicative drawing of the dam, indicated that it is something to be constructed in the future. There is no design provided for any dam. Consequently, I cannot find that the drainage work was deficient without the dam and spillway being constructed. However it is clear that, if a dam was to be constructed it would need to have a spillway to maintain the water that it contained at a correct level.

101. From all of this evidence I find that:

- (a) Although no calculations were made as to the required capacity of the drainage system it does not appear from the evidence that anything flowed from that. It is quite clear from the evidence that the problems experienced did not relate to any deficiency in the capacity of the system as designed but rather, to the refusal of the Owners to allow the works to be completed and their failure to pump the water collected in the underground pipes to the dam.
- (b) The pipes laid by the Builder were 100 mm in diameter and not 150 mm but I accept Mr Rodwell’s evidence that the diameter of the pipes that were used is sufficient.
- (c) Although Mr Carlin-Smith described the pits as flimsy, and said that he would have used larger pits, I am satisfied that the pits that were installed by the Builder were fit for the purpose.
- (d) The agricultural pipe was laid approximately 300 mm below ground level. Although Mr Carlin Smith said that it was usual to lay such a pipe deeper, I am satisfied that it was laid at a sufficient depth.
- (e) It was agreed by the experts that table drains should be constructed on both sides of the driveway. However these table drains were not within the scope of works required to be done by the Inspection Summary nor were they in any of Mr Rodwell’s designs. Consequently the failure of the Builder to construct them is not a breach of the contract.
- (f) Pit No. 4 next to the garage needs to be lowered. I find that this was defective work by the Builder.
- (g) Grassing the batter areas north of the House should have been done in order to prevent erosion and compromising the levels that the Builder created but it was not required by Mr Rodwell’s drawings or the Inspection Summary. The Owners rely upon a detail provided of the construction of a typical agricultural drain but that detail relates only to the area directly above the trenches excavated to lay the pipe, not to the areas to be regraded and battered in order to produce the necessary overland drainage. The direction given in this detail is to seed and re-establish lawns and reinstate other surfaces. I think a reasonable interpretation of that is to say that, if the trench is dug in a lawn, then

the lawn is to be reinstated where the excavation took place. If it is dug in some other type of surface, then that is also to be reinstated. The trenches to lay the agricultural pipe were not dug in lawn or any other form of finished surface that required to be reinstated and so the trench simply had to be back-filled. Consequently, the failure of the Builder to grass the area that was levelled and reshaped is not defective or incomplete workmanship on its part. The evidence does not permit me to make any finding as to what degree this has affected the original levels, although it was said that silt has been deposited in the area where the Builder created the fall from the House and over the invert/subsoil drain where the rocks were laid by the Owners. The rocks have since been removed by the Owners.

- (h) The Builder did not put a geotextile sock around the agricultural pipe as provided in the detail given by Mr Rodwell. I find that such a sock would have acted to prevent silt from entering the pipe but that it might also have become blocked with silt itself which would have reduced the effectiveness of the agricultural pipe. There was some discussion between the experts as to the need for such a sock. Mr Carlin-Smith agreed in cross-examination that a blocked sock could not be cleaned whereas if there were no sock, silt entering the pipe could be removed. It seems to me on this evidence that it would be better not to have sock. I am unable to find that the omission of a sock was defective workmanship or that it would be reasonable to allow the cost of digging up the drain in order to put a sock over the pipe.
- (i) The catch drain to the north was not extended far enough on the instructions of Mr Ryan and the end of it appears to have been filled in. Whether or not that was done by Mr Ryan, as Mr Raniti alleged, I find that it has not been maintained by the Owners. The catch drain to the west was not constructed, also on the instructions of Mr Ryan. The extent to which this is allowing water to reach the House is unknown. During cross examination, Mr Ryan, asserted that, if the underground drains had been done properly they would not have been required. That is contrary to the expert evidence.
- (j) The drainage to the fenced area to the east of the House needs to be improved. This is an area that has been landscaped by the Owners. Reshaping and draining this area was not within the scope of the Builder's Works.
- (k) There is a fall between the pits and they contain water because the pump is not being operated. Since the invert level in the pump sump pit is lower than the levels in the other pits, and there is a fall towards it from all of the other pits I find that the pits would not contain water if the pump were in operation. Although Mr Carlin Smith criticised the fall in the agricultural drain, according to the evidence the high point of that drain is where it changes direction. It falls from that point

towards both pits four and six. Consequently, his calculation that the fall is 1 in 243 is not correct.

- (l) The refusal of the Owners to permit the Builder to construct the swale drain to take overland flow from the south-east corner of the House means that water surrounding the House has no means of escape apart from the sump pump. I find that the swale drain is essential to protect the House against major flooding.
- (m) The Owners have carried out some works to the south of the House, including the installation of stepping stones, a planter box and a concrete slab which falls towards the House. It is not possible on the evidence to say to what extent this has affected the levels created by the work carried out by the Builder. Any settlement of the soil that was backfilled into the trenches for the underground drains is a matter that ought to have been addressed by the Owners unless it was present when the Builder was still on site, and that has not been suggested.
- (n) The Owners have not constructed a spillway on the dam in order to maintain the water level below the inlet pipe from the sump pit. It is not known whether backflow is occurring from the dam to the House. The construction of such a spillway was not within the scope of the Builder's Works.

102. Apart from lowering Pit No. 4 to ground level, I am not satisfied that any breach by the Builder is established in regard to the drainage system.

The sewer repair

103. Mr Carlin-Smith said that he was advised that there had been no engineer's inspection of the slab beam and slab reinforcement prior to the concrete pour. That was Mr Ryan's evidence but Mr Rodwell said that he carried out such an inspection and I accept that evidence.

104. Mr Silver submitted that I should find that the concrete used in the repair was a dry, ready-mixed product in a bag, referred to as "bag-mix" which had a strength of only 5 mpa instead of the 20 mpa concrete that was required. There is no evidence of any testing having been carried out to support that allegation nor anything else to indicate that bag-mix was used, apart from some photographs of some pieces of old concrete in the heap of rubbish that Mr Ryan claimed the Builder had left. As to that heap of rubbish, I am not satisfied that the Builder left it.

105. Mr Raniti swore that ready mixed concrete was delivered to the site in a small truck and brought to the laundry by barrow and I see no reason not to accept that evidence.

106. I am satisfied that the repairs to the sewer pipe were carried out. There is no credible evidence that those repairs were defective.

The driveway \$2,000.00

107. The scope of works required the Builder to:

“Supply and install 20 mm crushed rock to a nominal (loose) depth of 100 mm over the previously prepared 120 m long by 3 m wide driveway (the equivalent of 36 m³ over 360 square metres) and compact to a serviceable contoured surface”.

108. The material used by the Builder to resurface the driveway was not crushed rock but rather, crushed recycled concrete. It is whitish in colour instead of grey, as crushed rock would have been. Mr Ryan complained about foreign materials being present in it and produced some pieces of wire and other material that he said he picked up the driveway. He described the material that the Builder used as “builder’s rubble”.

109. Mr Simpson said that crushed recycled concrete is commonly used in driveways in rural locations and Mr Rodwell identify the material is coming from a particular quarry.

110. At the on-site inspection the material used on the driveway appeared to be good and serviceable and I could not see that it differed from the original material upon which it had been laid. I am satisfied that it is not builder’s rubble but rather a recycled material that is commonly used for rural driveways and I am satisfied that it was fit for the purpose.

111. Criticism was made that no table drains were constructed by the Builder on either side of the driveway but they were not part of the Builder’s Works. Mr Silva submitted that, without the table drains, the work the Builder did on the driveway could not be said to have been done in a proper and workmanlike manner. I do not accept that submission. The Builder’s Works only required the Builder to supply and install crushed rock to the driveway. That could be done in a proper and workmanlike manner without constructing table drains.

112. Mr Simpson said in his report that the driveway constructed by the Builder was almost 4 m wide, rather than 3 metres as required by the scope of works. The Builder also constructed an additional roundabout near the garage that was not part of the Builder’s Works.

113. It was said that the driveway had not been formed correctly with a crown, in order to direct water off to each side and allow avoid ponding. The Builder’s Works required the additional material to be compacted to a serviceable contoured surface which I find meant being contoured so as to direct water off to the sides.

114. Mr Price, who inspected the Property on 25 August 2016, said that the depth of cover appeared to be inadequate considering the drainage issues associated with the Property. He also said that the driveway as he inspected it had not been formed and graded so as to direct water off and prevent ponding. He also pointed out that the material used was not crushed rock as was specified.

115. Mr Simpson inspected the driveway on 23 January 2000 he pointed out that the driveway is wider than that specified, that the works of the completed driveway were in excess of what was required and that the Owners had received more value than had been agreed to. He did not address the issues of the material used or the contouring of the finished surface.
116. Mr Ryan alleged in his witness statement that the Builder had done no excavation or compaction of the material driveway but simply spread “builder’s rubble” on top of the existing “dirt track”. The Builder’s Works required it to spread the specified quantity of crushed rock over the previously prepared driveway. It was not required to do any excavation.
117. The photograph of the driveway attached to Mr Price’s report (*Tribunal Book page 214*) seems unremarkable. Exhibit D is a photograph of the driveway taken by Mr Simpson in August 2016 which also appears to be unremarkable. They show what appears to be a gravel driveway and I am quite unable to say from either photograph how it was formed. However Mr Price said that, in his opinion it had not been “formed (crowned) and graded”. He based this opinion on the state of the driveway as he observed it in August 2016.
118. When I looked at the driveway during the on-site inspection I could see nothing wrong with it. However I am not an expert and the photograph which appears on both pages 169 and 223 of the Tribunal book does show ponding on the driveway near the roundabout. The extent to which this is due to the non-construction of the table drains and the cut-off drains is unknown but it is clear from that photograph that the surface of the driveway is flat and not contoured as the contract required. The date on this photograph is 14 September 2016 which is a little under a year after the work was done. To allow this claim, I need to be satisfied that the rock was not properly contoured at the time it was laid.
119. I find that more than the required quantity of material was laid on the driveway. As to the contouring, there is no evidence of any complaint about the lack of contouring at the time that it was laid. The subcontractor who laid the stone was not called to say that he contoured it. The material is loose, in the sense that it is not bound together, and vehicles had been driving over it for 10 months before Mr Price observed it. One would expect that any contouring may have been reduced by the time Mr Price observed it. Nevertheless, on Mr Price’s evidence I must find that it was not contoured. What needs to be done now to contour the material that is there was not explored in the evidence.
120. I find that all that is required is to lay sufficient further material on top of what the Builder has done in order to provide the necessary contouring.
121. No one has costed that scope of works. There was extensive evidence given by the experts as to the cost of re-constructing the driveway but it was not directed to the cost of simply reshaping the surface which is all that needs to be done.

122. Mr Pitney calculated a figure of \$19,644.00 to replace the driveway altogether, but this involved excavating the driveway, regrading it, resurfacing it and installing run-off swale drains to the sides. That is well in excess of the Builder's Works and what I find to be required. Looking at his figures, for the supply of rock with 30% compaction, together with labour and material hired to places and roll it, he has allowed \$6,642.00, but that is for the construction of a new driveway.
123. A quotation was obtained from a Builder, Mr Zoch, to carry out all the work that the Owners have claimed needs to be done. Included in the items listed is an amount of \$3,400.00 to supply and install 20 mm crushed rock on the driveway or, if Lancefield Toppings are to be used, the cost would be or \$2,550.00. I note that this quotation is now over a year old.
124. Doing the best I can I allow an amount of \$2,000.00 for the supply and placement of another load of rock on the driveway in order to provide contouring.

Window seals

125. It was acknowledged that the Builder sealed the windows.

Installation of white goods

126. It was agreed that the Builder installed the dishwasher and this claim was abandoned.

Stain the garage passenger door

127. It was apparent that the door was stained and this item appeared to be conceded.

Benchtop in the garage. \$110.00

128. The requirement was to supply and install a nominal 1800 mm x 600 mm particleboard benchtop in the garage or purchase or provide a similarly sized freestanding proprietary unit.
129. The Builder supplied a benchtop, which I saw in the garage, although it was not assembled. It was slightly smaller but had a mounting board at the rear Mr Simpson suggested that the owners had received equivalent value.
130. Mr Noble submitted that the benchtop did not require installation because it was a freestanding unit. Nevertheless, since the requirement was to supply a benchtop and not the components of a bench top, I think the Builder should have removed it from the box and put it together. Consistent with credits assessed by Mr Simpson for other small jobs the Owners have done, I will allow a credit of \$110.00 for the Owners to do that.

The eastern internal wall \$1,150.00

131. The Builder was to pack, trim or otherwise straighten a plasterboard wall, ceiling and cornice in the rear passage of the House and repaint the repaired surfaces. Mr Raniti said that this was not done at the request of the Owners. He allowed a credit to the Owners of \$1,150.00 which Mr Price said was

sufficient to account for the saving to the Builder in not having to do it. That amount will be allowed.

Adjust bedroom door latch \$110.00

132. The Owners carried out this work themselves. Mr Noble submitted that, since the Owners had voluntarily taken the work out of the Builder's hands, they ought not to be entitled to a credit. However the Builder has not had to carry out the work and so there has been a saving. I think it is appropriate in all circumstances to allow a credit.

133. Mr Simpson said that an appropriate credit, including GST and overheads would be \$110.00, including one hour for a carpenter at a rate of \$55 per hour. It seems reasonable and that amount will be allowed to credit.

Adjust walk-in robe door \$110.00

134. This was also done by the Owners and a similar credit was assessed by Mr Simpson which will be allowed.

Adjust light switch \$110.00

135. This was also done by the Owners and a similar credit was assessed by Mr Simpson which will be allowed.

Adjust entry door latch \$110.00

136. This was also done by the Owners and a similar credit was assessed by Mr Simpson which will be allowed.

French doors \$20.00

137. The Builder was to remove and replace the oversized mismatching screws securing the top bolt of the slave panel of the French doors in the master bedroom. It was unnecessary to do that because the Owners replaced the door. It was agreed that an appropriate allowance for this would be \$20.00.

Porch parapet \$20.00

138. The Builder was to caulk, seal and humour the point of intersection between the parapet and substrate sheeting and the abutting quad trim on the western side of the entry portico.

139. The Owners did this work themselves. Mr Simpson said that an appropriate credit would be \$20.00 and that sum will be allowed.

The quad to the eaves lining \$110 00

140. The Builder was required to re-attach any loose or deflecting soffits and quads and repaint.

141. The Owners did this work themselves. There was very little discussion about this item at the on-site inspection and it appeared that the problem was relatively minor. I think that the Owners should receive some credit for saving the Builder the expense of doing it and in the absence of any other evidence I will allow \$110 00 inclusive of margin and GST.

Re-rendering return wall \$106.92

142. The Builder was to re-render a small 600 mm wide section of the return wall from the garage to the living room which had a bow in it and also the sill to the living room sliding door. The Builder was later engaged by the Insurer to re-render the entire House and invoiced for its work on 24 September 2015. It was therefore saved the expense of individually rendering the small wall.
143. Mr Simpson calculated the area of the wall at 1.62 m² and said that an appropriate allowance would be \$50.00 per square metre, giving a gross saving for the Builder of \$81.00. With 20% margin plus GST the figure would become \$106.92.

The family room door

144. This was raised in Mr Price's report as something that had not been rectified to the Owners' satisfaction. It was said that a new door needed to be supplied because a hole had been chased out of the frame to accommodate a bolt which is now missing. Mr Price costed the supply and fitting of a new door at \$1,750.00.
145. I cannot find this in the list of Builder's Works. It appears to have been Item 1.9.5 of the claim to the Insurer which the Insurer rejected.
146. It was discussed on site that a bolt could be supplied for \$100.00 but since it was not in the Builder's Works I find no breach.

Damage to garage door

147. The Owners alleged that the Builder had splashed concrete on the garage door. Mr Price assessed a cost of \$3,500.00 to supply and fit a new garage door.
148. The alleged concrete splashes were very small and there were only a few of them. When I scraped them with my fingernail the marks came off. It was suggested that there were steel wool marks where the Builder had attempted to remove them but I was not shown any. Whatever the splashes were, there is no direct evidence the Builder caused them. I am not satisfied as to this item.

Glass sidelight next to the front door.

149. There appears to be a small blemish within the glass that was installed by the original Builder. Replacing the glass was not within the Builder's Works and so I do not understand this claim. It was suggested that perhaps the glass had been damaged by an angle grinder but the blemish that I saw appeared to be a bubble in the glass itself.

Fly-wire screens \$1,034.88

150. By a variation to the original Builder's Works, the Builder was to remove and check all flyscreens and paint them with two coats of paint.

151. The screens were removed and have been painted. All but four have been reinstalled by the Owners. Those four have become stained but it is unclear whose fault that was. They were stored in the garage at the time of the on-site inspection. It was suggested that the stains could be removed with oxalic acid.

152. How the four frames became damaged is also unclear. Mr Simpson assessed a cost of \$1,034.88 to repair the four damaged screens and re-install all the screens. Mr Pitney assessed a cost of \$3,575.00 to replace all the flyscreens but it has not been demonstrated that that is either necessary or due to anything done by the Builder.

153. I will allow Mr Simpson's figure.

Parapet guttering \$501.60

154. Parapet guttering was said to be not sealed against intrusion by birds and vermin.

155. I was unable to see that during the inspection. Mr Pitney assessed a base cost of \$220.00 to fix the parapet guttering and a further \$160.00 to seal an opening in the pitched roof. With margin and GST that becomes \$501.60 and that will be allowed.

Slate in bathroom

156. It was claimed that the slate floor in the laundry was not sealed after the sewer was repaired. Although it is only a very small area, Mr Pitney has assessed a base cost of \$1,809.00 to seal it, on the basis that the flooring in the other rooms would need to be sealed as well. During the evidence he reduced this figure to \$450.00 if it were confined to the two rooms.

157. Although Mr Price said that, in his opinion, the slate was not sealed, Mr Simpson said that, in his opinion, it was sealed. It was not apparent to me during the inspection whether the slate floor in the bathroom had been sealed or not. It looked to be the same as the slate in the rest of the House. I am not satisfied that it has been established that the slate was not sealed by the Builder.

Rubbish removal \$250.00

158. The Owners complained that the Builder had left a great deal of rubbish on the Property. Among the items depicted in their photographs were old rusted barrel hoops and some rapid set cement. Those items do not appear to relate to anything in the Builder's Works. I am not satisfied that they were left there by the Builder but I think that I should allow a credit for the final clean that the Builder did not have to do because the contract was terminated.

159. Mr Pitney assessed a base cost of \$715.00 for rubbish removal. That assessment is on the basis that the Builder left behind the rubbish that Mr Ryan claims, and that has not been demonstrated.

160. Nevertheless, Mr Raniti acknowledges that, due to being denied entry to the site he did not have to carry out final clean so I will allow credit of \$250.00.

Summary of the respective claims

161. The Builder claims the balance of the contract price of \$15,001.60 (allowing the credit for the wall), plus an amount of \$750.00 for digging the dam. In his witness statement Mr Raniti said that he also wished to charge them for replacing the valve on their hot water service but that has already been paid by the Insurer.
162. Mr Silver submitted that, since there had been no final inspection, the balance of the contract price was not due and cannot now be claimed. I do not accept that submission. I find that Mr Ryan refused to allow Mr Raniti access to the site to carry out the final clean which was all it had to be done in order to complete the work. There was no opportunity given to the Builder to have a final inspection.
163. I am not satisfied that the Builder is entitled to charge for constructing the dam. That appears to have been done voluntarily and in exchange for not carrying out some of the open drainage work at the Owners' request. Mr Raniti said in evidence that he had not charged them for the dam. However I am satisfied that the Builder is entitled to the final payment, less the value of the credits and any damages due to the Owners.
164. As to the Owners' claims, the only defects in workmanship that are established are the driveway and the positioning of Pit No.4 at too high a level. For those defects, damages shall be allowed of \$2,000.00 and \$291.06 respectively. The other allowances are credits for work that the Builder did not have to do.
165. The damages and credits to be deducted from the Builder's claim amount to \$6,284.46, as follows

Damages

The driveway	\$2,500.00	
Lower Pit No. 4	<u>\$ 291.06</u>	\$2,791.06

Credits

Benchtop in the garage.	\$ 110.00
The eastern internal wall	\$1,150.00
Adjust bedroom door latch	\$ 110.00
Adjust walk-in robe door	\$ 110.00
Adjust light switch	\$ 110.00
Adjust entry door latch	\$ 110.00
French doors	\$ 20.00
Porch parapet	\$ 20.00

The quad to the eaves lining	\$ 110 00	
Re-rendering return wall	\$ 106.92	
Fly-wire screens	\$1,034.88	
Parapet guttering	\$ 501.60	
Final clean	<u>\$ 250.00</u>	<u>\$3,743.40</u>
Total deduction		<u>\$6,534.46</u>

166. The final payment is therefore reduced from \$16,151.60 to \$9,617.14.

Interest

167. The Builder also claims interest pursuant to Clause 11.10 of the contract, which provides that, should the owners fail to make any payments to the builder by the due date would be entitled to interest on all outstanding amounts the rates specified in schedule, which is 20% per annum, “adjusted weekly compounding”.

168. In the present economic climate, it might be questionable whether such a high rate of interest, compounding weekly, is a penalty. It is unnecessary to consider that however because, since the final clean had not been done, the work was not completed and so the final instalment never fell due under the contract. Clause 11.10 therefore does not apply.

169. Nevertheless, the tribunal has power in a domestic building dispute to award damages in the nature of interest pursuant to section 53(2)(b)(ii) of the Act. The builder has suffered loss by being deprived of the balance to which it was entitled and so it is appropriate to award damages in the nature of interest. I see no reason to depart from the rates fixed from time to time under section 2 of the *Penalty Interest Rates Act* 1983. Up until 1 February 2017 the rate was 9.5% thereafter it has been 10%. The calculation will be from the commencement date of this proceeding, which was 12 January 2016. On that basis, interest will be allowed of \$1,978.24.

Conclusion

170. There will be an order that the Owners pay to the Builder the sum of \$9,617.14 plus damages and the nature of interest calculated at \$1,978.24, making together the sum of \$11,595.38.

171. Costs will be reserved for further argument.

SENIOR MEMBER R. WALKER