

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**BUILDING AND PROPERTY LIST**

VCAT REFERENCE NO. BP703/2018

**CATCHWORDS**

Domestic building contract - damages for defective work - how assessed - nonconformity with the contract documents accepted by Owner - not reasonable to award cost of demolition and reconstruction

<b>APPLICANT</b>	Regulation Pty Ltd (ACN 610 147 290)
<b>RESPONDENT</b>	Platinum Building Group Pty Ltd (ACN 121 707 480)
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member R Walker
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	3 – 6 and 26 June 2019; 20 August 2019
<b>DATE OF ORDER</b>	27 August 2019
<b>CITATION</b>	Regulation Pty Ltd v Platinum Building Group Pty Ltd (Building and Property) [2019] VCAT 1294

**ORDER**

1. Order the Respondent to pay to the Applicant \$82,400.07.
2. Costs reserved.

R Walker  
**Senior Member**

**APPEARANCES:**

For Applicant	Mr K Oliver, of counsel
For Respondents	Mr A. Beck-Godoy, of counsel

## REASONS

### Background

1. The applicant (“**the Owner**”) is the owner of an attached house in Prahran (“**the House**”). The Owner’s director is a Mr Chehade. The Respondent (“**the Builder**”) is a Builder.
2. The House was constructed, together with an adjoining house, by the Builder for the Owner pursuant to a major domestic building contract dated 30 March 2011 for a contract price of \$1,050,000 (“the Contract”). The House is and was always intended to be the home for Mr Chehade and his wife. The work was completed on or about 23 May 2012, although they did not move in until a few months later.
3. Before taking possession of the House an inspection took place between a representative of the Builder and Mr Chehade and a list was prepared in Mr Chehade’s handwriting, listing a number of items that he wanted the Builder to rectify.
4. Some work was done with respect to the matters listed and also in response to various complaints that Mr Chehade made over the next few years.
5. On 21 May 2018, the Owner brought this proceeding, seeking damages with respect to numerous items of allegedly defective work.

### The hearing

6. The proceeding came before me for hearing on 3 June 2019 with five days allocated. Mr K Oliver of counsel represented the Owner and Mr A. Beck-Godoy of counsel represented the Builder.
7. I heard evidence from Mr Chehade and the director of the Builder, Mr Henneman. I also heard expert evidence from Mr K. Ryan on behalf of the Owner and from Mr G Beck on behalf of the Builder. During the course of the hearing I visited the unit with the parties and their experts and was shown the alleged defects about which the Owner complained.
8. The evidence concluded at the end of the fourth day and the matter was then adjourned until 26<sup>th</sup> of June 2019 when I heard oral submissions. The time allocated was insufficient and submissions were completed on 20 August 2019.

### The witnesses

9. Both counsels attacked the credibility of the other side’s main witness. I thought that Mr Chehade’s evidence concerning many of the defects was very vague and his recollection of events seem to be poor. He said that he took a great interest in the project, taking photographs almost every day during construction. His evidence concerning the ordering of the appliances is unlikely to be true when one looks at the emails that were sent and received at the time. The evidence given by Mr Henneman in regard to the construction of the front wall turned out to be wrong. However, I did not gain the impression that either of them was a deliberately untruthful

witness. In any case, this is a defects case where credibility is not a major issue.

10. Mr Beck-Godoy placed considerable reliance upon the fact that many of the items now complained about were not mentioned in the defects list that was prepared by Mr Chehade at the time the Owner took possession. I think not too much can be read into that. Just because an item is not on a defects list does not mean that, apart from the matters listed, the work was free from defects. A layperson such as Mr Chehade will list the matters that he notices and is concerned about but may well not notice other things that are wrong with the work. Although one would expect anything obvious to be on the list, what might be obvious to an expert is not necessarily obvious to a layman. The defects list is just one part of the evidence to be considered along with everything else.
11. The more significant difficulty arises from the witnesses that were not called. The first was the Builder's site supervisor, Mr Kiepas. He is no longer employed by the Builder. An email to Mr Chehade from Mr Kiepas in the Tribunal book that is supportive of the Owner's case has a partisan tone, very much in favour of the Owner, indicating that perhaps he is now more in the Owner's camp than in the Builder's. I draw no inference from the failure of either party to call him but I am deprived of the very relevant evidence that he might have been able to give. His absence meant that much of Mr Chehade's evidence was uncontradicted by other sworn evidence although his recollection appeared to be poor and evidence about most matters was very vague.
12. The other missing witness is the architect, Mr Kucyk ("**the Architect**"). Mr Oliver was at pains to point out that there is no evidence that the Architect supervised the construction. That is so, but when Mr Chehade was on site he was following the construction on a daily basis and, when he was overseas, there are emails showing a number of visits to the site and reports given by the Architect to Mr Chehade as to the progress of the work and whether particular stages of the work had been reached. The email correspondence in the Tribunal book does not appear to be complete.

### **The issues**

13. Since the whole of the Contract price was paid, there was no counterclaim by the Builder. It was a defects case that also raised questions concerning whether some of the works were in accordance with the Contract documents.
14. The form of Contract used was the 2008 edition of the standard Housing Industry Association New Homes Contract. There were no formal specifications. Rather, the Builder's final quotation dated 30 March 2011 was used in place of more detailed specifications. The Architectural plans and the engineering drawings were provided by the Owner.
15. As stated above, the person who seems to have been most involved in the construction on behalf of the Builder and who had most of the dealings with

Mr Chehade was Mr Kiepas, who did not give evidence. It appears that he is no longer employed by the Builder.

### Assessment of damages

16. In *Tabcorp Holdings v Bowen* [2009] HCA 8 the High Court affirmed that the normal rule as to the assessment of damages in contract is that stated by Parke B in *Robinson v Harman* (1848) 154 ER 363 where his Lordship said (at 365):

“The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.”

17. The court in *Tabcorp* also referred with approval to the judgment of Oliver J in *Radford v De Froberville* [1977] 1WLR 1262 where it was said that the principle is subject to the proviso that the plaintiff is seeking compensation for a genuine loss and not merely using a technical breach to secure an uncovenanted profit.
18. The general measure of damages for defective workmanship by a builder has, since *Bellgrove v Eldridge* [1954] HCA 36, been that the owner is entitled to have the defective or non-compliant work demolished and reconstructed in accordance with the contract, unless, in the circumstances of the particular case, that would be an unreasonable course to adopt.
19. In *Ruxley Electronics and Construction Ltd v Forsyth* [1994] 1 WLR 650, a builder constructed a swimming pool that was shallower than the contract required. The House of Lords held that the expenditure necessary to rectify the defect by demolishing and rebuilding the pool was out of all proportion to the benefit to be obtained from doing so. It awarded the plaintiff damages for loss of amenity instead.
20. In the case of *Clarendon Homes Pty Ltd v Zalega* [2010] VCAT 1202, after reviewing the various authorities, I concluded as follows (at para 165):

“I think the following principles concerning the assessment of damages for the breach by a Builder of a domestic building contract can be spelled out from the cases referred to:

(a) Where the work and materials are not in conformity with the contract, the prima facie measure of damages is the amount required to rectify the defects complained of and so give to the Owner the equivalent of a building which is substantially in accordance with the contract (*Bellgrove*);

(b) The qualification, however, to which this rule is subject is that, not only must the work undertaken be necessary to produce conformity, but that also, it must be a reasonable course to adopt (*Bellgrove*);

(c) Reasonableness is a question of fact (*Bellgrove*) and the onus of proving unreasonableness so as to displace the prima facie

measure is upon the Builder. It is the Builder who is seeking to displace the prima facie position (Tabcorp per Rares J.);

(d) In considering whether it would be unreasonable to award the cost of rectification, the tribunal should consider all the circumstances of the case before it. The nature and significance of the breach should be looked at in terms of the bargain the parties had and the relative importance of the breach within the context of the contract as a whole. The decision in *Ruxley* suggests that account can be taken of the following matters at least:

- (i) Whether and to what extent the work, although not in conformity with the contract, is nonetheless serviceable;
- (ii) Whether and to what extent the defect has affected the value of the work or the building as a whole;
- (iii) The cost of rectification, the proportion that the breach bears to the cost of rectification and whether the cost of rectification would be wholly disproportionate to the real damage suffered by reason of it;.
- (iv) The likelihood that, if rectification cost is awarded, the sum so ordered will actually be spent on rectification. Obviously, a successful plaintiff can spend his damages as he sees fit but this may be a useful indicator of whether the amount sought is greater than the real loss suffered.”

21. That paragraph still represents my understanding of the position. Mr Oliver submitted that the matters referred to in subparagraph (d) were not principles but rather, matters to be considered.
22. My findings in regard to the defects complained of are as follows. In each case the price quoted includes materials, labour, builder’s margin and GST as well as, in some cases, an allowance for a contingency. I adopt the numbering used in the Scott Schedule that the experts provided.

### **The defects alleged**

23. The following items were abandoned by the Owner:
  - (a) Item 3 - Hot water service unit;
  - (b) Item 6 - Auto irrigation system;
  - (c) Item 14 - Garage defects;
  - (d) Item 19 - Squeaky timber floor;
  - (e) Item 21 - Leaking tap;
  - (f) Item 23 - Bathroom water pressure;
  - (g) Item 28 - First floor bathroom ceiling;
  - (h) Item 30 - First floor ceiling height;
  - (i) Item 33 - Bathroom outlets;

- (j) Item 34 - Hot water controller for ground floor bathroom;
- (k) Item 35 - Water pressure in first-floor ensuite;
- (l) Item 38 - Study door frame alignment;
- (m) Item 43 - Plaster crack; and
- (n) The kitchen island benchtop length.

24. Item 1 - Roof plumbing defects \$1,087.00

- (a) It was agreed that there was a spreader missing from the downpipes from the upper roof, that one of the parapet cappings had a negative fall and that the outlets from the rain head were too small. Mr Ryan also said that the fall in the box gutter on the southern side was inadequate and that there was ponding. He also said that the “Klip-lock” roof on that side of the lower story had inadequate fall. When I examined the box gutter there was no water in it, although I was able to see water ponding in the equivalent box gutter for the other unit. I also observed sediments on one side of the gutter, indicating, according to the experts, that water has been there but has dried out. Mr Beck said that the falls on both the roof and the box gutter were compliant.
- (b) On this item I prefer the opinion of Mr Beck and will allow his assessment of the items acknowledged to be defective, which amount to \$1,087.00.

25. Item 2 - South boundary fence \$476.00

- (a) The garage was to be constructed on the boundary and so the original fence in that position needed to be demolished. Also demolished with it was the original fence between the garage and the house to the rear. The evidence does not establish whether it was the Owner’s demolition contractor that demolished that part of the fence or the Builder. Mr Oliver submitted that I should infer from the photographs and the fact that the Builder did not charge the Owner for the replacement fence, that it was demolished by the Builder. Mr Oliver said that there was no reason why the Owner’s demolition contractor would demolish the fence. There was also no reason why the Builder would demolish any more than was necessary. Demolition and clearing a site requires heavy machinery and the ground level on the Owner’s side of the boundary was lowered by the Owner’s contractor. It is not known what occurred during this process. The photographs are equivocal.
- (b) The south boundary paling fence that the Builder constructed in place of the fence that was demolished is missing a rail in one section. The plinth board of the adjoining section is also bowing inwards. It appears that the plinth board has been pushed in by the fact that the ground level in the adjoining property is slightly higher. It was agreed that the plinth needs additional support. It was also acknowledged that

the fence posts were too widely spaced and, to rectify that, two additional posts should be added.

- (c) The Owner also complained that the sleeper retaining wall constructed by the Builder has been built inside the fence posts, creating a small garden bed between the retaining wall and the fence. He said that this has reduced the width of the path and the amenity of the narrow open space between the house and the fence where Mr Chehade sometimes sits.
- (d) Mr Ryan said that the Builder ought to have incorporated the retaining wall into the fence, with larger posts and putting the sleepers in the adjoining property. He said that the boundary between the two properties should be the face of the frame of the fence between the palings and the frame and on that basis, it is appropriate for the sleepers to be in the neighbouring property. That may be so in regard to a normal plinth but what he proposes is the construction of a retaining wall. Mr Beck said that it would not have been lawful for the Builder to construct the retaining wall on the adjoining property. I accept that evidence. A party wishing to construct a retaining wall must do so on that party's own land and not on that of a neighbour.
- (e) I was referred to the design by the Owner's landscape Architect which shows that there was intended to be a planting of shrubs inside the fence line where the Builder has constructed the garden bed. I find no breach by the Builder in constructing the garden bed in the position shown on the plans.
- (f) On this item I prefer the evidence of Mr Beck and will allow the cost of inserting the missing rail (\$290.00) and supporting the plinth (\$186.00).

26. Item 4 - Air-conditioning installation \$1,037.00

- (a) Mr Chehade said that he complained to Mr Henneman in April 2013 that the air-conditioning did not work. He said that Mr Henneman arranged for a contractor to attend and carry out some maintenance work under warranty and that the contractor told him that he could not access the panel or motherboard but that he gassed the unit. He said that there is no heating from the upstairs of the house. He produced email correspondence that he had with Mr Henneman in July 2015 complaining about the air conditioning.
- (b) Mr Henneman said that the unit was tested and working when possession of the house was given. He said that, at an inspection on 13 September 2013, the unit was operating correctly for both heating and cooling.
- (c) Mr Ryan noted that the Owner was concerned that the air-conditioning unit was noisy and making the house shake. This was not demonstrated to me on site. Another complaint was that the air-

conditioning unit was not accessible for servicing. He suggested that a contractor be engaged to inspect and report on the unit.

- (d) Mr Beck said that the unit was operated during his inspection and that the noise appeared normal. Neither expert purported to have any expertise in regard to air-conditioning units and both agreed upon the advisability of having a contractor inspect the installation.
- (e) If this was to be part of the claim, the assessment of the air-conditioner should have been made before the hearing and the result tendered as part of the expert evidence. On the present state of the evidence, I am unable to find that the air-conditioning unit was defective, save that both experts agreed that the compressor on the roof was inadequately mounted and that the penetrations through the rendered first floor wall had not been properly sealed. I will allow the cost of doing that which Mr Beck assessed at \$1,037.00.

27. Item 5 - Spa operation \$265.77

- (a) In his witness statement, Mr Chehade said that there was no hot water for the spa. In his reply witness statement, he said that the spa has never operated properly but he did not say in what respect. Mr Ryan did not identify any fault in the spa itself, but he said that the Owner advised him that the spa heater will not heat a full tub of water and only fills to a level of approximately 200 mm before going cold. He referred to the particular heater that the Builder installed, which is an in-line heater mounted on the roof, powered by an external power point, and suggested that perhaps it was undersized and not fit for the purpose. He suggested that an appropriately qualified contractor attend and assess the heater and the installation. Mr Beck agreed that that should be done but did not agree that this was a defect.
- (b) It appears from Mr Beck's report, and was not disputed, that the purpose of the external heater is not to heat the water from cold but rather, to maintain the temperature of the water when it is recirculated by the pump. The hot water to fill the bath is intended to be heated by the hot water service for the house.
- (c) I am not satisfied that it has been demonstrated that the spa heater the Builder has installed is inadequate, but I accept the evidence of both experts that the external heater should have a cover to protect it from the weather and I will allow \$265.77 for the cost of that, based upon Mr Ryan's figures, allowing his contingency of 5% but reducing the margin to the 30% adopted by Mr Beck.

28. Item 7 - Render damage \$583.00

It was acknowledged that there was damaged render on the Unit and both experts agreed on a figure of \$583.00 to rectify it.

29. Item 8 - The first floor cladding



- (a) Mr Ryan said that there were many areas in the first floor cladding of the building where there are gaps. These are at the sheet joints and the ends of the sheets. He said these will allow water and moisture to enter the House. He also said that the Builder had not installed window flashing in accordance with the manufacturer's installation requirements and that there was a potential for water and moisture to enter the House.
- (b) Mr Beck agreed that there were sections of the cladding that required sealing but said that the windows that he inspected had been flashed. He said that, during the necessary sealing works, any adjustments to the flashings could be made.
- (c) Both experts included the cost of sealing the cladding in the rectification cost of Item 16 below, which relates to the windows.

30. Item 9 - Balcony timber cladding

- (a) The balcony over the front of the House is clad in timber which has been treated with a particular stain that needs to be touched up every 12 months. Mr Ryan said that when he inspected the House the stain had cracked and was flaking off. He said that the failure appeared to be consistent with a lack of preparation and not a lack of Owner's maintenance.
- (b) After Mr Ryan's inspection the Owner had the boards repainted. Mr Beck said that the boards appeared to have been recently repainted and he was unable to offer any opinion as to whether the original stain was defective.
- (c) When I inspected the House, I saw that the stain was flaking off again in places. The cladding is on the front of the House which faces west and the property is not far from the sea.
- (d) Since the House when I inspected it had been occupied for seven years and since the stain is required to be repainted every 12 months, I am not able to make a finding that the original staining was defective workmanship on the part of the Builder.

31. Item 10 – Leaking letterbox \$77.00

The Owner complained that water was entering the letterbox. The experts agreed on a figure of \$77.00 which will be allowed.

32. Item 11 – The front wall and the auto sliding gate \$908.00

- (a) The front wall of the property is 230 mm thick. The Architectural plans specified it to be 190 mm core filled reinforced block work with a rough-cast render over it. There was no design for the front wall provided in the engineering drawings.
- (b) Although there was no specific design for the construction of the front wall in the Architectural plans, there is a detail showing how a typical block work wall was to be constructed. That detail shows it to be

constructed out of 190 mm concrete blocks containing reinforcement and filled with concrete, but it does not show any render.

- (c) Mr Ryan said that he was informed by Mr Chegade that, instead of constructing a new wall, the Builder had used the old brick wall at the front of the site. That was not the case. Mr Ryan subsequently formed the opinion that the wall had been constructed, not out of concrete blocks but rather, ordinary bricks. That was suggested by the width of the wall, which was 230 mm. Mr Beck formed the same opinion.
- (d) Mr Henneman said during his oral evidence that the Builder had constructed the wall out of 190 mm concrete block work as directed in the detail and, at the direction of the Architect, rendered it with a smooth render instead of a roughcast render, 20 mm deep on each side. He said that the purpose of this thickness of render was to enable the creation of horizontal lines in the external face of the wall as an Architectural feature. He said that when the rendering of 20 mm a side was added to the thickness of the concrete blocks, the final thickness of the wall became 230 mm as measured by the experts.
- (e) That appears to have been a reconstruction because, after the evidence was given, Mr Ryan returned to the site and removed some of the render on the top of the wall and ascertained that it was, as he suspected, a double skin wall constructed of ordinary bricks. It is therefore not constructed in accordance with the detail in the Contract documents.
- (f) How the wall came to be constructed in this way is not disclosed by the evidence, since neither the supervisor, Mr Kiepas, nor the Architect were called. Mr Chegade was overseas between 25 October 2011 until 26 November 2011 but in that time, the Architect kept him informed of the progress of the work.
- (g) Indeed, in an email sent to Mr Chegade on 11 November 2011, the Architect said:

“Hi Victor,

Hope you and your wife are enjoying yourselves!

The front and back fence look great, the rebate horizontal lines work well and the colour is good against the dark render of the house. The plasterers were working when I was there on Monday and it was all coming together.

The kitchen bulkhead is looking good too.

Damien mentioned your kitchen is bigger than the front of the island I designed - I hope you have enough room for all furniture!

i.e. Dining table and sofas.

I don't have any more photos, since Monday, did you receive all 5 emails and photos?

What date do you return?”

- (h) Considering the visits that the Architect made to the site, particularly while Mr Chehade was overseas, it is most unlikely that he was unaware that the wall had been constructed of brick and not the concrete blocks he had specified. Also, the fact that Mr Chehade initially contended that the Builder had used an existing brick wall would suggest that he was aware that bricks had been used in its construction.
- (i) The plans provided for the wall to be “roughcast”. The substitution of render was a variation requested by the Owner that was ultimately billed to it on 17 January 2012 and paid. Rendering the wall had the effect of increasing its width from 190 mm to 230 mm.
- (j) At each end of the wall there is a pillar 350 mm wide to accommodate large letterboxes that were custom made to suit the Owner’s requirements and also a stainless steel enclosure to accommodate the intercom that the Owner’s electrician installed. The wall contains an external electrical power point and video intercom that were supplied and fitted by the electrician that Mr Chehade engaged directly.
- (k) There was no complaint about the wall until Mr Ryan’s report for 7 May 2018 and then it was raised in connection with the complaint about the fact that Mr Chehade’s car would not fit between the gate and the garage door. I find on the balance of probabilities that the Owner, whether through Mr Chehade, its Architect or both of them, was aware that the wall had been built using bricks instead of concrete blocks. If the Owner had objected to the substitution of material at the time, the wall could have been demolished and rebuilt by the Builder whilst it was still on site. Instead, the Owner elected to spend a substantial sum on having the wall rendered and had its electrician fit a power point and a specially built intercom into the wall. It also had special letterboxes fitted. The finished product was highly praised by the Architect in his email to Mr Chehade.
- (l) Consequently, it is more probable than not that this wall was accepted by the Owner. Further, to demolish it and rebuild it now, more than seven years later, would cost considerably more than it would have cost the Builder to have replaced the masonry during construction and it would be inequitable to visit this additional expense on the Builder.
- (m) Finally, it is not credible that the Owner would now, more than seven years later, demolish a very attractive wall and rebuild it, simply because it has been made from a different material than that specified in the Architectural drawing. To award as damages the cost of doing that would not be compensatory. It would be to give to the Owner an uncovenanted profit.
- (n) The Architectural and engineering drawings were supplied by the Owner and there was no engineering design provided in the engineering drawings for the wall that is described in the Architect’s drawings. In the absence of a specific engineering design, it was for

the Builder to construct a wall that was structurally adequate. No engineering evidence has been given to the effect that the wall is structurally unsound. It is a solid wall that has been in place now for over seven years and there is nothing about its appearance to suggest any deficiency. It was praised by the Architect in his email and no issue was raised as to its construction or the location of the letterboxes at that time.

- (o) There was no provision in the contract documents for an automatic sliding gate to close off the entrance to the driveway but this was requested by Mr Chehade and constructed by the Builder.
- (p) The complaint now is that, because the gate has been fitted to the inside of the wall, there is not sufficient space between the inside of the gate in its closed position and the garage door, to accommodate Mr Chehade's car.
- (q) The garage was designed to have a car stacker to allow both Mr Chehade's car and his wife's car to be parked within the garage at the same time. However, after they took possession, the car stacker, which had been specified by the Architect, failed. Although it was repaired, Mr Chehade had lost faith in the car stacker and asked the Builder to remove it, which the Builder did at no charge.
- (r) Mr Chehade now complains that he is unable to park his car between the gate and the garage, although he acknowledges that, if he parked his car in the garage, his wife's car would fit between the gate and the garage.
- (s) Mr Chehade suggested that the gate should have been fitted to the front of the fence but both experts pointed out that this could not have been done because it would have obstructed the footpath.
- (t) In support of the Owner's case, Mr Chehade said that he had gone to the trouble of measuring his car with representatives of the Builder. Mr Henneman acknowledged that they had indeed measured the car but said that the purpose of that was to identify a suitable location for the car stacker in the garage.
- (u) The only defect with the gate that has been identified in the experts' reports was a requirement for a vertical support post to prevent a minor lean that is preventing the gate from latching properly. I accept Mr Beck's figure of \$908.00 to address that problem.

### 33. Item 12 - Letterbox location

- (a) The contract was to construct both the house and the connected house at the rear, which the Owner has since sold. Although the rear house has a frontage onto a lane at the other end of the site, its letterbox, address and pedestrian access is by a pathway along the northern boundary of the site from Donald Street. The Architectural drawings (Sheet 1 of 20) show a tiny square on each of the north-western and

south-western corners of the site, with the letters “LB”, indicating that that is where the letterboxes were intended to be placed.

- (b) Mr Henneman said that Mr Chehade requested a large letterbox to accommodate A4 size letters and that consequently, large letterboxes were required which were selected by Mr Chehade and incorporated at each end of the front wall. The result is certainly visually pleasing but the Owner now complains that the letterbox for the rear unit, which it no longer owns, is located on its property and that the letterboxes are not in the positions indicated on the plans.
- (c) No complaint appears to have been made by the Owner about the letterboxes until Mr Ryan’s report. I am satisfied that the location of these letterboxes, which were chosen by Mr Chehade, were agreed to by the Owner and that this was a variation of the contract works, albeit an undocumented one. In any case, the positions indicated on the plans would have only allowed a very small letterbox indeed and that would not have met the Owner’s requirements. It would not have been possible to locate the letterboxes selected by Mr Chehade in the positions indicated.

34. Item 13 – The first floor balcony \$163.00

The first floor balcony is drained by a small strip drain leading to an outlet that directs water down a chain to the ground below. There was no overflow provided from the balcony in case the the drain should become blocked. Both experts agreed that an overflow provision needs to be made and a cost of \$163.00 was agreed, which will be allowed.

35. Item 15 - Hydronic heating installation

- (a) in his witness statement, Mr Chehade said that the slab central heating did not work. Mr Ryan said that the Owner advised him that the floor slab heating was not working. Neither of the experts has tested the system to see whether or not that was the case and neither of them professed to have any expertise in central heating.
- (b) The Owner relies upon an email that Mr Chehade sent Mr Henneman on 10 September 2013, saying that the system needed to be adjusted, and a further email on 1 June 2015 to say that the heater needs to work and the pipes need labelling.
- (c) Mr Henneman said that the system was properly commissioned when handover occurred and that it needs to be maintained on an annual basis. The Owner acknowledged that he had not done that.
- (d) In the absence of expert evidence, I am unable to find that there is anything wrong with the system apart from the fact that it would need maintenance and adjustment from time to time. That of itself does not amount to proof of a defect in existence over seven years ago.
- (e) Both experts allowed an amount for the installing contractor to return and ensure that it was properly operating but, since there is no expert

evidence of any defect, I cannot make an allowance for the cost of that.

36. Item 16 - Windows non-compliant with Contract \$42,842.80

- (a) The Architectural plans include a window schedule which specifies details of the windows that were to be to be supplied and installed. The openable windows described in the schedule are shown to be single glazed awning windows, hinged at the top.
- (b) However, the specifications described the windows that were to be provided as:
  - “Aluminium Improved Domestic windows and doors with square set Plaster Ezy set reveals internally, double glazed with frosted glass where required powder coated to colour nominated as per schedule.”
- (c) There was no evidence whether or not the description “Aluminium Improved Domestic” identified the particular windows that the Builder supplied, but even if it does, the windows are not described in the specifications as opening inwards and being hinged at the bottom.
- (d) The windows the Builder installed are fabricated in Melbourne to a European design from components sourced in Greece. According to Mr Beck, they are more expensive than standard windows and, having observed the number of seals and the fact that they are double glazed, I accept that is probably the case. However, they are not the windows specified in the window schedule.
- (e) The Owner complains that, because they are hinged at the bottom and open inwards, the blinds on the windows, which operate electronically, cannot be used if a window is open. Mr Chehade said that several blinds had been damaged in this way. Further, a number of the windows have failed and require repair, particularly a very large window over the spa bath with a bent frame, which appears to be broken. Mr Beck-Godoy suggested that the windows only need to be adjusted but at least two windows seem to have deteriorated beyond that.
- (f) Mr Ryan said that the windows will all have to be replaced with windows in accordance with the contract documents.
- (g) In his witness statement, Mr Henneman said that the use of these windows was a variation that the Owner requested after inspecting similar windows at another site. Mr Chehade acknowledged that he had visited another house that the Builder had constructed together with Mr Kiepas and that, while they were there, Mr Kiepas pointed to the windows in the house and said: “Those are the windows that you are getting”. Mr Chehade said that he thought that the windows that were pointed out to him “looked very nice” but that he did not request that they be supplied or agree to their substitution for those specified

in the window schedule. He was simply told that those were the windows he was getting.

- (h) He said that, although he saw the windows on that occasion when they were closed, the operation of the windows was not demonstrated to him. In particular, he was not shown that, unlike most windows, they are hinged at the bottom and open inwards.
- (i) Mr Henneman said that he demonstrated the operation of the windows to Mr Chehade but this was after the windows had already been installed. He acknowledged that he was not present on the occasion that Mr Kiepas pointed out the windows in the other house.
- (j) There is no evidence that the Owner either requested the use of these windows or agreed that they would be installed. The windows are therefore not in accordance with the Contract and the Owner is entitled to the cost of replacing them with windows that are compliant.
- (k) Another complaint made was that the windows are leaking. Mr Beck said that there was no evidence that they were and I could see no signs of water entry. The window that I was shown in this regard was in the laundry where there are two electric clothes dryers that are not vented to the outside and so discharge their water vapour inside the room. The House has no clothes line and so it would appear likely that all clothes are dried in the laundry. To remove the steam there is an exhaust fan in the ceiling of the laundry. The effectiveness of this arrangement is unknown. I am not satisfied that it has been demonstrated that the windows are leaking.
- (l) The further complaint is that the aluminium sliding doors were provided without fly screens. Mr Chehade acknowledged that fly screens for the doors were not in the contract documents but said that he was promised fly screens. He said that Mr Kiepas said to him that the Builder was required by law to provide them. The specifications provided that fly screens were to be supplied only for the openable windows. There was no requirement to provide them for the doors as well.
- (m) Mr Ryan assessed a cost of \$75,848.00 to replace the non-compliant windows and the sliding doors, including the cost of providing fly wire to the sliding doors. Mr Beck said that the cost should be \$30,482.00 plus a further \$3,411.00 to seal around the windows. In that figure he has included only the sliding door between the master bedroom and the balcony and has made no allowance for flywire on any of the sliding doors.
- (n) A substantial difference between the two assessments relates to whether or not it is necessary to remove external cladding in order to replace the windows. Mr Ryan said that the external cladding will need to be removed and replaced with new cladding to enable flashing to be installed. Mr Beck said that that was not the case, although he

has allowed a provisional sum of \$4,500.00 in his costing to make good any damage caused to the external cladding.

- (o) In this regard, I prefer Mr Beck's opinion. The evidence is that there is a gap between the cladding and the windows for which an allowance is to be made (see Item 8). Also, if the existing windows are to be scrapped, they do not need to be taken out as a unit but can be cut up in situ and removed. It was also not established that there are no window flashings in place. I note that Mr Beck's costing includes an allowance to make good any damage to the external cladding.
- (p) As to the cost of the replacement windows however, I prefer the evidence of Mr Ryan. Mr Beck's figure was a verbal quote from the Builder's supplier, whereas Mr Ryan's figure was for windows of the description in the window schedule. Substituting Mr Ryan's window cost in Mr Beck's assessment, produces a cost of \$42,842.80. This assessment also takes account of Item 8.

37. Item 17- Master bedroom timber floor defects \$1,818.50

- (a) The timber floor in the master bedroom has been scratched near the entrance door and by some previous work. Both experts agree that the floor needs to be sanded and polished.
- (b) There is a substantial difference between their assessments of the cost of rectification. Mr Ryan has costed the work on an hourly basis for labour and materials and arrived at a figure of \$1,818.50. Mr Beck has calculated the cost of repair on a square metre basis for labour and materials plus two hours for a labourer. Having examined the costings, I prefer the opinion of Mr Ryan and will allow his figure of \$1,818.50.

38. Item 18 - Sliding external doors

The complaint is that the Builder did not provide fly wire screens to the sliding external doors. I am not satisfied that there was any contractual obligation for the Builder to do that.

39. Item 20 - Heated towel rail

There is an electric heated towel rail in the bathroom that gets very hot. This was demonstrated during the on-site inspection. It is a proprietary product that plugs into a power point. There is no thermostatic control. There is no evidence that there is anything wrong with the unit or that it is any hotter than it is supposed to be. It was not suggested that it burns towels or other items that are hung on it. I am not satisfied as to this item.

40. Item 22 - Stained niche

There is a niche in the wall of the shower recess in the master bedroom ensuite which is said to be stained. The suggestion is that the limestone from which the niche was constructed was inadequately sealed. There is insufficient evidence of that. The mere fact that the floor of the niche requires cleaning after 7 years does not enable me to find that a defect existed at the time of construction.



41. Item 24 - First floor bathroom bulkhead

- (a) In the first floor bathroom, there is a bulkhead in the ceiling, carrying services, that passes through the top of the shower recess. The effect of that is to reduce the ceiling height for part of the shower recess to slightly less than 2100 mm. The shower recess is vented by an exhaust fan in the ceiling between the vertical side of the bulkhead and the opposite wall.
- (b) The Owner complained that the bulkhead was in the wrong position, but Mr Ryan confirmed that it was in accordance with the Contract documents. The Owner has also complained that mould forms on the underside of the bulkhead, although at the time I inspected the House, it had been cleaned off.
- (c) Mr Ryan said that he believed that non-washable paint had been used by the Builder to paint the underside of the bulkhead and he considered this to be a defect. Both experts agreed that wet areas are required to be painted with a washable paint. Mr Ryan calculated the wet areas throughout the unit and assessed a cost of \$1,029.10 to repaint them with washable paint. Mr Beck made a similar calculation and arrived at a figure of \$935.55.
- (d) Mr Henneman gave evidence that he saw the tin that contained the paint used by the Builder's painter and that it was indeed a washable paint. He also sought to produce an email from his painter and a copy of the product information concerning the paint that the painter said he had used. Mr Oliver objected to the reception of hearsay evidence of which no prior notice had been given. Mr Oliver submitted that it was unlikely that Mr Henneman would remember what a tin of paint looked like, considering the period that had since elapsed.
- (e) Regardless of Mr Henneman's powers of recollection, it has not been established that the paint used was not washable paint. Indeed, Mr Chehade said that he had cleaned the mould off the shower ceiling several times over the past seven years and I did not notice any deterioration of the surface from that process, suggesting that the paint is washable. Mr Ryan assumed that it was not washable because it was a matt finish but he acknowledged that he was unable to confirm the paint used was non-compliant. There is no evidence that a matt paint cannot also be washable.

42. Item 25 - Toilet pan heights

The pans for the ground floor and bathroom toilet are hung off the wall. The Owner complains that they are too close to the ground and that it is difficult to clean underneath them. Mr Ryan acknowledged that he was unable to confirm that the pans were installed at the wrong height. Mr Beck considered that there was no defect and I accept his opinion.

43. Item 26 - Ground floor bathroom stained tiles

About two cracked tiles were pointed out to me on site, as well as a number of chipped tiles, but I was not shown any stained tiles. The chipped and cracked tiles are dealt with as a separate item.

44. Item 27 - Cracked floor tiles \$4,000.00

- (a) Mr Ryan said that he observed that there were a number of floor tiles in various locations that were cracked or chipped. He identified two chipped floor tiles in the ground floor bathroom, three cracked floor tiles in the ground floor study, three chipped floor tiles in the laundry, one cracked floor tile and six chipped floor tiles in the kitchen and five cracked tiles and two chipped tiles in the living/dining room.
- (b) Mr Beck pointed out that there was no evidence as to when the chips and cracks appeared. He said that limestone is softer and more brittle than porcelain tiling and can easily be damaged. He pointed out that the unit has been occupied for seven years and that the chips and cracks might have occurred as a result of occupation rather than installation.
- (c) When I arrived at the House for inspection the floor was covered with small red adhesive paper dots and that had been put there by Mr Chehade to point out where the chips and cracks were. In most cases, I was unable to see anything. Some natural fissures in the stone were pointed out to me as cracks but they were acknowledged by the experts to be fissures that are to be expected in a natural material like stone.
- (d) All of the chips pointed out to me occurred on the edges of the tiles. The difficulty was, ascertaining when the chips occurred. It was suggested that, if there was grout seen in the chip then I should conclude that it was there at installation. However, that methodology was complicated by the fact that the Builder has since sent someone back who has added further grout to the floor.
- (e) I am satisfied that some of the tiles required replacement. Mr Ryan has costed \$4,836.50 for the rectification and Mr Beck has assessed \$3,147.00. Since they are both estimates and one is as likely to be right as the other, I will allow \$4,000.00.

45. Item 29 - First floor lounge room floor \$2,000.00

The floor was damaged by the Builder and a board needs to be replaced. Mr Ryan has assessed the cost of rectification at \$2,630.50. Mr Beck costed rectification at \$1,487.00. I am told that the difference is one of rates and it would seem that one is as likely to be right as the other. I will therefore allow \$2,000.00.

46. Item 31 – Living room door

The front metal trim on the living room stacker door is loose and requires riveting. The experts agreed on this item and also on the cost of rectification

of \$435.00. However, if the claim with respect to the replacement door is allowed (Item 47), then this figure will be incorporated into that item.

47. Item 32 - Ground floor bathroom leaks

This relates to Item 16.

48. Item 36 - First-floor bathroom door lock \$149.00

This relates to the tie screws that were too short. The experts agreed on this and on the rectification cost at \$149.00, which will be allowed.

49. Item 37 - External sliding door \$5,000.00

(a) The aluminium sliding door in the study is difficult to operate. Mr Chehade said that the door that was originally supplied was too large and was then cut down. The door has that appearance.

(b) It was agreed between the experts that the door requires replacement at a cost of \$5,952.43, according to Mr Ryan or \$4,007.50, according to Mr Beck. Again, one is as likely as the other to be right and so I will allow \$5,000.00.

50. Item 39 - Ground floor bathroom shower niche

The niche was constructed in the wall cavity out of limestone tiles that were bevelled. There is a chipped tile at the top of the niche where the tile was bevelled. It is impossible to say when this occurred but it seems to me that if it were present at the time of construction, the area of the chip would have been filled with grout. I am not satisfied as to this item.

51. Item 40 The Timber stairs \$115.00

It was agreed that the Builder has not completed caulking the stairs and the experts agreed on an amount of \$115.00 to complete that work, which will be allowed.

52. Item 41 - Living room gas heater

(a) There is a gas heater in the living room mounted in the wall. Neither the Architectural plans nor the specifications identified what unit was to be installed. The plans simply say "as selected". The Owner acknowledges that he selected the unit that is now installed there.

(b) The heater gets very hot and the plaster lining above the heater has cracked as a result. Mr Ryan said that the unit comes with a two-speed fan and that the fan in the heater was not operating, resulting in it becoming excessively hot. He allowed an amount of \$498.00 for a contractor to inspect the heater installation and commission it to ensure that it operates as required.

(c) Mr Henneman said that the heater the Owner selected does not have a fan and that it was correctly installed. An owner's manual for the current model was produced which states that it has a fan. However, according to the owner's manual for the earlier model, that model did not have a fan. Mr Henneman said that the heater the Owner selected

and the Builder installed is the earlier model and not that identified by Mr Ryan in his report.

- (d) The dates on the two owner's manuals would suggest that it is indeed the earlier model that has been installed. Since that was selected by the Owner and there is no evidence that it was incorrectly installed, this item is not established.
- (e) I do not accept Mr Oliver's submission that I should find that the heater, although selected by Mr Chehade, was not fit for the purpose and that the Builder is therefore liable for the cost of its replacement. The Builder was not responsible for the design of the house or for the selections the Owner made of the fittings to be installed. The Builder was only responsible to install the selected fittings in a proper and workmanlike manner. It is not suggested that there was anything about the heater that Mr Chehade had selected that would have put the Builder on notice that it should not be fitted.

53. Item 42 - Internal painting

This item concerns the alleged failure of the Builder to paint the wet areas with a washable paint. I am not satisfied that that has been established.

54. Item 44 - Kitchen defects

This includes a number of items, some of which were accepted and some were not. As to the costings, Mr Ryan allowed a contingency of 5% as well as a margin of 35%. Mr Beck allowed a margin of 30% and no contingency. Most of the items are simple and straightforward and I am not satisfied that a contingency is justified. I therefore generally prefer Mr Beck's costings. The items claimed are as follows:

- (a) Rangehood glass shelves of different heights.
  - (i) The imported Italian kitchen the Owner selected had a round range hood cover that covered the cupboards, with glass shelves on one side and the exhaust duct to extract the cooking vapours on the other. The cooking range was set into the benchtop directly below the exhaust duct. Mr Chehade did not like the fact that the cook top was not directly under the centre of the curved cover and requested the Builder some years after construction to move both the cooktop and the exhaust duct to the centre. This necessitated reorganizing the shelves so that they would go on either side of the duct. The Owner now complains that the shelves are unevenly spaced.
  - (ii) I am satisfied from the photographs and the brochure for the imported kitchen that the cooktop was intended to be to one side and not centred as Mr Chehade claimed.
  - (iii) The work the Builder did in re-working the layout of the range hood was done without charge and was not part of the contract works. There was no agreement as to the spacing of the shelves.

- (b) Column of drawers  
The Owner complained about insufficient drawers in the imported kitchen. Since the kitchen as a whole was a contract item, that is what the Owner ordered and what the Builder was contracted to supply, I find no breach.
- (c) Loose kickboard \$186.00  
The experts agreed that the kickboard needs to be fixed. I accept Mr Beck's costing of \$186.00.
- (d) Scratches in the cooktop  
The cooktop is stainless steel and the pot supports appear to be cast iron. There are some scratches where the pot support has rubbed against the stainless steel. These were not noted on the inspection report and it is unclear when they first appeared. I am not satisfied that it is proven to be a defect.
- (e) Dishwasher installation \$122.00  
The door needs adjustment to address an excessive gap on the right hand side. I accept Mr Beck's costing of \$122.00;
- (f) Rangehood light \$122.00  
The range hood light works intermittently. Mr Beck agreed with this item and I accept his costing of \$122.00;
- (g) Cupboard caulking \$133.00  
The caulking installed by the Builder as part of the rectification works is not adhering. Mr Beck agreed and I accept his costing of \$133.00;
- (h) Pot drawer lights \$61.00  
The lights work intermittently. Mr Beck agreed with this item and it was demonstrated to me on site. I accept his costing of \$61.00;
- (i) LED lights \$572.00  
When the Builder reworked the rangehood it damaged the LED lighting over the cooking area which now has to be replaced. This was an agreed item and I accept Mr Beck's figure of \$572.00;
- (j) Refrigerator doors  
(i) The refrigerator is integrated so that the panels attached to the doors match the surrounding cabinetry. There is a conflict of evidence in regard to this item but I am satisfied that Mr Chehade changed his mind about the refrigerator, that he wanted, which required the cabinetry doors to be changed to doors of a different size to suit the new refrigerator that he had selected. Mr Henneman's evidence in this regard is borne out by the order documents listing the items that Mr Chehade selected. I thought

Mr Chehade's evidence concerning these selection documents was improbable.

- (ii) The fact that the refrigerator doors are now of a different height than the adjoining cabinetry is a consequence of his own change of mind.
- (iii) As to the possible absence of two pieces of plastic that Mr Ryan described as bracket covers, it is not clear whether they are in fact missing, since they were present at the bottom of the refrigerator and their purpose is unknown.

(k) Kitchen appliance installation

There is a steam oven and an ordinary oven incorporated into the bank of cabinetry. The Owner complains that the oven doors do not align with the adjoining door joints. I accept Mr Beck's evidence that this was due to the appliances selected.

(l) Kitchen steam oven

- (i) There is a steam oven in the bank of cabinetry furthest from the sink and the cooktop. The steam oven produces steam for cooking which then condenses. Mr Chehade said that he and his wife use the steam oven often and that the water that condenses from the steam has to be collected in a container in the cupboard below because the Builder did not plumb it to the household drainage. In order to do that now, it will be necessary to remove the cabinetry, cut a hole in the slab and install a drain at a cost, according to Mr Ryan, of \$12,994.00. Mr Beck pointed out that it would not be possible now to cut a hole in the slab because of the hydronic heating pipes there.
- (ii) Mr Henneman said that the steam oven was not ordered by the Owner until the slab had been poured and it was no longer possible to incorporate plumbing for it. Mr Oliver submitted that the Builder knew that Mr Chehade intended to have a steam oven or at the very least, was contemplating a steam oven and should have finalised that item prior to pouring the slab. I do not accept that submission. It was for the Owner to select the appliances when asked to do so and provide details to the Builder in a timely way. That was not done. Mr Henneman said that he had offered to move the steam oven to where the coffee machine is and move the coffee machine to where the steam oven is, which would allow the steam oven to be connected to the drain under the sink but that Mr Chehade refused the offer.
- (iii) The defect alleged seems to be a failure of the Builder to make provision in the slab for a drainage pipe for the steam oven, but since the steam oven was not ordered until after the slab had been poured I find no breach. If there is a real problem with collecting the water from the steam oven, then swapping the

positions of the coffee machine and steam oven would seem to be a sensible solution. Alternately, the condensate from the oven could be emptied on a more regular basis.

55. Item 46 – Island bench replacement

The island bench was said to be the wrong size. That was not established.

**Further claims**

56. There are two further recent claims made at the commencement of the hearing. They are as follows:

**Additional refund of prime cost adjustment for the kitchen**

57. The kitchen was imported from Italy and there was a prime cost allowance in the contract with respect to it of \$70,000.00. The kitchen was obtained from the importer, a company called Eurologic Pty Ltd (“**Eurologic**”), a company related to the Builder, of which Mr Henneman is a director.

58. The selection of the kitchen by Mr Chehade followed meetings that he had at the Builder’s office and Eurologic’s showrooms where the kitchen was on display. There were a number of subsequent emails between Mr Chehade and Mr Henneman and also between Mr Henneman and the manufacturer in Italy, concerning the final design of the kitchen.

59. Mr Henneman gave evidence that the cost to the Builder of the kitchen was \$67,950.00 plus GST, making a total of \$74,745.00. He produced in evidence an invoice from Eurologic in that sum, which he said the Builder had paid. He was challenged in cross-examination to prove that the sum had actually been paid and subsequently produced banking records to show that three payments were made to Eurologic on 19 December 2011, 17 January 2000 and 4 April 2012, each of which he said, included an amount referable to the kitchen. The three amounts total \$74,745.00. The bank statements were produced to show that the overall payments were made. He also produced what he said was an audit trail showing the three amounts as having been invoiced by the supplier, Eurologic.

60. Mr Henneman said that, although the cost of the kitchen was more than the prime cost figure of \$70,000.00, there was no prime cost adjustment claimed from the Owner in order to keep Mr Chehade happy.

61. Amongst the discovered documents was an invoice from the Italian manufacturer to the supplier, Eurologic for €24,850.54. Mr Oliver submitted that, at the then prevailing exchange rate, that translated to \$32,996.54. He submitted that the Builder was effectively the alter ego of the supplier, Eurologic and so was able to set the price of the prime cost item. He produced a number of calculations suggesting that the amount allowed on the adjustment was equivalent to a mark-up of 105.9% from the price invoiced to the importer by the Italian supplier.

62. That calculation ignores the fact that the importer, Eurologic, was a different company from the Builder. There might also have been freight, import charges and insurance that would have added to the expense and the

importer would also have been entitled to make a profit on the transaction. Eurologic is not a party to this proceeding and no evidence has been given on its behalf.

63. Mr Oliver submitted that I should take the Italian supplier's cost, add 5% for import duty and \$4,000.00 for shipping costs and re-adjust the prime cost allowance, so that there would be a refund to the Owner that he calculated at \$29,245.00.
64. That suggestion is not only highly speculative but also unjustified under the terms of the contract. In calculating a prime cost adjustment, the acquisition cost incurred by the importer that supplied the item to the Builder is irrelevant. The adjustment is made on the amount that is paid by the Builder for the prime cost item. Unless I am to find that the invoice in evidence is a forgery or a document manufactured for the purpose, which is a serious matter that would require solid evidence, that is the cost upon which the adjustment must be made. I have no basis to find that the invoice is not genuine, particularly having regard to the financial records that have been produced.
65. The fact that the parties agreed upon a prime cost allowance of \$70,000.00 is an indication of what they contemplated the cost would be likely to be. Mr Henneman said that the kitchen on display was slightly smaller and advertised for sale at over \$75,000.00.
66. The contract price was paid by the Owner seven years ago without any adjustment for the kitchen and without objection. Mr Oliver did not identify the precise legal basis upon which the Owner could claim an adjustment now, long after the final payment has been made under the contract. Presumably, it would be a claim for restitution of part of the final payment. Since it was a voluntary payment, it can only be recovered if it can be shown that it was paid under a mistake. I am not satisfied that a mistake has been proven.

**The bifold doors** \$16,752.00

67. According to the plans and the window and door schedule, there was to be a four panel bifold door fitted to the front living room, opening up to the deck in front of the house. The Builder installed a five panel bifold door instead.
68. No complaint was made about the substitution at the time but the Owner now claims the cost of replacing the five panel door with a four panel door in accordance with the plans.
69. Mr Beck-Godoy said that the Builder's work was approved by Mr Chehade and the Architect but there was no documented variation for fitting doors otherwise than in accordance with the contract and no oral variation has been proven.
70. Mr Beck said that it is common industry knowledge that a single opening door should only be constructed with an odd number of doors in a bifold set up because, when the bifold door is opened, the external part of the third panel is not secured. He said that when it is closed, it is not supported in the



track and is more easily opened by intruders. He concluded that the Builder had installed a better constructed and better supported bifold door than that specified in the design drawings.

71. Mr Ryan said that although that is an issue, it is something that can be dealt with and that it did not justify the Builder departing from the plans.
72. The Owner seeks the replacement of the doors with doors in accordance with contract. It was said that the additional panel means that there are two further stiles in the door set, with a corresponding reduction in the glass area. During the on-site inspection, I found that the doors are difficult to open and Mr Chehade said that his wife was unable to open it. However that appears to be a matter of adjustment.
73. I think that it is not unreasonable to award the Owner of the cost of replacing the doors and so bringing them into conformity with the contract. To replace the doors, Mr Ryan calculated the cost at \$18,236.00, whereas Mr Beck has allowed an amount of \$15,268.00. One is as likely to be right as the other and so I will allow \$16,752.00.

#### **Preliminaries**

74. In his report, under the heading “Preliminaries”, Mr Ryan allowed \$3,000.00 for the cost of council permits for street occupation, hoarding and work zone as well as \$1,350.00 for the building permits. Mr Beck made no such allowances.
75. I am not satisfied that any building permit would need to be obtained with respect to the lesser scope of works listed above, or that any street occupation would be required if the wall is not to be demolished. The other items that Mr Ryan listed as preliminaries were the cost of alternate accommodation and furniture storage while the repairs are effected.

#### **Alternate accommodation and storage** \$3,930.00

76. It seemed to be acknowledged on both sides that Mr Chehade and his wife will need to find alternate accommodation while some of the rectification work is carried out. Mr Ryan said that eight weeks alternate accommodation should be allowed. Mr Beck said that it would take only five days to do the work. The wide difference of opinion is due to the very different scopes of work recommended by each expert.
77. I am allowing a much reduced scope of works from that contemplated by Mr Ryan but more than that contemplated by Mr Beck. It was agreed that the work on the timber floor upstairs and the replacement of the tiles would require the house to be vacated. Mr Beck said that the windows would be replaced one at a time, with each window being replaced immediately as the existing window is removed. I accept that opinion.
78. The other major work is the replacement of the sliding door in the study and the bifold door on the ground floor. That work would not seem to render the house uninhabitable.

79. Doing the best I can, I will allow two weeks alternate accommodation at the rate suggested by Mr Ryan, which is \$245 per night, which amounts to \$3,430.00.
80. Mr Ryan also said that Mr Chehade and his wife would need to move the furniture out while the work was undertaken. He allowed \$2,050.00 for the cost of removing and storing it for eight weeks, but that was for the full scope of works that he contemplated. The work listed above involves some rooms only but I think some allowance should be made for those items that will have to be moved. I will allow two-weeks storage, being \$500.00.
81. Mr Ryan also allowed a Builder's margin of 25% on these figures but I can see no justification for that. These are amounts that Mr Chehade and his wife will pay directly.

### Conclusion

82. The total cost of rectification for the items that have been established is \$82,400.07, details of which are as follows:

(a) Item 1 - Roof plumbing defects	\$ 1,087.00
(b) Item 2 - South boundary fence	\$ 476.00
(c) Item 4 - Air-conditioning installation	\$ 1,037.00
(d) Item 5 - Spa operation	\$ 265.77
(e) Item 7 - Render damage	\$ 583.00
(f) Item 10 – Leaking letterbox	\$ 77.00
(g) Item 11 – The front wall and auto sliding gate	\$ 908.00
(h) Item 13 – The first floor balcony	\$ 163.00
(i) Item 16 - Windows non-compliant with Contract	\$42,842.80
(j) Item 17- Master bedroom timber floor defects	\$ 1,818.50
(k) Item 27 - Cracked floor tiles	\$ 4,000.00
(l) Item 29 - First floor lounge room floor	\$ 2,000.00
(m) Item 36 - First-floor bathroom door lock	\$ 149.00
(n) Item 37 - External sliding door	\$ 5,000.00
(o) Item 40 timber stairs	\$ 115.00
(p) Loose kickboard	\$ 186.00
(q) Dishwasher installation	\$ 122.00
(r) Rangehood light	\$ 122.00
(s) Cupboard caulking	\$ 133.00
(t) Pot drawer lights	\$ 61.00
(u) LED lights	\$ 572.00
(v) The bifold doors	\$16,752.00

(w) Alternate accommodation and storage \$ 3,930.00

Total \$82,400.07

83. There will be an order that the Builder pay to the Owner the sum of \$82,400.07. Costs will be reserved.

R. Walker  
**Senior Member**