**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

VCAT REFERENCE NO. D190/2007

**DOMESTIC BUILDING LIST**

## CATCHWORDS

Domestic building, standard form building contract ABIC SW1 2002 Simple Works Contract, architect as certifier, assessor and valuer, variations, conditional variation, architect's reliance on owner's solicitor's advice, time allowance in variations, critical path, contingency, builder's obligation to undertake work inadequately described in contract documents, defects and incomplete works, prime cost and provisional items, practical completion, extensions of time, notices regarding the commencement and end of delays, whether work is complete.

| | |
|---|---|
| **APPLICANT** | RF Construction Management Pty Ltd (ACN: 074 490 958) |
| **FIRST RESPONDENT** | Castlemar Investments Pty Ltd (ACN: 105 053 469) |
| **SECOND RESPONDENT** | Dalil Pty Ltd |
| **THIRD RESPONDENT** | Avi Rauchberger |
| **WHERE HELD** | Melbourne |
| **BEFORE** | Senior Member M. Lothian |
| **HEARING TYPE** | Hearing |
| **DATE OF HEARING** | 18 - 22 February and 5 and 6 March 2008 |
| **DATE OF ORDER** | 26 November 2008 |
| **CITATION** | RF Construction Management Pty Ltd v Castlemar Investments Pty Ltd & Ors (Domestic Building) [2008] VCAT 2402 |

## ORDER

1 The First Respondent must pay Applicant the sum of $55,869.64 forthwith.

2 Interest and costs are reserved and there is liberty to apply.

**SENIOR MEMBER M. LOTHIAN**

**APPEARANCES:**

| | |
|---|---|
| For the Applicant | Mr Kenny, solicitor |
| For the Respondents | Mr M Robins of Counsel |

## REASONS

1 Sometimes the desire of one party, or more than one party, to get everything they possibly can out of a contract without regard to fairness, leads to litigation. This is such a case, but their misfortunes are not all of their own making. Early in the project a sewer was discovered in an unexpected position. Its discovery caused a substantial delay. Hard on the heels of the sewer delay came problems with the bearing capacity of the site and the length of screw piles. It appears that at this early stage, trust between the parties had broken down.

2 On 1 September 2005 a contract was signed between the Applicant ("Builder") and the First Respondent, Castlemar. The contract was for four high quality units at 348 New Street, Brighton. Although Castlemar was described in the contract as "Owner", this company never owned the site upon which the units were built. The Second Respondent ("Dalil") owned the site and, at the end of the hearing, still owned Unit 1. The Third Respondent, Mr Rauchberger, is the sole director and sole shareholder of the First and Second Respondents. Unit 1 is his home.

3 The Principal Registrar wrote to the parties at my request to clarify a number of matters. The parties filed a document entitled "Agreed Response to VCAT letter dated 28 October 2008" ("Agreed Response"). A question concerned whether Castlemar might have acted as Dalil's agent. The parties said in the Agreed Response:

> The parties also jointly advise the Tribunal that as a result of an agreement reached by the parties, the parties do not require the Tribunal to make findings or orders in respect to the Applicant's claim against the Second Respondent and the Third Respondent.

4 The Builder's claim is for the nett sum of $131,068.59. Castlemar issued an application D204/2007 against the Builder. That proceeding was consolidated into this proceeding on 3 May 2007. In accordance with the witness statement of Mr Rauchberger filed 18 January 2008, Castlemar's claim is for the nett sum of $28,950.68, revised to $25,494.26 (before interest) in the final submissions of Mr Robins of Counsel for Castlemar, Dalil and Mr Rauchberger ("the Respondents").

## PLEADINGS

5 A difficulty I have encountered is the uncertain nature of the pleadings. Another is that none of the parties set out a clear financial reconciliation, stating the amount of the original contract price, all additions and deductions, and how much has been paid.

### The Builder's Claim

6 The last pleadings provided to the Tribunal by the Builder were the Proposed Amended Points of Claim [emphasis added] stated to have been served on 20 December 2007 and Further Particulars of Points of Claim

dated 17 July 2007. Both were received by the Tribunal by fax on 15 February 2008.

7 The Proposed Amended Points of Claim appear to have been the document the Builder based its claim on - it was further amended during the course of the hearing - and these reasons are based on that document and the Builder's final submissions.

8 The Builder's claim is for extra time, an unpaid progress claim, "adjustments to the progress claim", retention money and interest. The Builder also claims that a notice of breach of 19 January 2007 and notice of termination of 5 February 2007 served on behalf of Castelmar and Dalil amounted to repudiation of the contract.

9 The Builder claims against Castlemar are for breach of contract and repudiation of the contract.

### Castlemar's claim

10 The only pleading Castlemar lodged was its application, seeking $32,338.46. There was no Tribunal order that points of claim be filed and served and none were filed. The particulars of claim attached to the application consisted of a letter from Mr Milder (the Respondents' administering architect) to Mr Rauchberger of 20 March 2007. I note that this letter was to Mr Rauchberger alone and it was not a certificate under the building contract. Perhaps surprisingly, Mr Milder is not a party to this proceeding.

11 The letter concerned the Builder's final claim under the contract. It commented on seven items claimed including 14 variations and dealt with three prime cost or provisional sum (PC/PS) items. It listed eight "credits and deductions". They were:

1. Unit 4 reduced in size by 29 sm @$1,863/sm, credit is $54,027
2. L/A damages: 4 weeks @ $4,000/week, $16,000
3. Double down pipes in courtyards of Units 1 &2 substituted with single down pipes, $250.
4. Carpet contract allowance, $16,380, actual cost $11,890, $4,490.
5. Garage stores, $11,324.28 (RFCM quote)
6. Foamboard, 100sm $400
7. Sales Register $1,912,898.57 compared to the Final Claim (reconciled) $1,909,981.24 indicates over payment of $2,917.30
8. Expenses incurred to complete works including caulking, cleaning, painting, screens, fences, gates, painting [sic], flywire, additional fees and misc $33,000.

12 At paragraph 125 of the Respondents' final submission, Mr Robins also referred to Mr Milder's letter of 20 March 2007 and summarised Castlemar's claim thus:

(a) at best [the Builder's] pre-interest final entitlement under Contract was $137,199.83 for the first six items;

(b) $6,011.24 must be deducted for agreed credits;

(c) $15,763 should be deducted for Variation 37 - additional screw piling

(d) $4,392.60 should be deducted for Variation #33A - electrical cabling

(e) $4,541 should be deducted for Variation #41B - additional staining

(f) $3,930.30 should be deducted for Variation #42 - extra concreting

(g) $4,379 should be deducted for Variation #52 - entry coat cupboards

(h) $4,999 should be deducted for Stainless Steel balustrades PC/PS

(i) $33,250 should be deducted for Reduction in size of Unit 4/UnitD

(j) $37,714 should be deducted for Liquidated damages of 68 days

(k) $4,490 should be deducted for Carpet overcharge by [the Builder]

(l) $11,324 should be deducted for [the Builder's] failure to install garage stores

(m) $2,917.30 should be deducted for [the Builder's] over claim for the value of the works

(n) $28,982.09 should be deducted for Contracted items not supplied by [the Builder] and the extra costs incurred by Castlemar due to the [the Builder's] breaches.

I base the decision and these reasons on the Respondent's final submission.

13 The issues I must determine are:

- The Builder's entitlement under the final claim to:
  - Agreed credits
  - Variations
  - Alleged defects or incomplete work and their value,
  - Prime cost and/or provisional sums,
  - Reduction in size of Unit 4, including whether the parties have compromised any claim for variations concerning unit 4,
  - Alleged overclaim by the Builder
- Whether the Builder was entitled to time extensions and if so, for what period,

- Whether Castlemar is entitled to liquidated damages for delay, and
- The status of the Castelmar notice of termination; particularly whether it has repudiated or terminated the contract improperly.

I commence with an examination of the credibility of the witnesses, comments on the contract and an examination of the Architect's role.

## CREDIBILITY

14 I have difficulty relying on the evidence of all the main witnesses.

### Mr Feldman

15 Mr Feldman, the "RF" of RF Construction Management Pty Ltd and director of the Builder, demonstrated that he was keener to tell a story that would help him win his case, than to accurately recount his recollection. An example was his description of a minor item, the placing of a three-way electrical switch beside a garage door in unit 4.

16 When asked how this came about, as it does not appear on contract drawing A19B, he replied:

> … during site instructions he [the Architect] would have informed my electrician.

Not surprisingly, Mr Robins objected to his speculative answer. Mr Feldman corrected himself:

> I mean my staff on site

The Applicant's solicitor, Mr Kenny then asked in re-examination:

> Did he [the Architect] speak to you?

To which Mr Feldman replied:

> Yes; yes he did.

17 Mr Robins also pointed out that Mr Feldman gave evidence that the Architect instructed him to install two air conditioning units to each of units 3 and 4, but then he changed his evidence. He said that although only one unit was called for at each location, the units were split systems, necessitating two allocations of three-phase power for each air conditioner. Mr Feldman was either careless or, as submitted by Mr Robins, deliberately untruthful.

18 There was undoubtedly hostility between the Architect and Mr Feldman. The Architect accused Mr Feldman of vandalising his car, which appears to have been inaccurate. The Architect also accused Mr Feldman of abusing his wife and children when trying to reach him by telephone. Mr Feldman did not respond to this accusation. While such behaviour is reprehensible, it is not relevant to the outcome of this proceeding.

### Mr Rauchberger

19 Mr Rauchberger is a careful and obviously intelligent witness, but not particularly credible. It was put to him in cross-examination that the only reason for the contract to have been in the name of Castlemar, a company that did not own the land, was for "asset protection", which is a euphemism for not owning anything should liability arise.

20 Mr Rauchberger answered "No". He said that he acted on the advice of his accountant but claimed he could not say why he was so advised. When asked what other possible reason there could be for this arrangement, he said that it could possibly be because his former wife had been a director of Dalil. It soon became apparent that this could not possibly be the reason as the property settlement with his former wife pre-dated the contract with Castlemar. His explanation indicated he was willing to give an answer that was misleading.

### Mr Milder

21 Mr Milder gave evidence for the Respondents and is referred to in these reasons either by his name or as "the Architect". His evidence was confused and largely unbelievable. One of many examples was when he was asked, in cross-examination, whether it was legitimate and fair to make enquiries about the bearing capacity of the site soil before the Builder was ordered to proceed with a variation for screw-piling. His answer was:

> I wasn't on site and there was no urgency.

Mr Kenny then referred Mr Milder to exhibit A3, his email of 28 November 2005 (the relevant day) to Mr Feldman which includes the words: "as per our discussion on site". When Mr Kenny asked if Mr Milder was on site that day, he responded:

> I attended the site every day. I didn't stay there all day.

When invited to retract the statement that he had not been on site, Mr Milder declined.

22 Another example which is cause for grave concern, is Mr Milder's evidence regarding the date upon which work stopped for the "Sewer delay" which is discussed in further detail below. By bad luck, bad management or a combination of both, it was not until work had started on site that the parties discovered a sewer line across the south side of the site. Its discovery necessitated a stop work and substantial redesign of unit 4. This delay was not the Builder's fault, which the Respondents have admitted. Mr Milder said at paragraph 15 of his Witness Statement in Reply that worked stopped "… on or about 20 September, 2005 …" On 22 September 2005 the Builder had sent the Architect a letter notifying a delay commencing on 15 September 2005. The letter was neither answered nor contradicted.

23 Before the hearing was adjourned on 22 February 2008, I asked the Architect if he had a job diary and he said he did not. On 5 March 2008 he

volunteered that he had located a manila folder which had previously escaped his attention and it had a number of notes on the inside back cover. The relevant note was:

> Work stopped 20/9/05 for sewer problem

The next note was:

> Monday Jan 6 2006 - still no work on site this year. Steel delivered in afternoon.

24 Mr Milder confirmed that the notes on the cover were contemporaneous and could not explain why the 6th of January might be described as a Monday when it was a Friday in 2006. I was left with the impression that I could not rely on this document.

25 I do not accept Mr Milder as a reliable witness in this proceeding, however I also note that witness statements presented in his name have at least been transcribed by solicitors for the Respondents. Had Mr Milder been the author of these documents without any assistance whatsoever, he might not have expressed himself precisely as he did in the witness statements.

## CONTRACT

26 The contract documents consist of the standard-form ABIC SW-1 2002 simple works contract, ("ABIC SW-1") to be administered by an architect and with inclusions for "housing in Victoria". Bound into the contract is the Builder's "Tender Submission" of 19 August 2005 and "Revised Tender Clarification" of 17 August 2005. The building contract was prepared by one or more of the Respondents, or by the Architect on their behalf.

27 A defect of ABIC SW-1 as filled in for this job was that it did not list the remaining contract documents, except in the most general way. Schedule 3 calls for inclusion of an order of precedence of contract documents. The person filling it out has written in:

> This contract
>
> Arch dwgs
>
> Eng dwgs
>
> Specs

without any means of identifying what those documents might be. It would be helpful if ABIC SW-1 gave architects and builders more guidance as to how the documents should be identified.

28 The drawings provided to me as evidence were neither stamped to indicate they were approved, nor signed by the parties. Neither party objected, therefore I treat these drawings as being the equivalent of the contract drawings. I was not provided with any iteration of drawing A04.

29 The contract price was $1,804,000.00 inclusive of GST and the date for practical completion was 15 September 2006.

## THE ARCHITECT AS CERTIFIER, ASSESSOR AND VALUER

30 Part of the Architect's role under the contract was to act as certifier, assessor and valuer. In accordance with A4.2 of the contract:

> The owner must appoint an architect to administer this contract … The owner must indemnify the contractor for any liability incurred by the contractor in respect of any default or negligence of the architect …

and in accordance with A6:

> 2. The architect is appointed to administer this contract on behalf of the owner. The architect is the owner's agent for giving instructions to the contractor. However, in acting as assessor, valuer or certifier, the architect acts independently not as the agent of the owner.
>
> 3. The owner must ensure that the architect, in acting as assessor, valuer or certifier, complies with this contract and acts fairly and impartially, having regarding to the interests of both the owner and the contractor. The owner must not compromise the architect's independence in acting as assessor, valuer or certifier.

31 Mr Milder appears to have confused his roles of impartial assessor and valuer, and partial agent of the owner, with respect to time extensions and possibly with respect to money allowed.

32 On 16 March 2006 Mr Milder sent an e-mail to Mr Feldman. It concerned time, payment for the screw piles and retention sums (retention sums was not in dispute before me). Excluding the formal parts, its contents were:

> Hi Rob,
>
> After discussing the matter with Avi [Mr Rauchberger], as discussed we propose the following for your consideration:
>
> An addendum be added to the contract detailing the following:
>
> The completion date to be confirmed as early September 2006.
>
> No retention will be deducted from future claims and the retention held to date will be paid out.
>
> The disputed **first** variation sum will be paid to you the day **after** the works are completed as agreed in September.
>
> The L/A [assumed to mean liquidated damages] will commence from the September completion date, but as the whole point is to finish early (obviously to everyone's benefit) the L/A damages should not be triggered so it is really a moot point.
>
> Please advise asap.
>
> Thanks
>
> Avi Milder

33 Another e-mail of 27 March 2006 referred to completion in November or December and added "we are awaiting your advice about completing closer to the original contract date as discussed". I note that if the Builder was being asked to accelerate the job to make up for the sewer delay, there was no mention of entitlements to acceleration costs.

34 The Architect continued to send letters and e-mails regarding time, mostly seeking to negotiate a new date for completion. On 28 July 2006 the Respondents' then solicitors, Russell Kennedy, sent the Builder's then solicitor, LMS Lawyers, a letter concerning, among other things, extension of time for practical completion. The letter responded to a facsimile letter dated 19 July 2006 sent by LMS Lawyers to the Architect. I was not provided with a copy of the letter from LMS Lawyers.

35 The Russell Kennedy letter commenced:

> We refer to your letter … to Mr Avi Milder, the architect ("Architect") appointed by our Client, Dalil Pty Ltd ("Owner") under the Simple Works Contract dated 1 September 2005 ("Contract")

36 The Russell Kennedy letter recited that the Builder was asking that the date for Practical Completion be extended to 23 December 2006. It continued:

> First, our client agrees that there was a delay of approximately two months in commencing carrying out of the work due to factors outside of your client's control. Accordingly, on that basis, the Contractor may have been entitled to an extension to the date for practical completion to 24 November 2006.
>
> Notwithstanding the above, Section L1 of the Contract sets out the procedure which is required to be complied with by the Contract, if the Contractor seeks an extension of time. First, the contractor must use reasonable steps to minimise the impact [of] delay on the progress of the works. Our client has not been provided with any evidence to suggest that the Contractor has taken any such reasonable steps. Section L3.1 of the Contract requires that notice of such delay be given within two (2) working days of the Contractor becoming aware of the start or the end of that delay. Such notice must set out when the delay commenced, provide a notice of the delay and give an estimate of the number of working days affected. When the delay has ended, the Contractor is required to notify the Owner of the end of the delay. <u>As the Contractor has not issued our client with such notice of delay in respect of the initial 2 month delay, or any subsequent delays, the Contractor no longer has a right to claim an extension of time for such delays</u>. [Emphasis added].

37 The letter from Russell Kennedy was inaccurate and the part underlined above breathtakingly unfair, but was sent by one solicitor to another, so could be seen as an ambit claim. Of more concern is that the Architect adopted it. In his letter to the Builder of 13 October 2006 he said in part:

> <u>Completion Date</u>

> We refer you to the letter of response from Russell Kennedy Solicitors of 28 July 2006 which states the position with regard to the completion date.

He had received the Builder's letter of 22 September 2005. Excluding the formal parts, the letter states:

> As per the head Contract [the Builder] hereby submits an Adjustment of Time claim (with Costs).
>
> **Issue:** Discovery of the sewerage pipe preventing the construction of the works.
>
> **Commencement of delay claim:** Thursday 15th September 2005.
>
> **Finalisation of delay claim:** Re-commencement of critical path activities.
>
> **Additional Costs:** Inclusive of (but not exclusive to) delay charges; re-establishment charges; insurance costs; quantifiable price increases.
>
> We will work closely with you to minimise additional cost/delays
>
> If you have any queries, please do not hesitate to contact me.

38 The Architect suggested in cross examination that he was not assessing, but "seeking a win-win solution." He then admitted that he erred in not changing the date for practical completion, and added "We were trying to find a way to get the builder to finish the work on that day."

39 It is clear that, by 13 October 2006 at the latest, the Architect was not independently administering the contract but was taking orders from the Respondents through their solicitors. The consequence is that I can have little regard to the Architect's acts as administering architect.

## THE BUILDER'S ENTITLEMENT UNDER THE FINAL CLAIM

40 The Architect's letter of 20 March 2007 refers to a "final claim" which I understand was the letter and attachments from the Builder's then solicitors, LMS Lawyers of 7 March 2007. ("LMS Letter"). Clarity under the contract has been ill-served by the Architect failing to issue a certificate and expressing this clearly partisan letter in such a confusing way.

41 The Architect referred first to item 7 of the LMS letter regarding a claim for interest on the final claim of $3,000.00. His response was that the final claim could not be submitted until the defects period had expired. I reserve all consideration of interest for later application.

42 The Architect then referred to item 6 of the LMS letter "interest payable on retention moneys - $3,000.00". His response was that "No details as to the method of calculation were supplied and hence this amount withheld pending independent confirmation." Although consideration of all interest claims is reserved, I note that the Architect did not deny that an amount might be payable for interest on late payment of the retention sum.

43 Continuing to work backwards, the Architect then referred to items 4 and 5 of the LMS letter, which are for the return of the retention moneys, totalling $45,622.72. His response was "These monies are not in dispute." In accordance with clauses C6 and C7 the Builder was entitled to half the retention "when the architect issues the notice of practical completion" and the other half "when the architect issues the final certificate".

44 Item 3 of the LMS letter was for $367.87 for "work performed as a result of water damage". The Architect's response was that the water came from a pipe ruptured by the Builder's contractor. It was also claimed by the Builder as variation 47.

45 Items 1 and 2 of the LMS letter referred to the total claim of $91,309.24 in the Builder's "Final claim (Reconciled)" of 1 March 2007. The Architect "advised" Mr Rauchberger of changes, disallowances or disputed variations, identified three Prime Cost/Provisional Sum adjustments in favour of Castlemar and a further eight "credits and deductions" to give a nett sum payable to Castlemar of $32,388.46.

### Agreed credits

46 Early in the hearing the parties took time to agree on some items that were in dispute. The reason was that the items were each of low value – lower than was justified by the amount of time and money that would be expended on them in the hearing. The items were:

- Water damage works - $367.87 - I note this is both variation 47 and item 3 in the LMS letter.
- Variation 5 - surveyor claims - $958.92
- Variation 21A - balcony soffit - $1,161.20
- Variation 35 - joinery changes - $150.00
- Variation 46 - joinery handles - $56.00
- Variation 48 - door handles - $121.55
- Variation 49 - skylight size reduction - $202.50
- Variation 50 - unit C kitchen cladding - $247.58
- Variation 51 - door changes - $152.50
- Light fittings PC/PS - $763.22
- Bathroom fixtures PC/PS - $1,312.90
- Double down pipes replaced by single down pipe - $125.00
- Foam board credit for installing 75mm board - $200.00
- "Additional defects not corrected by RFCM" for which Castlemar had claimed $483.00. - $192.00

The parties agreed that there should be a credit to Castlemar of $6,011.24 for these items. With respect to the agreed credits, the parties confirmed in the Agreed Response that for some of the variations, amounts are allowable to the Builder and the amounts included in the agreed credits are deductions.

### Contingency

47 I was not addressed on the issue of the Builder's entitlement to contingencies under the contract. $40,000.00 was included in the contract price and in the claims of 20 December 2006 and 1 March 2007 the Builder claimed 98.81% of contingencies. ABIC-SW1 does not mention contingencies and I was not referred to any other contract document that governed them.

48 I remark that contingencies included in contract sums are often a source of dispute and are rarely useful. It is reasonable that architects should advise their clients to have an extra amount in reserve to allow for the unexpected. Including a contingency in the contract with the builder serves no useful purpose unless there are supporting contractual provisions.

49 The Builder has treated the contingency as a fund from which some, but not all, the variations were paid. The variations claimed by the Builder under the contingency are 1, 2, 3, 4, 6, 9, 10, 11, 13a, 14a, 17, 18a, 19, 20, 22, 24, 25, 26 and 44. I accept the Builder's treatment of the contingency, being expenditure of $39,522.24. The parties confirmed in the Agreed Response that variations allowed for under the contingency total this sum.

50 The nett result is that the contract price is reduced by the unexpended portion of the contingency, being $477.76 which must be added to sums to which Castlemar is otherwise entitled.

### Money for Variations

51 The total variations claimed in the Builder's "Final claim (reconciled)" of 1 March 2007 which was annexed to the LMS letter was $82,604.29, not including the amounts for variations claimed as contingencies. The Architect did not issue a progress or final certificate in response to this document, or to the previous very similar claim of 23 February 2007. The nearest approach to a certificate is the letter to Mr Rauchberger of 20 March 2007, mentioned above.

52 The previous claim for variations, dated 20 December 2006, also not including those claimed as contingencies, was for $75,303.43. In the Architect's "Statement 14" (I assume progress certificate 14) the Architect allowed a total of $47,332.56 (I assume, not including the variations claimed as contingencies) of which $5,637.07 was allowed for "total variations this claim". This provision for variations is identical to the provision in Statement 13 and is clearly erroneous. Even if the additional

amount for variations in Statement 14 were the same as in Statement 13, the total would have to be $5,637.07 greater.

53 I find that the price of each variation claimed by the Builder was accepted by the Architect unless disputed in his letter of 20 March 2007.

54 On my calculations the variations not subject to price dispute in the Builder's "Variation List" of 23 February 2007 total not $47,332.56 as certified twice by the Architect, but $43,492.87. The difference was not pointed out to me and not explained in evidence. I take the amount claimed for undisputed variations as the amount allowed for them, to which must be added any amounts allowed for disputed variations. The undisputed variations not already taken into account under the contingency and as advised by the parties in the Agreed Response are 23, 27a, 28, 29, 31, 32, 34, 36, 37, 38, 44, 45 and 47. The total value of these variations is $27,813.04. Variations 30, 39 and 40 were also undisputed and have a nil value. I allow $27,813.04 for undisputed variations.

Disputed variations

55 Variations to the contract should be in writing. This is mandated by sections 37 and 38 of the DBC Act and by clause J2 of the ABIC-SW-1 contract (special conditions, housing in Victoria). Having regard to section 37(3) and 38(6) of the DBC Act, a builder is not entitled to recover any money in respect of a variation unless it is in writing and signed by (or for) both parties. The exception if it is not in writing is that it can only be recovered if it would not be unfair to the building owner and there are exceptional circumstances or the builder would suffer "significant or exceptional hardship" if denied recovery.

56 The variations where there is a price dispute are:

V07 Additional Screw Piling - $15,763.00

57 In the letter of 20 March 2007 the Architect said:

> This sum was paid after negotiations whereby RFCM agreed to supply the new boundary fence and landscaping at cost, free of margins and/or overheads. As RFCM reneged on the agreement, the basis of the payment is dissolved and hence this sum is being reclaimed.

58 The Builder said there were difficulties over the bearing capacity of the site. The site is sandy and called for screw piles, but the Builder claims the screw piles were substantially longer than provided for in the contract.

59 Mr Feldman, and Mr Theo of the Builder's piling contractor, gave evidence that they assumed the screw piles supporting the work would be no longer than 2 metres deep, although Mr Theo agreed to go to 3 meters without extra charge. This assumption is not surprising as in the soil report provided by Castlemar as part of the tender documents Dr Philip Irwin of Statewide Soil Laboratories said at paragraph 6.3 of his "Foundation Investigation & Footing Recommendations" of 22 April 2005:

**6.3 Abnormal Soil Moisture**

If construction proceeds soon after any tree removal and building demolition, then to safeguard new footings for the likely effects of abnormal soil moisture conditions, the following is recommended:

…

- Bored piers or screw piles founded at a depth of 1.8 meters or onto clayey SAND (whichever is shallower) are appropriate. Void forming materials should be used beneath footings.

60 It was explained that the torque (resistance) developed by screw piles driven into soil depends on both the bearing capacity of the soil and the design of the screw pile. I understand that torque is a function of both length and diameter of the screw pile.

61 With one exception there is no mention of the diameter of the screw piles in the Respondents' documents. It is not mentioned in the Statewide report, nor are screw piles included in the specification, and I was not provided with a copy of the engineering drawings where details of the screw piles might have been found. The exception is that in a letter from Mr Turnbull of T.D.&C. Pty Ltd (Respondents' Tribunal Book pages 227 and 228) he said:

> It is thus our opinion that the piling contractor adopted helix sizes which were too small to achieve anticipated torques at the anticipated depth of 3m.

62 Mr Turnbull advised the Architect. His letter is dated 28 February 2006; well after the piling work had been undertaken. As no evidence has been provided as to the responsibility for design of the piles, I assume that they were in accordance with any engineering requirement. My task has not been made easier by the Applicant's failure to call Mr Mann (an engineer, previously of the piling sub-contractor) and the Respondents' failure to call Mr Turnbull. Mr Theo is not an engineer and could not say why the conditions encountered were not as expected.

63 Screw piling began at the back of the site, at the location of units 3 and 4. When work was underway, Mr Feldman told the Architect that some of the screw piles could not reach the desired torque without being driven substantially deeper than 2 metres. Variation 7 was signed by Mr Feldman on behalf of the Builder and by the Architect on behalf of the owner and dated "2/12/05". On the side of the variation the Architect wrote "Will be confirmed by further site investigation" and dated it "7/12/05".

64 It was put to Mr Feldman in cross examination that entitlement to money and time for this variation was dependent upon another soil report to say that the conditions had "changed". Mr Feldman did not agree with that interpretation. The note was signed only by the Architect and I find it was written on the variation request after it left Mr Feldman's hands.

65 A side issue which occupied some time during the hearing was that the Builder had also claimed an amount for piling units 1 and 2, being $18,900.00 inclusive of GST. This was never paid by Castlemar to the Builder or by the Builder to the piling sub-contractor. Mr Theo said he believed they were not going to get paid as he understood the architect wouldn't approve it, and his firm agreed to write it off. I have not taken it into account.

66 The parties agree that the $15,763.00 variation 7 for the Unit 3 and 4 piling was paid. Mr Robins described it as a "conditional variation", but did not take me to a provision in the contract allowing for such a thing. The Architect gave evidence that the Respondents had two conflicting desires. One was to complete the job as quickly as possible. The other was to avoid paying any more than necessary. This novel and nasty concept, the conditional variation, appears to have been the Architect's way to try to get the Respondents everything they wanted. I find this was a proper variation and Castlemar is not entitled to a refund. The only "condition" that I find reasonable was that the sub-contract should keep bore-logs, to demonstrate how many piles were deeper than 3 metres. The bore logs were kept and there is no suggestion that they were inaccurate.

67 I also have regard to the comments of Deputy President Macnamarra in *Lloyd L Watkins Pty Ltd v Vondrasek* [2006] VCAT 2479 [at 124] where he said:

> Where a person doubts that money is properly due but pays anyway "for the sake of peace", the payment is regarded as voluntary and one to close a transaction and is not recoverable as money paid under a mistake if the doubt as to the validity of the demand is subsequently proved to be correct.

Castlemar has provided no evidence as to the alleged agreement regarding the boundary fence and landscaping. I find the Builder is entitled to $15,763.00 for this variation.

### V33a Electrical Cabling Changes - $8,525.50

68 The Architect said in the letter of 20 March 2007 "amount disputed and revised to $4,132.40". The written variation is for $8,525.50, dated 11 December 2006 and is signed for the Builder, but not for the Owner. There is no doubt that at least some of this work was authorised or requested by the Architect on behalf of his client, and it is regrettable that neither the Builder nor the Architect insisted that a variation be signed before the work commenced.

69 The description of the work in the unsigned variation is:

> Additional electrical & cabling costs associated with revised drawings & on-site requests (revised)

70 The work was done before the variation document was prepared. Under cross-examination Mr Feldman said that the additional works were agreed

before they were undertaken, but that it was costed later. The associated invoice - also 11 December 2006 - is supported by a quotation from W & S Security of 1 September 2006, and invoices from A.R.M. Contractors of 15 October and 5 December 2006. In his witness statement dated 18 January 2008, Mr Feldman said that the variation "is calculated as follows". He listed the A.R.M. invoice of 5 December 2006 for $3,268.10, the A.R.M. invoice of 15 October 2006 for $841.45, part of a second invoice of 5 December 2006 from A.R.M. being $2,594.90 and the W&S quote for $891.00. To these sums were added site co-ordination of $55.00 and builder's margin of 10% to give the figure sought of $8,525.50.

71 In his witness statement of 18 January 2008 the Architect said:

> A number of items claimed in that variation were contract items and should not have been claimed as variations. I subsequently revised the amount claimed to $4,132.40 which I was prepared to approve.

72 In the Architect's witness statement in reply of 12 February 2008 he said that wall lighting illuminating the common driveways should have been separately metered but the Builder did not allow for it and had included it on the metering of Unit 2. He said:

> This would only have led to another dispute and accordingly, the developer reluctantly agreed to a variation.

He also said garden lights replaced some of the wall lights and that the former were charged for without a credit being allowed for the latter. He also reiterated that the variation included items that were contract items.

73 On 21 February 2008 during the hearing the Respondents filed a further document entitled "Proposed further evidence of Avi Milder as to the calculations in respect of Variation #33A and the credit due for light fittings." The part of the document relevant to the credit for lighting was withdrawn the next day as it was subject to an agreement concerning a number of items. This document also gives a total for the variation of $4,132.40. It was broken down as described in the following paragraphs.

74 Instead of $891.00 for the W&S quote, the architect allowed $748.00 inclusive of GST. He said that one less telephone/data point was installed and deducted $120.00 plus GST of $12.00. Under cross examination Mr Feldman said the correct sum for a telephone point is $60.00. The Builder provided no further evidence of the value of a telephone point and the only indication of the cost of "points" is that of data cabling points in the W&S quote.

75 In re-examination Mr Feldman said that the nett change in data points was that four were supplied rather than three. This part of the variation is a perfect example of why they should be in writing and costed before they are undertaken. I prefer the Architect's evidence to that of Mr Feldman concerning the number of data points and accept the Architect's deduction of $120.00. I allow $690.00 for the W&S quote, excluding GST.

76 The Architect then considered A.R.M. invoice 10120 of 5 December 2006 for $3,268.10. He deducted two light points in the entry totalling $150 as he said the points were not additional, but already in the design and relocated before construction. Under cross-examination Mr Feldman said he did not believe the lights had simply been moved but that he would check at lunch time. Mr Feldman said nothing more about these lights. I accept the Architect's evidence that these lights were relocated from the walls to the soffits. I allow the deduction of $150.00.

77 The Architect then said there should be a credit for 5 wall lights each at $75.00, totalling $375.00. I accept the Architect's evidence under cross examination that five less garden lights were supplied than documented and they were not credited elsewhere. I allow the deduction of $375.00.

78 The next element considered by the Architect was a claim for $1,000 for four Tastics – combined ceiling lights and heaters for bathrooms. Mr Feldman's said this was a prime cost item that was not charged for. However I note that Tastics are shown on drawing A10A as to be supplied by the Builder. I allow the deduction claimed.

79 I allow the Builder $1,743.00 for invoice 10120.

80 The Architect next considered A.R.M. invoice 10118 for $2,359.00. The Architect allowed $1,180.60. Of the "public light" items he allowed the first four items, totalling $223.60 and rejected the balance. In addition I allow the next four items totalling $405.40 as I accept that they were part of the same work allowed by the Architect for the first four items. When he was asked about that in cross-examination the Architect agreed that it might be that they were another part of the same work but added that there was a limit to how far he would go on a variation.

81 As to the remainder of this invoice, the Builder has failed to convince me that I should allow the claim for a double power point in the walk-in robe of Unit 1. For units 3 and 4 I allow the light points above the air conditioning units, six double power points and two no. two-way kitchen lights, which items were also allowed by the Architect.

82 The total I allow for this invoice is $1,479.00.

83 The architect allowed the other A.R.M. invoice 10102 of $841.45 in total, as do I.

84 In summary I allow in total for V33a $690.00 for the W&S quote, A.R.M. invoices 10120 - $1,743.00, 10118 - $1,479.00 and 10102 - $841.45. I also allow site co-ordination of $55.00 and administration of $100.00 giving a sub-total of $4,908.45. I allow a total for this variation including GST of $5,399.30.

V41b Additional Staining (ii) revised - $4,541.00

85 The Architect said in the letter of 20 March 2007 "Claim disputed as previously advised". Mr Feldman said the Architect was unhappy with the

"Intergrain" timber stain finishes, resulting in variation 31 (which is undisputed) to change it for units 3 and 4, which he said "the Architect instructed me to carry out ... on a 'Cost Plus' basis rather than a fixed price." He said variation 31 was paid, then the Architect instructed the Builder to re-stain units 1 and 2.

86 According to the Builder, variation 41 was presented on completion, for $5,661.00 and there was disagreement about the amount of tradespersons' time to be paid by Castelmar. Mr Feldman said the Architect asked him to re-submit the variation removing 16 hours, which he did as variation 41b.

87 In his witness statement of 18 January 2008 the Architect said that the additional staining was neither instructed nor done and went on to say that the standard of all external staining was poor. In his witness statement in reply of 12 February 2008, the Architect said Mr Feldman had told him the extra cost for variation 31 would be approximately $700.00. There is clear agreement that, regardless of how foolish such a decision is, the Builder and Architect had agreed that the earlier staining variation would be done on a cost plus, or "do and charge" basis. The Architect said that he instructed the Builder not to proceed with staining without providing a quote and then being given specific instructions to proceed. The Architect continued:

> On the advice of the painter that staining the front (street) elevation would only cost approximately $500.00 and given that the builder was seeking a quick decision so as to remove the scaffolding from the front, only the front unit had applied an additional coat of stain.

88 I find the Architect's evidence unconvincing in circumstances where nothing was allowed for the second variation, although he said that work to which it related "would cost approximately $500.00". I accept the evidence of Mr Feldman that the Builder was instructed to carry out this work on a cost plus basis and I accept that the amount sought by the Builder is reasonable. I allow the Builder $4,541.00 for this variation.

### V42 Concreting Extras - $4,416.50

89 There is a written variation signed only for the Builder. Two versions of the written variation appear in the Respondents' Tribunal Book. Both are dated 20 October 2008, but the apparently earlier version is for the amount claimed and is at pages 259 and 260. The version at 257 and 258 has $4,416.50 crossed out and $3,930.30 is written beside it.

90 The Architect said in the letter of 20 March 2007 "Claim disputed as previously advised". The concreting referred to is associated with a change to the garage slab for unit 4, necessitated by the changes associated with discovery of the sewer. Under cross examination the Architect admitted that the variation had necessitated extra concrete but that the claim was made late. He agreed that when considering the deduction for the reduced size in unit 4 he did not take the extra concrete into account.

91 Under discussion of Castlemar's claim for reduction in the size of Unit 4, below, I have concluded that the parties agreed not to adjust the contract sum for extra costs or savings caused by changes necessitated by discovery of the sewer. I therefore make no allowance for this variation.

V52 Additional Entry Coat Cupboards - $4,379.00

92 The Architect said in the letter of 20 March 2007 "Not a variation as previously advised. Required under contract."

93 The coat cupboards were one class of a few elements of the works where the parties dispute whether they were the responsibility of the Builder. The coat cupboards in question are in units 1 and 2. Similar issues also arise regarding the stores in all four garages and slatted timber screens or fences in certain areas. It is arguable they were not documented with sufficient detail to enable them to be built without further information. Most were indicated by a line or double line on the site plan - drawing AO1B. During cross-examination, Mr Feldman agreed that he did see the lines on the site plan for the fences, coat cupboards and garage stores, but did not see the equivalent design on any other drawing. He admitted he had not asked the Respondents or the Architect about these items. He said this was because he thought he did not have to build them.

94 The Respondents referred to the site plan. The parties agree these items do not appear on other drawings. No further instructions were issued by the Architect until late in the project. In answer to my question, the Architect said no tendering builder had asked about these items.

95 Mr Robins said in closing that Mr Feldman deliberately omitted to ask questions about these items at tender time "to keep his quote low and entitle him to variations". Mr Robins' submission tends to support the view that it is now reasonable to allow such items provided by the Builder as variations, because of the implicit admission that they have not been allowed for in the Builder's price. However Mr Robins has a point. A variation nearly always costs more than the item would have been priced for if included in the contract at the beginning. Having incomplete work undertaken by others can be even more expensive. Quoting builders should therefore be careful to ensure that everything drawn is priced or queried.

96 I also note that the Architect appears to have missed them - to deliberately fail to document these items could only be regarded as illogical - so it is assumed this is not what happened.

97 Clause B1of the contract deals with discrepancies or omissions in documents. It provides:

> If either the contactor or the owner discovers a discrepancy or omission in, or between, any of the contract documents, that party must promptly give written notice to the Architect. The Architect must promptly resolve the discrepancy or omission by giving a written instruction to the contractor and a copy to the owner.

98 Under cross-examination Mr Feldman agreed that everything shown on the contract drawings should be either provided for in the tender or clarified, but he added that this contract had a $40,000.00 contingency sum and that if details were provided after the contract was signed, they could be costed then and deducted from the contingency. These items could properly have been expended from the contingency sum, but were not.

99 On drawing AOIB there are two lines adjacent to each of the four front doors which make a rectangle with the front and side walls. Each is behind the door as it opens and is described in each position on drawing A01B as "CBD". The size of the cupboards in units 1 and 2 is not quite the same as the size of the cupboards in units 3 and 4. As admitted by the Architect, the former are two-door cupboards and the latter three door.

100 On joinery drawings J03 and J04 for units 3 and 4 respectively, they are properly documented. The equivalent drawing for units 1 and 2 do not show coat cupboards.

101 The Architect's first mention of the coat cupboards was to say that they had always been a contract requirement and to insist they be built without further documentation. The Builder did provide the coat cupboards, but only after the Architect provided a drawing for them on 22 September 2006.

102 In Mr Robins' words, the Builder "performed this work under protest and sought a variation in the sum of $4,379.00". There were a number of e-mails and faxes between the parties concerning the cupboards. Although the Builder invoiced for them as a variation on 1 March 2007, there was no written variation and it was clear that at all times Mr Rauchberger and the Architect insisted that the cupboards were part of the contract works. One e-mail dated 20 September 2006 from Mr Rauchberger to the Architect is particularly telling and provides an insight into why the Architect appears not to have acted independently in administering the contract.

103 He said:

> There is no doubt that I am entitled to expect cupboards in Unit 1 and 2 at no extra cost!
>
> I know you are meeting with [Mr Feldman] tomorrow morning and wanted to express my thoughts prior to your meeting.
>
> Without pre-empting the outcome of the meeting, I must emphasise that certainly in relation to the last two issues, I should not incur ANY additional costs. In the above cases, whether the issues rose from your mistake or the builder's greed – in either case – I am certainly the innocent party and I would be grateful if you could resolve those issues between yourself and the builder without my involvement and without me incurring any additional costs.

104 I find that although the coat cupboards should have been detailed, they were very similar to those in units 3 and 4, and the presence of the cupboard in

both disputed units was clearly necessary to support the screen at the front doors. I make no allowance for the coat cupboards.

Total for variations

The nett allowance for disputed variations is:

| | |
|---|---|
| Screw piles | $15,763.00 |
| Electrical cabling | $5,399.30 |
| Staining | $4,541.00 |
| Total | $25,703.30 |

**Alleged defects or incomplete work**

Garage stores - $11,324.28

105 As mentioned above, garage store were similar to entry coat cupboards because they were insufficiently documented. Castlemar claimed them as an incomplete item.

106 The representation of the garage stores is similar to the coat cupboards - lines and "STORE" appears beside them. However the difference between the stores and the coat cupboards is that none of them were detailed. There is no indication at all of the design or materials for the garage stores, other than their foot-prints. Castlemar has claimed $11,324.28 for this item, as the amount quoted by the Builder to provide the stores after further design details were provided by the Architect.

107 I find Castlemar is not entitled to any sum, as the garage stores were not sufficiently described in the contract documents to enable the Builder to construct them.

"Items not supplied" - $28,982.09

108 In the final submission for Castlemar, Mr Robins stated that the Builder should allow his client $28,982.09 for "contracted items not supplied by RFCM and the extra costs incurred by Castlemar due to RFCM's breaches". This sum was reduced by a further $80.00 by Mr Rauchberger during cross-examination, to $28,902.09. The $80.00 appears on Respondents' Tribunal Book page 313 and is for painting to a side fence which was not claimed.

109 Unfortunately, because of an oversight, this aspect of Castlemar's cross claim was never properly pleaded out, however the items are described in the witness statements (and witness statements in reply) of Mr Rauchberger and the Architect. They are described at paragraph 85 of Mr Rauchberger's witness statement as:

a. caulking;

b. general site cleaning;

c. slated [sic - I assume "slatted"] timber screens separating unit A and unit B (see site plan A01A) including painting;

d. gate and fence to rear of Unit A(see site plan A01A) including painting;

e. [slatted] timber gate and fence to the side of unit B (see site plan A01A) including painting;

f. flyscreens to all openable doors (see site plan A12A and A20A) including painting;

110 In his letter of 20 March 2007 to Mr Rauchberger, the Architect had said of this collection of items:

> Expenses incurred to complete works including caulking, cleaning, painting, screens, fences, gates, painting [sic], flywire, additional fees and misc. $33,000.00.

It appears the $33,000.00 was a rough estimate.

111 Paragraph 86 of Mr Rauchberger's witness statement lists items marked a. to f. , but they do not all correspond to the items in paragraph 85. Beading has been added to caulking, it is claimed that there was stained concrete in the garages which necessitated painting and $6,013.34 was claimed for "architectural fees for the extra work required due to RFCM's defaults"

112 I discuss the items individually:

### Caulking and beading - $2,064.70 and $385.00

113 Castlemar claims the cost of caulking the driveway, garages and paths. The work was undertaken by ADAH Group Pty Ltd ("ADAH") and its invoice of 15 March 2007 is Respondents' Tribunal Book page 312. $1,877.00 plus GST, a total of $2,064.70, is claimed for caulking. As admitted by the Architect under cross examination, external caulking is not specifically called for and I make no allowance for it.

114 Although not specifically mentioned in the Architect's letter of 20 March 2007, Castlemar has claimed $385.00 (inclusive of GST) for "beeding [sic] to entry units 3 and 4". The contract documents did not call for beading, but Mr Rauchberger said there was a gap between the walls and ceiling at the entry to units 3 and 4 that "looked shocking". The contract called for a shadow-line cornice, which Castlemar's photographs (exhibit R11) show has been poorly executed. I find rectifying the defect by addition of beading is reasonable. The Builder must allow Castlemar $385.00 for this item.

### General site cleaning - $2,790.00

115 Castlemar claimed $2,790.50 for cleaning of which $750.00 was invoiced by Machiques Nominees on 5 March 2007 and $2,040.50 was invoiced by Asset Industries Australia Pty Ltd ("Asset") on 5 June 2007 for work done on 22, 23 and 24 February 2007 and 19, 20 and 23 March 2007.

116 Mr Aldo Perri gave evidence for the Builder. He is a builder's labourer who subcontracts to the Builder and is paid on invoice. Mr Perri appeared to me to have limited memory of work done over a year before he gave evidence and although he said that when his work was complete all cleaning had been done, I am not satisfied that I can rely upon this. In particular I note that his last invoice was dated 9 February 2007 and the Builder was still engaged in work on site until 22 February 2007.

117 The Builder showed a video of all four units taken on or about the time the Builder left the site. Although the video did not show the properties in detail, it showed there was no obvious cleaning work to be done.

118 Mr Feldman was asked in cross-examination whether the amount claimed by Castlemar for cleaning was reasonable. His response was "I believe they related to [Mr Rauchberger's] sale campaign." Given that the Asset invoice was for two lots of cleaning a month apart, there is some logic to Mr Feldman's belief.

119 Castlemar provided no photographic or other compelling evidence that cleaning was necessary. On the other hand, as Mr Robins said to Mr Feldman in cross-examination, cleaning cannot be completed until the work is completed. Given the date of invoice and the description "builders clean" on the Machiques Nominees invoice, I find that this clean would otherwise have been undertaken by the Builder. The Builder must allow Castlemar $750.00 for cleaning.

Slatted timber screens separating unit A and unit B - $3,553.00

120 For reasons which are not altogether clear, the Respondents have referred to the units by number on some occasions and by letter on others. I note that units A and B are shown on the contract drawings as units 1 and 2. Castlemar claimed $3,553.00 (inclusive of GST) for this screen, as described in the ADAH invoice of 15 March 2007.

121 Mr Feldman said of this "screen" and the other two slatted gates and fences referred to below:

> The applicant did not install those fences because they were not detailed on the architectural elevation plans and sections were not specified … Consequently, I did not regard those fences formed part of the contract. [sic]

As I have already mentioned, for the Builder to take the attitude that such an item must be shown in elevation as well as plan is fraught with peril.

122 On site plan AOIB at the west end between Units 1 and 2, from the party wall to the street, is a double line, above which is written "slatted timber screen". At right angles to the words there is a line which indicates a slatted timber screen, which appears on drawing A05A; the west elevation of units 1 and 2 and which has been built.

123 I am not satisfied that the notation "slatted timber screen" on plan AOIB relates to the structure to divide the garden of unit 1 from the garden of unit 2. I find it describes the screen on A05A. I find that the partition between Units 1 and 2 was not sufficiently described on the drawings to build.

124 There is no allowance for this screen.

Gate and fence to rear of Unit A - $2,120.80

125 This item appears to have been described by ADAH as "Screen and gate to side of Unit 1". It is shown on drawing A01B and runs north-south, commencing at the north-east corner of unit 1 and the amount charged by ADAH was $2,120.80, inclusive of GST. I am satisfied that the Builder was obliged to provide this item and did not. The Builder must allow Castlemar $2,120.80 for this item.

Slatted timber gate and fence to the side of unit B - $3,311.00

126 This item appears to have been described by ADAH as "Screen and gate to left hand side of driveway". It runs east-west, and is shown on drawing A01B as "slatted timber gates" to the south of the Unit 2 garage. The amount charged by ADAH was $3,311.00, inclusive of GST. I am satisfied that the Builder was obliged to provide this item and did not. The Builder must allow Castlemar $3,311.00 for this item.

Painting slatted fences and gates - $2,823.75

127 Castlemar has claimed a total of $1,980.00, inclusive of GST for the labour of painting slatted fences and gates, and a further $843.75 as the cost of the necessary paint.

128 The Builder must allow Castlemar the same proportion for painting as has been allowed for the gates and fences themselves. Of a total claim for screens, gates and fences of $8,984.80, $5,431.80 was allowed, being approximately 60%. I allow Castlemar 60% of $1,980.00 for labour being $1,188.00.

129 The claim for paint is largely for paving paint. The paint which appears to be for the screens and gates is "Sikkens HLS ebony" at a total cost of $253.00. I also allow Castlemar 60% of this item being $151.80.

130 I allow Castlemar a total of $1,339.00 for this item.

Flyscreens to all openable doors $1,265 00

131 Mr Rauchberger said in his witness statement:

> Redwood Joinery was paid $1,265.00 for completing the flywire doors to unit A [unit1].

Mr Feldman agreed that the charge was reasonable and agreed the doors were not installed, but said he was not able to complete the job as he was excluded from site. The Builder has not proved that it has the flyscreens, nor that the cost to it would be less than the Redwood Joinery invoice.

Further, as found below, the Builder did not bring the works to practical completion by the date for practical completion, as extended, and the Respondents properly terminated the contract. I allow Castlemar $1,265.00 for this item.

### Painting garage floors

132 Mr Rauchberger claimed that the garage floors were badly stained and had to be painted to bring them to an acceptable standard. The photographs provided do not support his evidence. I make no allowance for this item.

### Architect's fees - $6,013.33

133 Castlemar claimed $6,013.3 for two months additional fees paid to the Architect. There was no indication of what the fees were for, except additional time. Castlemar has failed to demonstrate that this item was reasonable or necessary. It is not allowed.

### Total for defects and incomplete items

| | |
|---|---|
| Beading | $385.00 |
| General site cleaning | $750.00 |
| Gate and fence to rear of unit A | $2,120.80 |
| Slatted timber gate and fence to the side of unit B | $3,311.00 |
| Painting slatted fences and gates | $1,399.00 |
| Flyscreens | $1,265.00 |
| Total | $9,230.80 |

## Prime cost and provisional sum items

134 The Architect's letter of 20 March 2007 to Mr Rauchberger identified three prime cost or provisional sum items for adjustment. They were the stainless steel balustrades discussed below, light fittings and bathroom fixtures. The latter two are part of the agreed credits.

135 The documented approach to prime and provisional cost items was slap-dash. Instead of listing them all in the standard-form building contract at schedules 6 and 7, schedule 6 was completed:

> See specs + plans schedule

and schedule 7:

> See schedule in specs and plans.

136 If the reference had been to the schedule in the specification alone, the confusion might have been less. However there is at least one item which probably should have been included but was not. I refer to carpet, discussed below.

Stainless Steel Balustrading/Handrails – Builder claims $3,141.00, Castlemar claims $1,858.00

137 The Respondents assert that there is a $10,000.00 allowance for this item; $5,000.00 on page 00870 of the specification (the schedule referred to above) and a further $5,000.00 on drawing A02B. This note also appears on drawings A03, A05A, A06A, A07A and A08A. The Builder asserts they are the same sum. I prefer the Builder's interpretation. It is confusing to place a prime cost or provisional sum on a drawing, particularly as the sum is the same as the amount in the specification. Further, I note that other items appear on drawings, such as "kitchen and laundry mixer allow PC sum $200 each". All also appear in the specification at 00870, all are the same sum as the amount allowed on the drawing and there is no suggestion that these sums should have been doubled. The provision is unclear and as the Respondents provided all the contract documents, I construe it contra proferentum, against their interests.

138 The Respondents have not challenged the Builder's assertion that actual expenditure on this item was $8,141.00; the claim is about the interpretation of the allowance. The Builder claims an additional $3,141.00 and Castlemar claims a credit of $1,858.00, the approximate difference between $10,000.00 and $8,141.00. I allow the Builder a contract sum adjustment of $3,141.00 for this item.

Carpet - $4,490.00

139 Castlemar claims the Builder has overcharged for carpet, and has claimed $4,490.00. The only reference to carpet in the documents is on the drawings. It is not listed in the prime cost items and the part of the specification which would refer to carpet - page 09680 - is not part of the specification that was presented in evidence. The parties agree that upon the request of the builder, the Architect advised that $70/$m^2$ should be allowed. A possible explanation is that the price of carpet indicates the quality to be provided.

140 The parties seem to have treated the carpet as a prime cost sum, so I will also. If it were not a Prime Cost item, the price would be irrelevant to the Owner, it would be the Builder's business alone, just as is the price of framing timbers, nails, screws and tubes of silicon. The question is whether the allowance is for the carpet rate alone ($70/$m^2$), or the amount as extended - the total sum for the carpet.

141 The Architect said in evidence that Mr Lipshut of the Builder told him that $16,380.00 had been allowed in the tender. The dispute over carpet arose because the Respondents received a copy of the invoice of 27 November 2006 from Macey's Floor Coverings Pty Ltd. The amount payable for carpet by the Builder was shown to be $11,890.00 therefore Castlemar claimed a credit for the difference between the amount Mr Lipshut is

alleged to have told the Architect that the Builder allowed and the actual cost.

142 As Mr Robins said in final submission, Mr Feldman conceded Castlemar's claim in his witness statement in reply, but then recanted. This fact certainly adds weight to Castlemar's claim, but it is also possible that Mr Feldman was, as he asserted, genuinely mistaken.

143 Mr Lipshut was not called to give evidence, therefore the Architect's evidence about the conversation with him is uncontradicted. Although in accordance with section 98 of the *Victorian Civil and Administrative Tribunal Act* 1998 the Tribunal is not bound by the rules of evidence *Jones v Dunkel* (1959) 101 CLR 298 provides a sensible guide to how to deal with such an issue. The Builder could have called Mr Lipshut to give evidence but did not. I accept the Architect's evidence and allow Castlemar $4,490.00 for carpet.

### Reduction in size of Unit 4

144 Castlemar has claimed $33,250.00, based on the evidence of Mr Fulton, a quantity surveyor and its expert witness. The Respondents, through the Architect, could have avoided this part of the dispute by acting in accordance with Clause J1 of the contract. The relevant parts are:

> a. The architect may give to the contractor a written instruction for a variation at any time before the date of practical completion.
>
> b. The instruction for a variation may include an instruction to provide within 20 working days or longer period if stated in the instruction, one or more of the following:
>
> - an estimate of the effect of the variation on the date for practical completion
> - a quotation for the whole of the cost of the variation.

145 There is no evidence that the Architect gave any such instruction. Had he done so, the cost of the variation and delay could have been calculated at the time when it was fair to do so - during the course of the work.

146 Mr Fulton's evidence was not met by evidence of a quantity surveyor for the Builder, because the Builder asserted that Mr Feldman and Mr Rauchberger had come to an agreement. During the course of the hearing this came to be known as "the coffee bar agreement".

#### The alleged "coffee bar" agreement

147 Mr Feldman asserted that he met Mr Rauchberger in a coffee bar near the site in October or November 2005 and they agreed that in exchange for the Builder not claiming time extension costs or other costs associated with disruption and re-starting the job and the increased cost of materials, the Respondents would not be entitled to any deduction for the decreased size of Unit 4. Mr Rauchberger denied that such an agreement was made. In

submissions, Mr Robins said that it would be most unlikely that Mr Feldman would bind himself to such an agreement at the time, because he would not have known the costs associated with the new design.

148 The first of mention in writing of the alleged agreement was in an e-mail from Mr Feldman to the Architect of 27 March 2006. It was in reply to an e-mail from the Architect to Mr Feldman of the same date asking Mr Feldman to "look at these and advise ... credits due". In response, Mr Feldman said:

> I don't mind giving credits for changes to the unit 4 floor plans, however [the Builder] has incurred extensive costs in administration, loss of income & delay costs of which only very few have been passed on to your client. So I suggest we move on as agreed earlier on this issue, but if you would like to discuss further, let's speak on site over next few days & I'm sure we can come to some arrangement.

149 Mr Feldman said that after this e-mail he heard no more about the issue from the Respondents until this proceeding commenced.

150 The evidence which is consistent with the coffee bar agreement is:

a Mr Feldman asserts it.

b Had the coffee bar agreement not been made, the Builder would be entitled to various costs associated with suspension of work and the variation itself. These were foreshadowed in the Builder's letter of 22 September 2005, but with the exception of variation 42, they were not claimed then or since.

c The Architect did not seek a credit until six months had elapsed.

d There was no further mention of this credit by the Respondents or by the Architect while work was underway.

151 The evidence inconsistent with the coffee bar agreement is:

a There is no written evidence of it at the time of the alleged agreement.

b Mr Rauchberger denies it.

c Mr Feldman's e-mail of 27 March 2006, quoted above is equivocal. Although there is a reference to an agreement, there is also an invitation to discuss the matter further.

d If the Builder believed the nett variation would be to decrease the contract price, he might be content to just let the matter slide, in the hope that it might be overlooked.

152 On balance, I find that the coffee bar agreement was made either in the coffee bar or later when the exchange of 27 March 2006 took place.

153 I make no allowance to the Respondents for the decrease in size of unit 4 and as indicated above, I have made no allowance for variation 42.

### Alleged overclaim by the Builder

154 Castlemar claims $2,917.39 as described by the Architect in his letter to Mr Rauchberger of 20 March 2007:

> Sales Register $1,912,898.57 compared to the Final Claim (reconciled) $1,909,981.24 indicates an over payment of $2,917.30

Castlemar has not demonstrated how it is entitled to this sum under the building contract or otherwise, and I do not allow it.

## TIME

### Date for completion

155 In accordance with item 16 of schedule 1 to the contract, the date by which the contract was to reach practical completion was 15 September 2006. There is no doubt that the work had not reached practical completion by that date but the parties disagree over the extent of time extensions to which the Builder is entitled.

156 The contract defines practical completion at M1.1:

> The works are at practical completion when, in the reasonable opinion of the architect:
>
> - they are substantially complete and any incomplete work or defects remaining in the works are of a minor nature and number, the completion or rectification of which is not practicable at that time and will not unreasonably affect occupation or use
> - all commissioning tests in relation to the plant and equipment shown in item 17 of schedule 1 have been carried out successfully and
> - any approvals required for occupation have been obtained from the relevant authorities and copies of documents evidencing the approvals have been provided to the architect.

157 The Builder alleges it is entitled to time for the sewer delay (described later), and nine variations.

158 Section L of the ABIC SW-1 contract governs adjustment of time. Clause L1 concerns adjustment of time with time extension costs and L2 concerns adjustment of time without time extension costs. Clause L3 provides the steps to be taken:

> **Contractor to notify of delay**
>
> **L3.1** When the progress of the works is delayed by any of the causes in clauses L1 or L2, the contractor must, within 2 working days of becoming aware of the start, or end of a delay, as the case may be, notify the architect in writing:
>
> - that the works are being delayed, and state when the delay began, give a description of the cause of the delay and give an estimate of the number of working days affected and

- that the delay has ended, stating when the delay ended.

**.2** Subject to subclause L3.1, delays of less than 2 working days may be notified in the same notice.

### Parties' views of the date for completion

159 The Builder's approach to its entitlement to time extensions has been unclear. In the Points of Claim of June 2007, the conclusion to the particulars of paragraph 8 was that "The date for practical completion should be extended to at least 20 January 2007." The further particulars of 17 July 2007 listed the variations and attributed delay days to them totalling 36 working days and added "Further, delays due to the Christmas shut down were from 23 December 2006 - 15 January 2007." There was no mention of the sewer delay. Mr Feldman's witness statement of 18 January 2008 was to similar effect.

160 If there had been only 36 days of time extensions, the date for practical completion would have been extended to 13 November 2006; well short of the first day of the Christmas shut down.

161 In his witness statement of 18 January 2008, Mr Rauchberger said at paragraph 16 and following that the Architect told him about the problem with the sewer line on or about 20 September 2005 and "As a result the construction works were delayed and [the Builder] resumed work on 24th November 2005." At paragraph 18 he said:

> I spoke to Mr Feldman about the project in November 2005. Mr Feldman told me that he was confident of achieving the original completion date of 15th September 2006 despite the delay due to the sewer easement under unit [4].

162 At paragraph 4 of his witness statement in reply of 12 February 2008, the Architect referred to Mr Feldman's witness statement and said:

> Despite the fact that I was of the opinion that the correct date for practical completion should have been no later than 11 December 2006, I accepted Mr Feldman's word that the works would be completed by 20 December 2006 and therefore I agreed to that date as the date for practical completion.

163 Much correspondence passed between the parties - mainly between Mr Feldman and the Architect on behalf of the Respondents - but agreement was never reached. I am not satisfied that either party has properly analysed the time by which the date for practical completion should be extended, therefore I do so myself.

### Alleged delays:

<u>The sewer delay</u>

164 The Sewer delay arose because the drawings upon which the Builder tendered could not be built as they impinged on a sewer line. The Builder

claims that work ceased on 15 September 2005, in accordance with its letter of 22 September 2005.

165 The Builder's notice of the commencement of delay should have been sent perhaps two days earlier, but there is no doubt that all parties were acutely aware of the problem causing the delay almost as soon as it arose.

166 I accept that no notice was sent by the Builder to say that work had recommenced. In strict compliance with the contract, the Builder probably should have sent such a notice. However the letter of 22 September did give a trigger event, being recommencement of critical path activities. As discussed below, there was some confusion over the recommencement date that would have been avoided had the second notice been sent, but I find the breach was not so serious as to deprive the Builder of time for the sewer delay.

167 The Respondents' evidence, given by both Mr Rauchberger and the Architect, was that work stopped on or about 20 September 2005. As discussed above under "The Architect as certifier, assessor and valuer", I do not consider the Architect's evidence was reliable on this point and, as also noted above, that there was no contemporaneous response to the Builder's letter of 22 September 2005. I find that work ceased on 15 September 2005.

168 There is also disagreement over the day on which work recommenced. The Builder claims it was 3 December 2005 and Mr Rauchberger said in his witness statement that it was 24 November 2005. As stated above, the Builder did not provide a notice of end of delay as required by L3.1. The most compelling evidence about when the delay ended is the Builder's bar chart of critical path activities of 17 May 2006 (Respondents' Tribunal Book page 334) which gave the set-out date as 21 November 2005. The revised planning permit was not obtained until 28 November 2005 and the revised building permit was not obtained until 5 December 2005.

169 Mr Feldman said under cross-examination that the Builder could not re-commence critical path works, being screw-piling, before the building permit was obtained, however I note that Builder's exhibit A4, the piling log for units 3 and 4, shows 29 November 2005 as the start date. I therefore do not accept his evidence on this point. I also note that set out and excavation took place before screw-piling and took five working days as shown on the bar chart provided by him.

170 There was a suggestion from the Respondents that the Builder could have staged the work; started another area before the revised permit for Unit 4 was received. However, under cross examination the Architect admitted that the plumber could not commence work until the Plumbing Industry Commission issued a number for the job, which in turn was dependent upon a building permit.

171 Had critical path work not commenced until the building permit was issued, I would have extended time until then. The evidence indicates that the

Builder took the risk and started screw-piling once a revised planning permit was received. I allow a time extension from and including 15 September 2005 up to and including 20 November 2005. In accordance with the MBAV Working Day Calendar for 2005, this equals 42 working days.

Critical path and time extensions for variations

172 A number of variations had time extensions approved by the Architect, but after the work was undertaken the Architect said time should not be extended because the particular items of work were not on the critical path. On 11 December 2006 the Architect sent an e-mail to Mr Feldman, which said in part:

> V17, V19, V21A, V24 and V38A do not justify any extensions of time as they were not in the critical path and had no impact on the progress of the works. We note that V21A is not complete confirming that it did not impact on progress.

24 working days had been claimed and this e-mail purported to limit the days allowed to 11.

173 The question of whether an item of work is on the critical path might be relevant to an architect deciding whether a time extension is reasonable. However, once a time extension has been allowed by including it in a variation, I find it was too late for the Architect to resile, unless for error or on some other reasonable basis.

Specific variations

174 The variations for which the Builder claimed extra time were 9, 14A, 17, 19, 21A, 24, 28, 35 and 38A.

Variation 9 - Supply and installation of Agricultural Drain

175 The Builder claims one day for this variation and the Architect signed the variation. I allow one day.

Variation 14A - Additional works to remove and replace existing side fence

176 The Builder claimed two days for this variation. The amount for this variation was allowed as part of the contingency.

177 The Builder provided a variation form to the Architect which was signed for the Builder and appears to be dated "29/4/06" but it was not signed for the Owner. The Architect wrote "Go ahead". I find the "go ahead" equivalent to signing and I allow two days for this variation.

Variation 17 - Change to timber strip flooring

178 The Builder claims four days for this variation and the Architect appears to have signed the variation "Avi", his given name. He denied signing the variation because he said he does not sign that way. He later agreed that this notice had been faxed to the Builder from his office and that he had written

"As per sample" and signed "Avi" in the same manner higher up the same sheet. This is one of the variations where the Architect later said that the time claimed was not on the critical path.

179 I find the Architect did sign the variation. I allow four days.

### Variation 19 - Backing to free-standing single skin of brickwork

180 The amount for this variation was allowed as part of the contingency. The Builder claims a one day time extension. The variation dated 9 June 2006 was signed for the Builder but not for the Respondents. This is one of the variations where the Architect later said that the time claimed was not on the critical path. However as the variation was unsigned and the Builder did not give evidence about how this variation delayed the work, I make no time allowance for it.

### Variation 21A - Tiling balconies in lieu of timber deck and installation of rendered cement sheet soffit to underside of entry balconies in Units 1 and 2

181 An aspect of this variation was part of the calculation of agreed credits, so the dispute concerns time only. The Builder claims five days for this variation and the Architect signed the variation, but later said that the variation was not on the critical path. Under cross examination he said "I just signed to get the work done".

182 Mr Feldman said in his witness statement of 18 January 2008:

> … on 16 August 2006 I submitted variation no. 21A to the Architect and did not receive the approved variation until 1 September 2006. This delay of more than two working weeks prevented the applicant's ability to commence work which was the subject of that variation which was substantial changes to the flow of construction to units 1 and 2.

183 I allow five days to the Builder.

### Variation 24 - Alteration of brick support

184 The dispute concerning this variation concerns time only. The Builder claims one day for this variation and the Architect signed the variation, but later said that the variation was not on the critical path. I allow one day to the Builder.

### Variation 28 - Unit 4 garage wall/door changes

185 The amount for this variation was allowed as part of the contingency. The Builder claims one day for this variation and the Architect signed the variation, but later said that the variation was not on the critical path. I allow one day to the Builder.

### Variation 31 staining

186 The amount for this variation was agreed. The Builder's notice was signed by the Architect and has a dash next to "Reasonable estimate of delay to process of works caused by variation", therefore it is assumed that no claim

was made for additional time when the Builder prepared the variation form. The Builder has since claimed ten days.

187 The Builder has failed to prove how this variation delayed the work. I make no time allowance for it.

Variation 35A - Additional joinery items/changed joinery finish

188 An aspect of this item was part of the agreed credits. The Builder claimed ten days for this variation. The Builder's variation notice of "19/9/06" was signed for both the Builder and by the Architect. The "reasonable estimate" was "two weeks". The original cost written on the variation was "$6,897.50", which was crossed out and "$5,491.20" written in, which accords with the invoice to Castlemar of 28 September 2006, then this figure was crossed out on both documents and "$844.80" written in on both to indicate that only the first of three Victoria Cabinets Pty Ltd charges applied.

189 On the Builder's variation notice "two weeks" has been circled and has a question mark next to it, but it has not been changed. In the absence of information to the contrary, it is assumed that the relevant work, and thus the delay, was due to commence immediately after 19 September 2006. According to the MBAV Working Days calendar for 2006 published by the Master Builders Association of Victoria, during the two week period following that date there was one rostered day off. I therefore allow nine days to the Builder.

Variation 38A - Supply and install lattice to areas as discussed on site

190 The dispute concerning this variation regards time only. The Builder claims one day for this variation and the Architect signed the variation, but later said that the variation was not on the critical path. I allow one day to the Builder.

### Date for practical completion as extended

191 I have allowed 42 working days for the sewer delay and 23 days of time extensions for variations, a total of 65 days. Based on the MBAV working day calendars for 2006 and 2007, the date for practical completion as extended was 15 January 2007, taking into account the Christmas shut down which provided that the last day of work was 22 December 2006 and the first day in 2007 was 15 January.

### Was the work completed?

192 Occupancy permits are necessary to enable owners to occupy buildings. They were issued by the building surveyor for units 3 and 4 on 11 December 2006 and for units 1 and 2 on 27 December 2006. The permits were subject to conditions - all units required hard-wired smoke detectors and units 1 and 2 also needed shower screens to en suites, corking [sic] to

junctions of wall and floor tiles and holes in ceilings for home theatre to be made air-tight.

193 Although occupancy permits are necessary, they are not sufficient evidence of completion if there are items necessary under the contract which are not the concern of the building surveyor.

194 Under examination in chief the Architect said practical completion had not been achieved by 15 February 2007, although under cross-examination when it was put to him that other than the gas connection, everything had been done by the end of 2006 he responded "That may be true". However, when it was put to him that there were no items which prevented practical completion, he disagreed strongly. When asked to say which items prevented practical completion, he said that the number of items outstanding meant that full access to the site was necessary. As discussed below, I accept the Respondents' evidence that by the date the Builder left site, there were works necessary for practical completion that remained incomplete.

### Claims about practical completion

195 By notice dated 11 December 2006 the Builder gave notice to the Architect that practical completion would occur within 10 working days in accordance with clause M2.1 of the contract, which provides:

> When the contractor considers that the works are near practical completion the contractor must notify the architect in writing 10 working days before the date when practical completion is expected to be reached.

196 According the MBAV calendars, ten working days from 11 December 2006 was 15 January 2007.

197 On 14 December 2006 Mr Feldman wrote the Architect a further letter which referred to the notice of 11 December 2006 and continued:

> As per Contract item M2(2) an inspection of the works has not taken place. We require that the notice of Practical Completion to be forwarded to our office. Also please instruct the client to release half the retention monies a.s.a.p.

198 M2.2 obliges the architect to inspect within ten working days and to issue a notice under either M3 or M4 which are, respectively, where the architect decides the works have, or have not, reached practical completion. The ABIC SW-1 contract does not state the consequences of the architect failing to inspect.

199 Under cross-examination Mr Feldman said the Architect visited the site on the last working day of the year (Friday 22 December 2006) but did not issue a certificate. The certificates under clauses M3 or M4 must be issued within five working days of inspection, which would have been by 18 January 2007.

200 On 20 December 2006 the Builder sent the Architect a four page fax commencing "Final claim less retentions" which included:

> Pls add if all is OK ½ of retention as agreed of Date of Practical Completion.

The Builder's detailed progress claim of the same date showed all elements 100% complete.

201 On 9 January 2007 the Architect issued Statement 14 which was not accompanied by a notice of practical completion. The Architect sent the Builder an e-mail on the same day stating that "the works were neither complete not practically complete [at] the time the claim was sent."

202 On 15 January 2007 the Architect wrote to the Builder. The letter commenced:

> We confirm our advice that, in accordance with the Contract Section M4, the works have NOT reached practical completion.

The letter went on to list allegedly incomplete items and to say:

> This is **not** an exhaustive list nor is it a complete defects list as there are numerous other examples of incomplete work evident, but it is sufficient to illustrate that the project is not complete, not practically complete, not ready for the owner to take possession and not ready to be occupied.

203 On 17 January 2007 the Architect wrote to Mr Lipshut of the Builder cancelling a meeting for the next day and adding:

> …but with so much work yet to be completed a defects inspection was pre-mature anyway.

204 There was correspondence between the Architect and Builder about how the Architect came to the figure of $100,000.00 for Statement 14 and by 19 January 2007 they were taking an acrimonious tone.

### Castlemar/Dalil notice of default

205 The Respondents say Castlemar correctly terminated the building contract, although I note that Dalil was also mentioned in the notice. The Builder says that one or more of the Respondents repudiated the building contract by purporting to terminate when not entitled to do so.

206 The ABIC SW-1 contract has a two-stage procedure for terminating the contract for the builder's default. First, the owner gives a notice of the default and requires it to be remedied within ten days, then the owner may give another notice to end the contract.

207 By notice addressed to the Builder and dated 19 January 2007, the Respondents' then lawyers, Tisher Liner & Co gave notice to the Builder that it was in default by:

> Failing to bring the works to practical completion by the date for practical completion in accordance with the Building Contract.

The notice gave the Builder ten days to remedy the alleged defaults.

208 For the notice to be valid, practical completion must not have been achieved by that date.

209 The Architect sent the Builder an e-mail on 22 January asking "… when you believe the works will be complete so we can carry out our inspection …" and asking for access. He also said that he had been unable to gain access to Units 3 and 4 on three occasions.

210 On the same day the Builder sent a letter to the Architect, again asserting the project was practically complete. Mr Feldman on behalf of the Builder paraphrased clause M1 of the ABIC SW-1 contract which contains the definition of practical completion. He said the Builder:

- Has substantially completed the works and any incomplete works/defects are of a minor nature and number. Rectification of these will not unreasonable [sic] affect the occupation, use and quiet enjoyment of the occupants.
- Plant and equipment have been tested and commissioned successfully
- Certificate of Occupancy has been provided by Building Surveyor.

211 Mr Feldman went on to list the items mentioned in the Architect's letter of 15 January 2007. The items with which Mr Rauchberger joined issue in his witness statement of 18 January 2008 were:

- Gas meters
- Screen fences to front courtyards, to conceal plant and equipment and to the north of Unit 1 garage
- Battens to Unit 1 pergola
- Joinery to Units 1 & 2

212 Mr Rauchberger also said in his witness statement that "the letter did not address most of the defects and incomplete works noted by Mr Milder". I note that the Architect had provided a fairly extensive list of then outstanding alleged defects on 8 November 2006, then further lists after 15 January 2007, culminating in a list sent by the Architect to the Builder in a letter dated 15 February 2007. The list is of four pages containing many items, but most are minor in nature.

Gas supply

213 With reference to the gas meters, the parties agree that gas meters had not been installed and gas not connected by the date of the letter. Mr Feldman said in re-examination that by the time he left the site the gas pipe was capped where the meters were to go. Mr Feldman wrote:

> The installation of gas meters can only be carried out upon application by the owner. After many months of discussion, the client has only just carried this out. All works regarding this item (with respect to the Builder ie providing the gas meter connection point) are Practically Complete.

214 The contract documents included the tender submission of 10 August 2005, and one of the exclusions was "supply authority fees". While the cost fell on the Respondents, the exclusion did not extend to arranging the connection, which is specifically called for in part 02560 of the specification.

215 On 25 January 2007 Mr Lipshut of the Builder sent an e-mail to the Architect to say the gas supply authority required cages around the gas meters or bollards to protect them and would not connect the meters until they were supplied. Mr Lipshut asked the Architect to arrange for them. The Architect replied that supplying such items is the Builder's responsibility because obtaining the supply was the Builder's responsibility and:

> Whatever is required to achieve that is also the builder's responsibility and you are therefore required to do whatever the service provider has instructed in order to get the gas meter connected.

216 Bollards and cages are not mentioned in any of the contract documents and if required by the relevant authority, should have been allowed as a variation. Such items are the type of object contemplated by the DBC Act at section 37(2)(b)(i):

> (2) A builder must not gave effect to any variation unless-
>
> …
>
> (i) a building surveyor or other authorised person under the Building Act 1993 requires in a building notice or building order under that Act that the variation be made;

217 Mr Feldman said the Builder did install the bollards, "but only because we got sick of it." Mr Robins remarked that the Builder did not seek a variation for the bollards. The next chapter in the bollard saga was in an e-mail from the Architect to Mr Rauchberger of 5 February 2007 where he reported that the gas supplier said the bollards were not strong enough to enable the gas to be connected.

218 Mr Rauchberger said at paragraph 124(i) of his witness statement:

> gas meters were the responsibility of [the Builder] and it was incorrect for Feldman to assert that only the owner could make application for such installation.

219 It appears the gas meters were connected by late January or early February. I accept the evidence of the Architect under re-examination that the gas meters were "off the defects list" by 7 February 2007.

220 I am satisfied that, among other items, gas had not been connected by the date of the default notice of 19 January 2007 and that practical completion should have been achieved by then. It follows that the notice of default was validly given.

### Notice of termination

221 On 31 January 2007 Tisher Liner & Co sent a further letter to the Builder on the instructions of Mr Rauchberger. The letter offered a further seven days to complete, if the Builder agreed to undertake all the listed work in the Architect's letter of 29 January 2007. A response was sought by 5.00 pm on 1 February 2007. The letter concluded:

> In the event that we do not receive such confirmation, kindly note that the terms of the Notice will stand and the Contract will be deemed to be terminated in accordance with such Notice.

222 On 5 February 2007 Tisher Liner & Co wrote to the Builder again, stating that the defects had not been remedied, the contract was ended and any attendance by the Builder on site would be regarded as trespass.

223 To determine whether the notice was validly given, I have regard to the Architect's letter to the Builder of 15 February 2007. Gas was no longer an issue, but there were a number of outstanding items. Quite a few were minor and did not need a builder's expertise to complete. Others were unreasonable, such as requiring that the GPOs on kitchen splash-backs be black when there was no evidence that this was called for in the specification. There were others that could not easily be undertaken in an occupied home, such as installation of fly screens and a glass door in two of the kitchens. On balance I find that practical completion had still not been achieved by the notice of termination and that the notice of termination was valid.

## LIQUIDATED DAMAGES

224 Castlemar claimed $37,714.28 as liquidated damages for 68 days.

225 Clause M8 of the ABIC SW-2 contract provides in part:

> **.1** If the works have not reached practical completion by the date for practical completion as adjusted, the architect must promptly notify the owner and contractor in writing of the owner's entitlement to liquidated damages.
>
> **.2** The owner may then, or at any time until the final certificate is issued … advise the architect … whether it intends to enforce its entitlement to liquidated damages against the contractor.
>
> **.3** The contractor is liable to pay or allow to the owner liquidated damages at the rate shown in item 18 of schedule 1.

The rate in item 18 is $4,000.00 per week.

226 Mr Rauchberger wrote to the Architect on 23 November 2006 under clause M8.1 of the contract to advise that he did wish:

> to enforce my entitlement to liquidated damages

Mr Feldman agreed that he had been informed of Mr Rauchberger's decision.

227 I find Castlemar is entitled to liquidated damages from 16 January 2007 being the day after the date for practical completion, until the contract was terminated on 5 February 2007; a total of 20 calendar days, at $571.43 per day. The Builder must allow Castlemar $11,428.60 for liquidated damages.

## NO REPUDIATION

228 Another consequence of the Respondents terminating the contract properly is that they did not repudiate it as alleged by the Builder.

## AMOUNT PAID BY THE RESPONDENTS

229 The parties stated in the Agreed Response that the Builder has been paid $1,773,149.30.

## CALCUALTION OF ENTITLEMENTS

| | To Castlemar | To Builder |
|---|---|---|
| Contract sum | | $1,804,000.00 |
| Agreed credits to Castlemar | $6,011.24 | |
| Unspent contingency | $477.76 | |
| Undisputed variations | | $27,813.04 |
| Disputed variations | | $25,703.30 |
| Completion and rectification | $9,230.80 | |
| Prime cost adjustments: | | |
| stainless steel balustrades | | $3,141.00 |
| carpet | $4,490.00 | |
| Liquidated damages | $11,428.60 | |
| Paid to Builder | $1,773,149.30 | |
| Total | $1,804,787.70 | $1,860,657.34 |
| Less due to the Owner | | $1,804,787.70 |
| Due to the Builder | | $55,869.64 |

## SECURITY BY CASH RETENTION

230 The Builder provided security deducted from payments in accordance with clause C2 of the ABIC SW-1 contract. Clause C2.2 requires the owner to "hold the cash retention ... as trustee for the contractor in a separate bank

account designated as a trust account." It is a matter of concern that Mr Rauchberger said in cross examination that no bank account has been set up and that Castlemar has not kept the retention money aside. Apart from including the retention amount in the sum claimed, the Builder has neither pleaded nor argued any matter concerning the proper handling of this money. It has not been the subject of the proceeding before me.

231 I also note that C2.2 entitles the Builder to interest on the amount retained, less bank charges. The question of interest on the cash retention is reserved.

## INTEREST AND COSTS

232 As requested by both parties, interest and costs are reserved with liberty to apply.

**SENIOR MEMBER M. LOTHIAN**