VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D394/2007

CATCHWORDS

Domestic Building, HIA Plain English Contract for Domestic New Homes, cash payments and the difficulty of proving them, variations, ss 37 and 38 of the *Domestic Building Contracts Act* 1995, design discrepancies, design errors, builder's knowledge of design errors and the unavailability of materials at the date of contract signing, time extensions, completion and "possession" of the site, time extension costs and agreed damages for delay, interest on late payment, defects, *Bellgrove v Eldridge* damages, interpretation.

APPLICANT	Sayed Rustom t/as Snab Home Improvements
RESPONDENT	Mohammed Ismail
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Hearing
DATE OF HEARING	30 June, 1-3, 7-10, 14-15, 18-22 July 2008
DATE OF ORDER	2 December 2008
CITATION	Rustom trading as Snab Home Improvements v Ismail (Domestic Building) [2008] VCAT 2419

ORDER

1 The Applicant must pay the Respondent $99,363.09.

2 The question of costs and any further interest is reserved and either party may apply to the Tribunal for them.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicant	In person
Applicant's witnesses:	The Applicant
	Mrs Rustom
	Mr Banda Rostom
	Mr Bulos Saad
	Mr Phillip Morris, expert witness
For Respondent	Mr J. Shaw of Counsel
Respondent's witnesses:	The Respondent
	Mr Po Leong
	Mr Melchiori
	Mr R Lees, expert witness

REASONS

1 Owners are entitled to the houses they contract for. The unusual aspect of this dispute is that most of the work complained of appears to have been competently built but, it is alleged, with little regard to the contract drawings.

2 The Applicant-Builder agreed to build the Respondent-Owner's house to lock-up. The site slopes substantially from high on the north side to lower in the south and south east in particular. Mr Lees, who gave expert evidence for the Owner, said he believes many of the problems have arisen out of the Builder's failure to build to the levels indicated on the contractual drawings.

3 This dispute is between the Builder and Owner alone. It appears that both parties might have reason to complain of action or inaction by the designer, Mr Po Leong. However, neither sought to have him joined as a party to the proceeding under s60 of the *Victorian Civil and Administrative Tribunal Act* 1998 ("VCAT Act") as a person "…who ought to be bound by … an order of the Tribunal in the proceeding". Mr Leong gave evidence for the Owner.

4 Mr Leong's design appears attractive and mainly competent, but his "management" of the project has added confusion rather than clarity. He said in answer to my questions of him that he did not consider it his responsibility to insist that the Builder remove and replace any element of the building work that did not comply with the contract documents. He also failed to insist that the Builder provide requests for variations in writing.

5 The Builder said he has worked with Mr Leong for 12 years and also alleged that Mr Leong is the Owner's nephew. This was not confirmed by the Owner or Mr Leong. Something which was confirmed by Mr Leong was the Builder's allegation that there was an arrangement that the Builder would pay him $10,000.00. In answer to my question, Mr Leong said "I didn't ask for a commission for this job." However there is no doubt that it was agreed to and at least part of it was paid. For a building professional administering a project to take money from a builder raises the possibility that he or she is not acting properly as the owner's agent.

6 I am unable to rely on Mr Leong's evidence. I make no finding about whether he was deliberately dishonest, but he appears unusually likely to agree with anyone who is questioning him. As a result some of the answers he gave under cross-examination and to questions I asked came as a surprise to the Owner, who then sought and was granted leave to file a further witness statement. Also, his witness statements describe him as the principal of a "firm of architects". Under cross-examination he said he is an architect then later admitted that he is not an architect, but is an architectural draftsperson.

CLAIMS

7 Both claims have evolved over time, including during the hearing. The Builder's claim is documented in the Further Amendment to the Amended Points of Claim of 22 July 2008 ("Builder's Claim") and the Further Amendment to Applicant's Particulars of Loss and Damage ("Builder's Particulars") of the same date, but they are inconsistent. The former is for $87,790.00, the latter for $157,099.76.

8 The Builder's Claim is the contract sum of $275,000.00 plus variations of $95,860.00, less payments of $300,610.00. The Builder's Particulars also include $40,950.00 for liquidated damages and $28,559.76 for interest under the contract. I treat the amount in the Builder's Particulars as the amount he is claiming.

9 I note that the Builder appeared for himself, but was legally represented until 12 June 2008. Some amendments to the Builder's pleadings and witness statements after that date may not have been in his best interests. In particular, some of the claims made give the impression that the Builder might have been making desperate efforts to match the amount of the Owner's claim, without having the benefit of the professional skill and independent advice of lawyers. An example is the Builder's claim for interest claimed by the Builder on variations, which is discussed below in detail.

10 The Owner's counter-claim takes into account the sum of $9,130.00 that would otherwise have been payable to the Builder if the work were completed properly and on time, and is primarily for rectification and liquidated damages. The last Respondent's Particulars of Loss and Damage filed on 22 July 2008 gave a total claim of $177,328.00.

TERMS OF THE CONTRACT

11 The standard-form contract is the HIA Plain English Contract for Domestic New Homes ("Contract"). It is signed by both parties and dated 18 October 2005 on page 5. On the page headed "Particulars of Contract", the remaining contract documents are described as:

> The specifications include 4 pages that were supplied by Structural Systems Pty Ltd. There are 4 sheets of Plans and they were prepared and supplied by Princeton Design Group Pty Ltd. There are 4 sheets in the Engineer's Design and [they were] prepared by Structural Systems Pty Ltd Consulting Engineers for the Owner.

12 I have not been provided with four pages of specifications, certainly not supplied by Structural Systems Pty Ltd ("the Engineers"). The document treated as the specification by both parties is a three page quotation by the Builder, signed by both parties, the second page of which is described as the specifications.

13 Princeton Design Group Pty Ltd is Mr Leong's firm and I note that eventually the parties worked from twelve pages of design drawings. The

Contract does not identify the four pages and the Builder's evidence was that he was given sheets A.001, A.003, A.004, A.005 and three sheets of engineering drawings to quote from. There are no drawings signed by the parties to identify them as contract drawings.

14 The Builder said he was not given A.002, the plan with measurements and other details on it, at the time he quoted and was therefore unaware that the north-south wall between bedroom 4 and the study and retreat was brick veneer rather than plaster. The width of that wall on A.001, the site plan, was consistent with a plaster stud wall, although it is not marked as such on the drawing.

15 In his witness statement of 10 June 2008 Mr Leong said he gave the Builder drawing A.002, but he provided no contemporary evidence of this, such as a letter or transmission document, and the four design drawings are not identified in the Contract.

16 I accept the Builder's evidence that Mr Leong told him A.002 was not finished and concerned only the interior, and that he did not receive a copy before the contract was signed.

17 The parties agree that the contract was to the end of lock up for $275,000.00, which, according to Mr Shaw of Counsel for the Owner, was adjusted immediately to $281,700 by virtue of two variations, being $2,500.00 for site preparation and $4,200.00 for a variation to windows to provide ComfortPlus glass. These appear in hand-writing on page 12 of the contract.

18 On a number of occasions in his witness statement the Builder remarked that the Owner did not take steps under the contract to insist that the works be built in accordance with the design and on time. He asked similar questions of the Owner during cross examination. As I said during the hearing, although the Owner had a right to insist on timely compliant work, he did not owe the Builder a duty to do so. The Owner's inaction, if there was inaction on the part of the Owner, does not excuse the Builder from failing to comply with the contract.

Mr Leong's role

19 The contract is not one which provides a role for an administering architect, but the parties agree Mr Po Leong was the agent of the Owner for certain purposes. The Owner says that his role was also to "monitor progress of the works", whereas the Builder says he was a project manager.

AMOUNT PAID UNDER THE CONTRACT

20 The Builder's evidence is that he was paid $300,610.00 as listed on exhibit SR15 to his main witness statement. The Owner's evidence is that he paid $304,010.00. The difference of $3,400.00 is the total of an alleged payment of $3,000.00 on 3 March 2006 and an alleged payment of $400.00 on 26 May 2006.

21 The Owner's records of payment are not very good. Because some very large payments were made in cash and not all payments were receipted, he does not have a complete record of payments made. He kept a running document which included amounts alleged to have been paid to the Builder, but not all were signed by the Builder. Two amounts were not signed for on 3 March 2006 - they were $1,500.00 for clearing trees and $3,000.00 for clearing the block. The alleged $400.00 payment on 26 May 2006 was also not signed for.

22 The parties agree that the $1,500.00 payment of either 2 or 3 March 2006 was made, and this sum is part of the Builder's total of $300,610.00. I prefer the Builder's evidence to the Owner's regarding payments and find the total amount paid to the Builder by or on behalf of the Owner was $300,610.00.

VARIATIONS

23 Mr Shaw said during the opening, that although variations have been undertaken in breach of ss37 and 38 of the *Domestic Building Contracts Act* 1995 ("DBC Act") and of the provisions in the contract that govern variations, the Owner has withdrawn his claim for reimbursement for variations for which payment has been made. The variations in question are numbers 1, 2, 3, 4, 5 and 6 in the Builder's Points of Claim (as listed below) and because the Owner had already paid for these variations, he has based his abandonment on the reasons in *Lloyd L Watkins Pty Ltd v Vondrasek* [2006] VCAT 2479 [at 124].

24 The Owner nevertheless does not admit the Builder was ever entitled to these variations and specifically denies that the Builder is entitled to time extensions and time extension costs.

25 I note that the amounts claimed in the Builder's Claim of 22 July 2008 and the Particulars of 27 June 2008 differ markedly. I have treated the last document - the Builder's Claim of 22 July 2008 as stating the Builder's true claim regarding variations.

26 Clause 23 of the Contract governs variations requested by the Owner or Builder. It states in part:

> 23.0 Either the Owner or the Builder may ask for the Building Works to be varied. The request must be in writing, must be signed and must set out the reason for and details of the variations sought.
>
> 23.1 If the Owner requests the variation and the Builder reasonably believes the variation will not require a variation to any permit and will not cause any delay and will not add more than 2% to the Contract Price the Builder may carry out the variation.
>
> 23.2 If the Builder requests the variation, the notice given by the Builder must state the following further particulars:
>
> - what effect the variation will have on the Building Works;

- if the variation will result in any delays, the Builder's estimate of such delays; and
- the cost of the variation and the effect it will have on the amount payable by the Owner under this Contract.

…

23.4 Subject to Sub-Clause 23.1 the Builder must not give effect to any variation unless the Owner gives the Builder a signed consent to or request for the variation attached to a copy of the notice referred to in Clauses 23.2 or 23.3

27 The DBC Act is to similar effect and includes provisions regarding variations that have been undertaken, or are alleged to have been undertaken, in breach of the obligations to ensure they are in writing. Section 37(3) governs variations sought by a builder and provides:

> (3) A builder is not entitled to recover any money in respect of a variation unless—
>
> (a) the builder—
>
> (i) has complied with this section; and
>
> (ii) can establish that the variation is made necessary by circumstances that could not have been reasonably foreseen by the builder at the time the contract was entered into; or
>
> (b) the Tribunal is satisfied—
>
> (i) that there are exceptional circumstances or that the builder would suffer a significant or exceptional hardship by the operation of paragraph (a); and
>
> (ii) that it would not be unfair to the building owner for the builder to recover the money.

28 Clause 38(6) is to similar effect for variations sought by the Owner except that there is no equivalent to 37(3)(a)(ii). In both sections where the builder is entitled to be paid for the variation:

> the builder is entitled to recover the cost of carrying out the variation plus a reasonable profit.

29 The problem for any builder who undertakes changed or additional work without a signed variation in accordance with the contract and the DBC Act, is the risk of not being paid for it. The provisions have been included in the DBC Act for good reason - as time goes by the memories of parties to a building contract diverge about what was agreed. It is therefore by no means automatic that a builder will be paid for any variation that has not been reduced to writing.

30 Clause 37(3)(b) and its equivalent in clause 38 make two requirements. The first is that there be exceptional circumstances or that the builder would suffer significant or exceptional hardship. The second, which is in addition

to the first, is that allowing the builder to recover money for the variation would not be unfair to the owner.

31 The Builder referred me to the decision of Senior Member Young in *Pratley v Racine* [2007] VCAT 159. Senior Member Young considered the expression "significant hardship" and concluded in 2004, for the particular case he was hearing, that any amount greater than $200.00 would be "of consequence" and therefore significant. However, when considering whether a potential hardship to the Builder is "significant or exceptional" it is hard to imagine that a single loss of $201.00 could be regarded as "exceptional". I am, however, guided by his view of the meaning of "not unfair to the building owner". In *Pratley* the owners admitted discussions with the builder about some variations. Senior Member Young decided that where the builder discussed the need for a variation with the owners and gave an estimate of costs, it was fair the owners pay that cost.

32 The Builder agreed under cross-examination that he knew how to claim money for variations and did not comply with the relevant requirements and that he made no attempt to comply with sections 37 or 38 of the DBC Act. He did not say why he failed to comply.

New claim for 20% builder's margin

33 The Owner has accepted and paid for a number of variations, some of which do not say whether the builder's margin is or is not part of the variation sum. At paragraph 7 of the Builder's Claim he claimed, for the first time, an additional 20% as the margin to which he is entitled for all variations except No 4. The first time this margin was claimed was in the Amended Applicant's Particulars of Loss and Damage filed 27 June 2008, on the last business day before the hearing commenced. The claim included interest on amounts alleged to be outstanding, some of which were purely the claim for the 20% margin. The Owner says that at least some of the variations discussed below have already had the 20% added, so to allow it again would be "double dipping". The Builder has not proven entitlement to the 20% margin for any variation with the exception of variations where it was part of the original claim.

34 While a late claim is not necessarily an invalid claim, lateness can add support to the view that the claim is not genuine. The lack of a written variation that shows the Owner the whole cost of the variation means that to find the Builder is entitled to a further 20% would be unfair to the Owner. In this proceeding where the margin is not mentioned, I find it is fair to treat the Builder's lump sum claims for variations as including everything to which the Builder is entitled.

No 1. (first) Site Clearance $2,500.00 plus 20% - $3,000.00

35 This variation was added to the Builder's Claim for the first time on 15 July 2008. He confirmed that it is the same item as appears in hand-writing on page 12 of the Contract. The sum in the contract is $2,500.00 and stated

that payment was due with the deposit. The parties agree that this sum was paid with the deposit. The deposit is shown in Schedule 3 of the Contract as $13,750.00 and the parties agree that $16,250.00 was paid.

36 I find that $2,500.00 was the total amount the parties agreed the Owner would pay the Builder for this item. The allowance to the Builder is $2,500.00 for this item, either as an adjustment to the contract price at the time of signing (as the Owner asserts) or as a variation.

No 1. (second) Remove rock $4,480.00 plus 20% - $5,376.00

37 According to the Builder, the soil classification for this site was "P", which he assumed meant that there was fill on it. While excavating the foundations he discovered rock and claimed a variation.

38 Despite the claim in the Amended Points of Claim for $4,480.00, the Builder has said in his witness statement that he agreed with Mr Leong that the sum for this item was negotiated at $3,000.00. Mr Leong also agrees that he and the Builder agreed on $3,000.00. This agreement is supported by Owner's Tribunal Book document 24 which is the Builder's invoice to the Owner of 4 February 2006, changed by the Builder's hand from $4,480.00 to $3,000.00. I find the ordinary meaning of this invoice is that the whole sum the parties agreed for this item was $3,000.00.

39 The allowance to the Builder is $3,000.00 for this item.

No 2. Remove trees $1,500.00 plus 20% - $1,800.00

40 During the hearing I visited the site with both parties twice. At the first site visit a pile of logs and a couple of entire fallen trees were pointed out. The work for this variation may or may not have been done, but was not the subject of a claim by the Owner. The parties agree that the Owner has paid the Builder $1,500.00 for this item and the Owner withdrew his claim to be repaid.

41 The allowance to the Builder is $1,500.00 for this item.

No 3. Windows $4,200.00 plus 20% - $5,040.00

42 This change was made at the request of the Owner when the contract was signed, and like the first variation 1, appears on page 12 of the Contract. It was invoiced on 8 May 2006 which is included in the Owner's Tribunal Book document 25. The Owner characterises it as part of the contract sum and I accept his evidence that $4,200.00 has been paid to the Builder for this item. For the reasons given at paragraphs 33 and 34 above, the 20% margin is not allowed.

43 The allowance to the Builder is $4,200.00 for this item either as an adjustment to the contract price (as the Owner asserts) or as a variation.

No 4 Retaining wall $8,160.00

44 The Owner does not dispute this amount for the retaining wall and points out that the invoice includes the cost of the bricks used for the retaining wall and expressly includes the 20% margin. The Builder is entitled to $8,160.00 for this item.

No 5 Plumbing $1,500 plus 20% - $1,800

45 This is a variation paid by the Owner. For the reasons given above, the 20% margin is not allowed. The allowance to the Builder is $1,500.00.

No 6. Concrete slab and backfill $15,000 plus 20% - $18,000.00

46 This is a variation paid by the Owner and at the site inspection I was shown extensive areas under the south-west end of the house which have been concreted and are now used for storage. The Owner does not dispute the amount of the variation but says that it includes the 20% margin (although not specifically mentioned).

47 For the reasons given above, the additional 20% margin is not allowed. The allowance to the Builder is $15,000.00.

Variations relating to the garage stairs:

48 There are two claimed variations concerning a discrepancy between the design and engineering drawings regarding the composition of these stairs – variations 7 and 11. Section E-E on drawing A.004 shows these stairs as timber, but also refers the Builder to the engineering drawings. Section E on Engineering drawing 02A shows the whole of the three steps within the garage as concrete.

49 I accept the Builder's evidence that he asked Mr Leong what to do and that Mr Leong told him to follow the engineering design. I also accept the Builder's evidence that it costs more to build these concrete stairs than the wooden stairs designed by Mr Leong. I further accept his evidence that Mr Leong told him to go ahead with the structural steel and "not to charge too much".

50 I note that the Builder has not given evidence that he priced wooden stairs rather than concrete in his quotation. I also note that the concrete stairs are considerably more extensive than they should have been, as there are nine risers within the garage rather than three as shown on the Engineering drawing.

<u>No 7 Steel columns and beams under garage stairs $1,500.00 plus 20% - $1,800.00</u>

51 The Builder sought payment of $1,500.00 plus 20% margin on 12 February 2007 and it has not been paid by the Owner. This is the same invoice as for variation claim numbers 8 and 9. I find $1,800.00 for this item is "not too much" and that the Builder reasonably relied on Mr Leong's instructions to

go ahead. I also note that in his witness statement of 29 May 2008 that he "advised the [Owner] that he accept the Variation."

52 I allow the Builder $1,800.00 for this variation.

11. Concrete to garage stairs $2,520.00 plus 20% - $3,024.00

53 This alleged variation was first claimed on 17 July 2008. I am not satisfied that the Builder is entitled to any amount for this item. The concrete steps are shown on at least one contract document – the engineering drawing – and the steps are erroneously more extensive than they should have been. I make no allowance.

No 8. Front entrance stair extension $5,000 plus 20% - $6,000.00

54 The Builder first invoiced for this alleged variation on 27 February 2007 and claimed $5,000.00 plus 20%.

55 The stairs as built are not as they were originally designed. The first difference is that the design called for formed concrete stairs with posts and rails as balustrades, open beneath, but they were built with brick sides and concrete treads.

56 The second difference is the design showed three flights. Starting from the ground there was to be a flight of 11 risers to the west terminating in a landing. A person climbing the stairs would then turn left (south) and climb another four risers to a landing, then turn right 180 degrees (north) and climb a further four risers to the porch, a total of 19 risers. The stairs as built are a single long flight from the ground to the porch, ascending to the west. There is a total of 20 risers.

57 The third difference is that although drawing A.001 - the site plan - showed stairs with a fanned bottom end, drawings A.002 and Engineering Drawing 01B call for stairs that do not splay out at the bottom. When I asked the Builder if he drew the discrepancy to Mr Leong's attention he said he did not as it was "his [Mr Leong's] problem". This is most emphatically not the case under the Contract.

58 Clause 16.1 of the Contract requires:

> If the Builder finds any deficiency in the Plans or any conflict between the Plans and Specifications, the Builder must promptly notify the Owner in writing. The Owner must then advise the Builder in writing how to resolve the problem or which document to follow. If the Owner does not do so within 7 days, the Builder may decide what to do, and must notify the owner in writing within 7 Days of the decision or the document that will be followed.

59 The parties agree that Mr Leong gave the Builder document SR11, which is an undated plan of the new design for single flight, fanned stairs and as discussed under the Owner's claim for defective front stairs (see heading "No 19 Front Steps" below) the design appears to have been defective and was significantly shorter than the original design. The plan shows 18 risers.

60 The parties also agree that Mr Leong made a mistake about whether the stairs should be straight or fanned, although the stairs are fanned on drawing A.001 and I have found the architectural drawing on which they are not fanned, A.002, was not in the Builder's possession until after the contract was signed.

61 The Builder insisted that he was unwilling to complete the change unless he was paid $5,000.00, whereas both the Owner and Mr Leong said the Builder agreed to make the change if Mr Leong - not the Owner - paid $1,500.00. Apparently Mr Leong agreed to pay this amount to the Builder because the Owner always wanted the fanned stairs and Mr Leong admitted he made a mistake in the drawings.

62 In his witness statement signed 15 June 2008, on page 11 in the first paragraph the Builder said:

> In or about November 2006 [Mr Leong] presented me with a drawing of the new front stairs on site. [refers to SR-11] I constructed the stairs in accordance with the drawing. However the finished stairs on the ground were completely different to that on the plan. On the ground the last fanned rise finished at 2100mm wide as showed on the drawing but at a 900mm rise. … I called [Mr Leong] to come with [the Owner] to see the problem. … [Mr Leong] couldn't tell what went wrong even checking over my work. I told them that I would not continue with the stairs because it would cost me money. I told them that to fix the problem the whole brickwork needed demolishing and to start again. I told them that if I was to continue the stairs it would cost them $5,000.00 … They refused. [The Owner] said that he was not willing to pay any more money. [Mr Leong] turned towards me and said that he would pay $1,500.00. I then refused. After both left and an hour later [Mr Leong] called me and tried to negotiate. I refused to construct the stairs**.** [Mr Leong] then agreed to pay the $5,000.00 so then I continued with the stairs as agreed. (Emphasis added)

Change of flights

63 The Builder said in his witness statement of 15 June 2008 that he suggested the change from three flights to a single long flight. The parties agree that the Owner sought to have the stair sides built of brick and that he provided the bricks and brick-laying. There does not appear to be an issue about this.

64 I accept the uncontradicted evidence of the Builder that he built in accordance with document SR11, the changed design provided by Mr Leong, and that the design proved to be defective, as discussed further below under "No. 19 Front steps". In answer to my question, Mr Lees, expert for the Owner, said the cost to build the stairs in one flight rather than three would be similar. I also accept the evidence of the Builder that he had already placed the footings for three flights. The stairs as built are significantly longer than designed but only two risers more than the design at SR11 and one riser more than the original design.

65 I make no allowance for the change, despite the defective design, as the last riser was still too high by the time the Builder left the site.

Straight stairs to fanned

66 On balance I find the agreement between the parties regarding the fanned stairs was that the Builder would receive nothing from the Owner. I note that both the Builder and Mr Leong agree that Mr Leong at least offered to pay $1,500.00. Mr Leong is not a party to this proceeding and I make no further comment about whether he is now obliged to pay the Builder this or any other amount.

No 9. Additional bricks $46,000.00 plus 20% - $55,200.00

67 The first time the Builder claimed these extra bricks was in an invoice dated 12 February 2007 and the claim is for $46,000.00 for 23,000 bricks, plus 20% margin; a total of $55,200.00. The Builder agreed under cross-examination that the invoice gave no indication of what the bricks were for and that by that date work had either finished or was almost finished.

68 The Builder claims that there were discrepancies in levels between the design drawings and the conditions on site, and that drawing A.002 required "double brick walls" and a brick veneer wall between bedroom 4 and the study that he was unaware of until after the contract was signed.

69 As I found in my discussion of the contract, the Builder did not have drawing A.002 before the contract was signed. However, the only walls that are double brick are between the living room and bedroom 5 (which from its width on drawing A.001 would indicate at least a brick veneer wall) and the walls to the south of the garage and painting room. The width of the wall between bedroom 4 and the retreat and study on A.001 would have been unlikely to alert the Builder to the possibility that it might be a brick wall. It is shown at the same thickness as a single stud wall. I reject the Builder's evidence that this wall could have required six to seven thousand bricks and accept the evidence of Mr Morris, the Builder's expert witness, under cross examination that it required approximately 2,900 bricks.

70 I gave the Builder the opportunity to mark up a copy of the Plan of Survey (Respondent's Tribunal Book document 5) to show discrepancies in levels, but he did not do so. In answer to my question, the Builder said he "got the impression" that the site was out of level, but did not know for sure until the end of the job. Later under cross-examination he said that he checked with a theodolite, but his evidence on this point was unconvincing. In answer to Mr Shaw's question about whether it would have been wise to check the levels with a land surveyor, the Builder said:

> When I claimed the extra bricks it was their job to check with the surveyor, not mine.

71 At another point in cross-examination he said that he had inspected the site before he signed the contract and he did not take any measurements "because it's the land surveyor's problem" but that he knew what the levels were by 14 December 2005, before work commenced, other than site clearing and preparation.

72 I note that when the Builder was given possession of the site it was a natural bush block with possibly some old fill on it and the Builder admitted in answer to my question that he has undertaken at least some site cutting to prepare the block for building.

73 I accept the evidence of Mr Lees that it was the Builder's obligation to ensure that the as-built levels would be correct and that any discrepancy with levels should have become apparent at the set-out stage, before any construction commenced. Had the Builder sought a variation due to the alleged level errors on the drawings, it could have been checked then and any necessary adjustment made to the contract price. As mentioned above, seeking the variation after there is any chance of checking the accuracy of the Builder's statement has two effects. It makes the Builder's statement about this item less convincing, and it is a factor in making such a variation "unfair to the building owner" under sections 37(3)(b)(ii) and 38(6)(b)(ii) of the DBC Act.

74 I accept the evidence of Mr Lees that the only area of the site significantly different from the levels shown on the contract drawing was section EE on drawing A.004. However, for the reasons discussed below, I do not find that the Builder bought more bricks than he should have had to buy in accordance with the contract documents he had when the contract was signed.

75 The Builder said he calculated that he would need 55,000 bricks - 50,000 with a ten percent allowance for wastage - but used approximately 73,450. Mr Lees said that the dwarf walls beneath the floor were apparent on the drawings the Builder quoted on. Mr Lees estimated the job would require between 88,000 and 90,000 bricks. The Builder's own expert witness, Mr Phillip Morris, estimated during cross examination that based on drawings A.001, A.003, A.004 and the engineering drawings the number of bricks required for the house as designed was between 75,000 and 85,000. This is substantially more than actually used. I accept the evidence of Mr Lees that the Builder's change to the roof line (discussed below at "No 15 Roof profile") saved significant numbers of bricks.

76 Leaving aside the lack of notice to the Owner when the Builder says he became aware that he would need more bricks, I find the Builder has not provided more bricks than he should have, even quoting in the absence of drawing A.002. I also note that additional bricks for variation 4 could not be claimed under this variation, as they were already allowed for. There is no allowance for this item.

No 10. Eave Linings $28,511.65 plus 20% - $34,213.98

77 On day ten of the hearing on 15 July 2008, for the first time the Builder made a claim for an alleged variation regarding the eaves. The claim was that the specifications allowed eaves of 450mm, but that some of the eaves had been built in accordance with the contract drawings to a greater width. The claim appeared to have arisen out of a misunderstanding of the Contract, and particularly clause 16.1 which deals with inconsistency in documents. The amount claimed also seems very high as it is the cost not of the whole of the eaves, but only of the additional size of the eaves. It represents over 12% of the original contract sum.

78 On 17 July 2008 the Builder filed and served his witness statement in support, which would have required Mr Leong to be recalled in order to give evidence in reply. Mr Shaw said that if the Builder went ahead with this claim his client would be claiming indemnity costs and after a short break to enable the Builder to talk to his family, he withdrew the claim.

79 In his final submissions, at page 6 the Builder said in part:

> Extra eaves authorised by Mr Leong. … The new set of plans showed eave measurements varying from 700mm, 800mm and 1500mm. It was authorised by Mr Leong to follow the new eave measurement. An amount of $28,511.65 was claimed in my further amendment to amended point of claim dated 15 July 2008, item 10. This claim was refused. The builder was unfairly left to endure his loss and damages.

80 In response to this the following exchange took place:

> SENIOR MEMBER: Now, I might say, Mr Rustom, you were given the opportunity to pursue that claim if you wanted to and you withdrew that claim. So you need to make up your mind about whether you withdrew that claim or not.
>
> MR RUSTOM: (Through interpreter) No, I'm not interested. I wasn't interested.
>
> SENIOR MEMBER: Speak up, Ms Translator.
>
> INTERPRETER: Sorry, he says, "No, I didn't want to go through it."
>
> SENIOR MEMBER: You didn't want to go through with it, so is it right to say that you withdrew the claim? Can you interpret that please?
>
> MR RUSTOM: (Through interpreter) Yes, because I don't want it to get longer than it has already.

I rule that the claim for this alleged variation is withdrawn.

No 11. Concrete to garage stairs

81 See above variation 7.

No 12. Window 35 $3,500.00 plus 20% - $4,200.00

82 More is said later about window 35, which the Owner has claimed as a defect. This alleged variation was also first claimed on day 10 of the hearing on 15 July 2008 in circumstances where the window had been the subject of witness statements and cross examination of the Builder, and no claim had been made for it. The Builder's claim is that the space into which window 35 was to be placed has not been properly designed and the window was too high. It is true that there is a design defect, but less clear whether the window as originally designed would have fitted into the space if built to the defective design.

83 The Builder's claim for the variation is that he bought and paid $3,500.00 for the original window, had no use for it and threw it away. His claim is for the purchase price plus 20%.

84 The Builder provided a recent quotation to show the price, but neither an invoice nor a receipt to show that he had been charged for it or paid for it. The suggestion that he would throw away a perfectly good window valued at $3,500.00 was impossible to believe and is also inconsistent with the installation of four windows (as he did) rather than a single four-paned window as designed. I do not accept the Builder's evidence regarding this variation and I make no allowance for it.

Variations allowed:

No 1 (first) site clearance	$2,500.00
No 1 (second) rock removal	$3,000.00
No 2 remove trees	$1,500.00
No 3 windows	$4,200.00
No 4 retaining wall	$8,160.00
No 5 plumbing	$1,800.00
No 6 concrete slab	$15,000.00
No 7 steel columns	$1,800.00
Total allowed to the Builder for variations	$37,960.00

Interest claimed by the Builder on variations

85 The Builder's claim for interest on variations is discussed below under "Builder's other claims for interest."

TIME

86 The contract allowed the Builder 210 days to complete the work, subject to time extensions. Clause 34 of the Contract deals with the Builder's entitlement to extensions of time. It provides in part:

34.0 The … Building Period is extended if the carrying out of the Building Works is delayed due to:

- a variation or a request for a variation by the owner in accordance with Clauses 16, 21, 23 and 24;

…

- anything done or not done by the Owner or by an agent, contractor or employee of the Owner;
- any other cause that is beyond the Builder's direct control.

34.1 The Builder is to give the Owner a written notice informing the Owner of the extension of time. The written notice must state that [sic] cause and the extent of the delay.

87 The importance of complying with such a clause cannot be over-emphasised. The person assessing the claim at first instance or later in a tribunal or court needs to know why the delay is claimed and the period for which it is claimed. Dates are important because if there are two or more concurrent delays, the time allowed is the days actually delayed; they are not cumulative. For example, if a builder were to be delayed on the first of April because of rain and on the same day because the owner has not made a decision about say, a prime cost item, the first of April counts as one day, not two.

88 Under cross-examination the Builder agreed that he knows what to do to claim an extension of time. He agreed under cross-examination that he made only two claims for time extensions - on 24 June 2006 and 21 September 2006.The first was for 28 days, the second for three weeks. According to the Owner, neither of these claims were made in accordance with the provisions of the contract, and I accept what the Owner says about them. They are both in writing, but they do not state the cause of the delay except in the most general terms - the first mentions "extra work", the second "variations". Neither provides enough information to show whether it was for a cause that would entitle the Builder to a time extension.

89 During cross-examination Mr Shaw asked:

> But you are not actually saying, "I was delayed for 28 days." That is just how many days you want, isn't it?

To which the Builder replied "Correct".

90 Nevertheless, the Owner allowed the Builder the first claim while the work was underway and has not since denied the Builder's entitlement to the time allowed.

91 In his final submissions the Builder said at paragraph 4:

> The contract allowed for 210 days completion building period. I started site clearance work in December 5, 2005. The expected date of completion building period was July 3, 2006. The completion

> building period ended on January 10, 2007. The completion building period was late by 191 days or 27.3 weeks.

92 I note that the completion date of July 3 2006 assumes that the commencement date was 5 December 2005, and includes an allowance of the 28 days that the Owner made at the Builder's request. I also note that the Builder appears to have the mistaken belief that he is entitled to payment for this period. More is said about this below under the heading "Builder's claim for delay damages".

Owner's claim for Agreed Damages

93 Clause 40.0 of the Contract provides in part:

> If the Building Works have not reached Completion by the end of the Building Period the Owner is entitled to agreed damages in the sum set out in item 9 of Schedule 1 for each week after the end of the Building Period to and including the earlier of:
>
> …
>
> - the date the Owner take Possession of the Land or any part of the Land.

The amount in item 9 of Schedule 1 is $500.00 per week.

94 The Owner has claimed 33 weeks agreed damages, to the date when the Builder was no longer present on site at all. I do not regard this as a reasonable interpretation of the expression "Possession" which is defined in clause 1 of the Contract as:

> "Possession" includes occupancy, use or control. [Emphasis added]

95 The Contract is not entirely suitable for this project because the standard form assumes a builder will have complete control of the site and the works will be built to "Completion", when an owner can move in and live in the house. Nevertheless, the Builder was obliged to finish by a certain date and did not. For example, roof plumbing was part of the Builder's work, but the compliance certificate issued by the plumber stated that the date of completion of plumbing work was not until 14 February 2007. The Builder agreed under cross-examination that the last work undertaken on site by him or his employees was in late February 2007.

96 On the other hand, the Owner admitted under cross examination that he was undertaking work inside the house from September 2006. In the circumstances the Builder's view of delay is accepted.

97 The Builder's brother, Mr Banda Rostom, said at paragraph 14 of his witness statement that the Owner shifted in his belongings and was living in the house in or about October 2006, but under cross-examination he agreed that the Owner had not brought in furniture then. When I gave him the opportunity to say what "stuff" had been brought in then, he was unable to recall. I do not accept Mr Banda Rostom's witness statement on this point.

98 The Builder must allow the Owner Agreed Damages for 27.3 weeks at $500.00 per week, being $13,650.00.

Builder's claim for delay damages

99 The Builder's particulars of 27 June 2008 included, for the first time a claim for delays totalling 28.6 weeks. On the first page of the Builder's Particulars he claims $40,950.00 being 27.3 weeks at $1,500.00 per week as allowed by the building contract. A builder who obtains a time extension does not automatically get time extension costs. Standard-form building contracts often allow the builder extra time if the delay is due to something the builder could not control and time plus money if the delay is caused by something the owner could control. Clause 34(3) governs the delays that entitle builders to money in the HIA contract:

> 34.3 If there is an extension of time due to anything done or not done by the Owner or by an agent … of the Owner, the Builder is, in addition to any other rights or remedies, entitled to delay damages worked out by reference to the period of time that the Building Period is extended and the …amount set out in Item 12 of Schedule 1.

100 In order for the Builder to claim delay damages, he must first have given the Owner a written notice under clause 34.1, claiming a time extension. As mentioned above, the Builder made only two claims for time extensions and did not give a specific reason for either. It is therefore impossible to tell whether they were for a reason that would entitle the Builder to time extension costs. Mr Shaw said the time allowance granted by the Owner is without any admission that the Builder is entitled to time extension costs.

101 The second step for a builder seeking delay costs is to prove that the delay for which a time extension was obtained was caused by something done or not done by the owner or the owner's agent.

102 No attempt has been made to prove any of these alleged delays and they have not been taken into account. They are not supported by any document between the parties.

103 The Builder is not entitled to any amount for delay costs.

Builder's claim for interest on delay damages

104 The particulars of 27 June 2008 also claimed interest on these previously unclaimed amounts, from the dates that they are alleged to have arisen, to 30 June 2008. No delay damages are allowed so there is no entitlement to interest.

BUILDER'S OTHER CLAIMS FOR INTEREST

105 The Builder has also claimed interest on allegedly late payment of the progress and final payments, and on alleged late payments of variations.

Entitlement to interest

106 Clause 31 of the Contract states:

> If the Owner does not pay the amount of a Progress Payment, or the Final Payment, within 7 days after it becomes due, the Builder is entitled to interest on the unpaid amount, at the rate set out in item 8 of Schedule 1, from the date the payment becomes due until the date the payment is made.

107 Clause 30.0 states in part:

> The Owner must pay the amount of a Progress Payment set out in Schedule 3 within the number of days set out in Item 7 of Schedule 1 after both:
>
> - the stage has been completed; and
> - the Owner has received a written claim for the Progress Payment. [Emphasis added]

Clause 36, which governs the final claim also requires a claim in writing. The amount in item 8 of schedule 1 is 15% per annum and the time for payment in item 7 of schedule 1 is 7 days.

Alleged late progress and final payments

108 According to the Builder's Summary of Payments, which is exhibit SR15 to the Builder's witness statement of 15 June 2008, the Builder invoiced the Owner eight times - only six of these were tendered by the parties. The payment dates are from SR15 and were not the subject of cross-examination, so I accept them as accurate. As there is no evidence to the contrary, I also accept that the stages claimed for were completed by the date the relevant invoice was issued, with the exception of the final or completion stages. The Owner did say in his statement of 10 June 2008 that he paid "as and when requested by the Applicant." I have found that some of the payments below were late, but also that many substantial payments were on time.

109 The invoices are as follows:

OTB# *	Date of invoice	Invoice number and item	Amount	Date paid
-	11/11/05	03 - deposit and clear site	$16,250	11/11/05
-	30/1/06	08 - base stage	$82,500	6/2/06 - $60,000 3/3/06 $22,500
24	4/2/06	09 - variation 1 (second time mentioned)	$3,000	3/3/06

-	-	Removal of existing trees	$1,500	2/3/06
25	8/5/06	17 - frame stage and variations 3, 4 and 5	$96,360	12/5/06 - $30,000 4/7/06 - $58,860 21/7/06 - $7,500
26	23/6/06	20 - variation 6	$15,000	21/7/06
28	21/8/06	07 - lock-up stage	$77,000	29/8/06 - $50,000 26/9/06 - $27,000
32	12/2/07	14 - variations 7, 8 and 9	$63,000	Not paid
33	15/2/07	15 - completion or finish	$10,000^	Not paid

* Owner's Tribunal Book page number.

^ Builder's document SR15 shows "completion stage" as invoiced for $19,250, of which $9,000.00 is alleged to have been paid in cash on 13 November and 23 December 2006 and $250.00 discounted. This is not reflected by the invoice, which is for $10,000.00.

110 For the purpose of determining interest, I have assumed the Owner received progress claims on the second business day after their date. Invoice 07 included an amount for interest but it was not clear how that amount was calculated. I rely on s53(1) which empowers the Tribunal to "make any orders it considers fair to resolve a domestic building dispute" and substitute my own calculations for interest accrued under the contract.

111 I calculate the interest as follows:

Invoice	**Amount outstanding**	**Days late**	**Interest**
8	$22,500.00	25	$257.55
17	$58,860.00	51	$1,237.03
	$7,500.00	72	$222.53
7	$27,000.00	38	$422.80
			$2,139.91

112 The Owner must allow the Builder $2,139.91 for interest under the contract for late payment.

Alleged late payment of variations

113 In accordance with clause 24 of the Contract:

> If the variation increases the amount to be paid by the Owner… [it] is added to the next Progress Payment after the work is done.

In consequence, I have allowed interest on variations included in progress claims. No interest accrued on variations billed before the next progress claim, because each was paid before the due date for the next progress payment.

ALLEGED DEFECTS

114 The Owner complains of a number of alleged defects, some of which, he alleges, call for demolition of part of the works. In accordance with the decision of the High Court in *Bellgrove v Eldridge* (1954) 90 CLR 613, this is the proper measure where such demolition and rebuilding is both necessary and reasonable. In illustration of what is reasonable, Dixon CJ and Webb and Taylor JJ said:

> No one would doubt that where pursuant to a building contract calling for the erection of a house with cement rendered external walls of second-hand bricks, the builder has constructed the walls of new bricks of first quality the owner would not be entitled to the cost of demolishing the walls and re-erecting them in second-hand bricks. In such circumstances the work of demolition and re-erection would be quite unreasonable … We … think that the building owner's right to undertake remedial works at the expense of a builder is not subject to any limit other than is to be found in the expressions 'necessary' and 'reasonable' … Many examples may, of course, be given of remedial work, which though necessary to produce conformity would not constitute a reasonable method of dealing with the situation and in such cases the true measure of the building owner's loss will be the diminution in value, if any, produced by the departure from the plans and specifications or by the defective workmanship or materials (618–619).

115 There is no evidence before me as to diminution of value, and Mr Shaw has urged me to make my own assessment of the amount of compensation to which the Respondent should be entitled for elements of the building which do not accord with the design. A similar problem confronted the trial judge in an English case about a swimming pool, which was not as deep as was contracted for. He found it was not reasonable to demolish and rebuild the pool and allowed £2,500.00 for loss of amenity. The appeal to the House of Lords is *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344. In his judgment Lord Bridge of Harwich said:

> The circumstances giving rise to the present appeal exemplify a situation which one might suppose to be of not infrequent occurrence. A landowner contracts for building works to be executed on his land. When the work is complete it serves the practical purpose for which it was required perfectly satisfactorily. But in some minor respect the finished work falls short of the contract specification. The difference in commercial value between the work as built and the work as specified is nil. But the owner can honestly say: 'This work does not

> please me as well as would that for which I expressly stipulated. It does not satisfy my personal preference. In terms of amenity, convenience or aesthetic satisfaction I have lost something.' Nevertheless the contractual defect could only be remedied by demolishing the work and starting again from scratch. The cost of doing this would be so great in proportion to any benefit it would confer on the owner that no reasonable owner would think of incurring it. What is the measure of the loss which the owner has sustained in these circumstances? If there is no clear English authority which answers this question, I suspect this may be because parties to this kind of dispute normally have the good sense to settle rather than to litigate (353).

116 I accept the invitation of Mr Shaw to set figures which appear to me to be fair and reasonable to compensate the Owner for items where the reasonable outcome is to leave non-compliant elements of the building in place.

117 In considering which elements should be valued on a *Bellgrove* basis and which on a pull down and reinstate basis, I also consider whether it is likely that the Owner will do the work. In this dispute I have more concrete evidence of what the Owner is likely to do than in some, because he has already done it. Because the Builder's task ended at lock-up, the Owner has been in a position to decide if he will demolish and rebuild, or continue to fit out the house. He has continued, although the house remains incomplete. However some of the fittings go far beyond minimal finishing to allow the Owner to "camp" in the house until demolition works begin. For example, expensive-looking, delicate light fittings have been suspended from ceilings that would have to be demolished if the roof works (discussed below) were to be undertaken. Removing, storing and re-installing them would be risky. If all that was needed was light, a bare bulb would have sufficed. For much of the work complained of, the Owner has elected to accept it, possibly reluctantly, rather than to demolish and rebuild.

118 I accept the Owner's evidence, at paragraph 35 of his witness statement of 29 May 2008 that:

> I did not at any stage during the construction request or agree to any variations/alterations to the design other than the variations specifically referred to … above.

119 I note the Owner has not given evidence that he intends to undertake the work to return the house to its original design.

The Lees Reports:

120 Mr Lees, building consultant, was engaged to report for the Owner. The first report was dated 13 September 2007 and identifies the following items:

No. 1 - Sliding doors to the meals/dining room

121 Mr Lees correctly reports that the sliding doors located in the west wall of the meals/family area were designed by Princeton Design Group ("Princeton") to be double sliding doors, rather than single with a fixed side light and casement windows as installed. His observations were confirmed at the first site inspection.

122 Mr Lees said that the doors as designed are not standard and slide beyond the door opening, past a solid wall section. He pointed out that the designed wall opening is 1700 mm wide and the as-constructed opening is 2400 mm. He also said:

> There would be little benefit to reduce the opening size and install doors as per the design drawing.

And that the sliding door as built does not appear to be faulty.

123 However, the Owner is entitled to have the house built in accordance with the contract documents. Mr Lees said that the doors as designed are not standard and recommended a change from the design to allow the Owner to have double sliding doors in the same sized opening as the existing opening. The Builder admitted that the door and window unit installed does not match the unit designed. There is no suggestion that the Owner agreed to substitution of the units. I find that replacement of the unit as recommended by Mr Lees is both reasonable and necessary to give the Owner a result in approximate accordance with the contract.

124 Mr Lees' estimate of the cost to remove the existing doors and install units that conform with the drawings is $3,480.00. The Builder has provided no evidence about the cost of such work and I accept Mr Lees' estimate as reasonable. The Builder must allow the Owner $3,480.00 for this item.

No. 2 South wall of the family room

125 Mr Lees said that a stud wall has been built between the meals/dining area and the living room, where the design shows a timber stair and balustrade. He also said:

> As part of the fixing stage the Owner has sheeted the wall with plaster and installed double doors at the stairs.

126 Mr Lees surmised that the Builder would not have installed a structural beam over the central area and therefore rectification would involve installing further structural columns and beams. His estimate to bring the work back to approximate the design was $19,606.00.

127 The Builder admitted that this wall was framed by him mistakenly and his evidence was that he offered to take it down and build it as designed. His evidence on this point is unconvincing because he also said that the east-west beam that was designed to support this part of the roof had been placed in a different position to that designed, then withdrew that evidence

the next day. It is therefore likely that the wall is necessary to support the roof.

128 In the course of the hearing the Owner reduced the claim for this item to eliminate the parts relating to removal of work subsequent to the Builder's work, such as plastering. However, the Owner's conduct such as plastering the wall and installing quality double doors at the head of the stairs in the wall, is compelling evidence that the Owner has elected to accept the work. Further, Mr Leong admitted under cross-examination that he decided not to require the wall to be removed and replaced because he did not want to disrupt the progress of the work.

129 In answer to my question Mr Leong said he knew the east-west beam had not been installed and told the Owner but did not tell the engineer or the building surveyor.

130 The Owner is entitled to compensation for having a result different from the design, and all such items are considered together below under the heading "Compensation for non-compliance".

No 3 Sliding door to west wall to living room

131 As observed at the site inspection, Mr Lees said that a single sliding door has been installed where the contract documents call for double sliding doors. His estimate to remove and replace the doors is $3,391.00. I find it reasonable that this item be rectified as recommended by Mr Lees. His evidence was uncontradicted. The Builder must allow the Owner $3,391.00.

No 4 Gap above windows

132 Mr Lees said that there is a substantial gap of between 30 and 40 mm between the top of certain window frames and the steel lintels. He recommends pop-riveting a powder coated aluminium section to the window frames to close the gaps, at a cost estimated at $1,549.00.

133 At the site inspection, I observed a number of gaps over windows. Mr Lees' evidence was uncontradicted. The Builder must allow the Owner $1,549.00 for this item.

No 5 South wall of study

134 According to Mr Lees the design called for four openings in the wall between the study and the retreat, each 453mm wide and with 400mm of wall between each opening. The wall as built has three openings each 285 mm wide with 560 to 570mm of wall between them. Mr Lees recommends removing the plaster and reframing to enable the wall to be built as designed at an estimated cost of $3,865.00

135 The openings appear competently built and quite attractive, although not as designed. Plastering was not undertaken by the Builder, but by a separate sub-contractor, and as Mr Leong admitted, the plasterer first plastered the wall without openings and then created openings. One purpose of the

second site visit of 16 July 2008 was to enable Mr Lees to run a "Stud Finder" over the wall, to show whether the frame had vertical members consistent with the Builder's claim that the wall was framed properly, but plastered incorrectly. For example, it is clear that the openings are higher at base than they are shown on the drawings.

136 Mr Lees' investigations demonstrated that gaps for the openings were not left in the stud wall in ways that would enable the openings to be created as designed. At this point, the Builder drew everyone's attention to the fact that the wall as constructed is a single stud wall, whereas the design calls for a double stud wall. He said that he had built the wall correctly and someone must have removed it and replaced it with the non-compliant wall. I do not take this remark made on site seriously.

137 I accept Mr Lees' evidence that another opening cannot be built readily without making the wall appear decidedly strange. On the other hand, it would appear that both the plasterer and Mr Leong became aware that the design called for four openings at some stage, but chose to install three rather than four. This departure from the design is taken into account below under compensation for non-compliance.

No 6 Sliding door to master bedroom

138 Mr Lees says the design calls for a double sliding door unit in combination with windows whereas the door installed is a single sliding door unit, which the Builder admits. He also notes that there is little fall from the sill to the outside, which could contribute to the damp problem noted in No 7 below.

139 Mr Lees recommends replacement at the estimated cost of $4,137.00. For the same reasons as given under No 1 above, the Builder must allow the Owner $4,137.00 for this item.

No 7 Damp flooring

140 Mr Lees reports that the particleboard flooring in front of the sliding door unit is particularly damp, which might result from an unsealed articulation joint in the north-west corner of the room, or possible incorrect installation of sill flashings. He recommends sealing the articulation joint and rebuilding the brick sill at an estimated cost of $143.00. I accept his evidence. The Builder must allow the Owner $143.00 for this item.

No 8 Staircase

141 Although Mr Lees has described this item as "staircase" he acknowledged in his report that these four or five stairs were not part of the building contract. The claim is not for the staircase but for the passage in which the stairs are located. It was designed to be 2m wide for the whole of its length. As built, it is 1970mm wide between the study wall and powder room wall, and 1685mm wide at the bottom of the stairs. He said two "off sets" have been constructed in the north wall. He acknowledged that demolishing and rebuilding in this area would be very expensive and recommended either

that the walls be accepted as they are or that the framework be altered to the north wall to obtain a straight and continuous line. He did not provide an estimate for this work.

142 I accept that the walls in this area are not in accordance with the design. While this area of the house looks workmanlike, the Owner is entitled to what he bargained for. An allowance for this item is made under "Compensation for non-compliance."

No 9 Window location - bedroom 3

143 Mr Lees reports that window 28 was to be located in the centre of the north wall of the bedroom, but is off-centre by approximately 110mm. He said that the cost of rectification would be very high for relatively little benefit and recommended either that the window be accepted as constructed or that it be moved and replaced in the correct position. He did not provide a costing for this work. I remarked at the site inspection the position of the window was obviously not centred, but did not have the appearance of incompetent work.

144 I accept the evidence of the Builder that part of the problem with this window was inconsistencies in measurements on drawing A.002. I make no allowance for this item.

No 10 Window position - bedroom 4

145 This window is also claimed to be out of position, and Mr Lees made similar observations and drew the same conclusions as he did for window 28. As with the window to bedroom 3, at the site inspection the position of the window was obviously not centred, but did not have the appearance of incompetent design or construction work, and does not appear to be centred on drawing A.002. There is no allowance for this item.

No 11 Survey and town planning corrections

146 Mr Lees' first report included a sum for a levels survey, which has not been undertaken. The Owner has withdrawn this item.

No 12 Stairs to garage

147 Mr Lees reports that two flights of stairs have been constructed of concrete when the design called for timber. He also notes that the lower flight has nine risers when the design called for four, which supports the theory that the levels are wrong, and that the bottom riser is 215mm when the maximum allowable is 190mm. The Builder admitted under cross-examination that the bottom step exceeds the permissible riser height.

148 Mr Lees recommends demolition and reconstruction of the bottom flight at an estimated cost of $2,503.00. I accept Mr Lees' evidence that it is a question of safety that steps should have risers of the same height and in accordance with the Building Code of Australia must not be higher than 190mm. I also accept that the Builder is responsible to set out the steps so

that they comply and that it is not necessary to include riser heights in the design. The Builder must allow the Owner $2,503.00 for this item.

No 13 (first) Dividing walls between the painting room and the double garage

149 Mr Lees reports that the design calls for two single doorways to be constructed at the bottom of the garage, but only one door has been built, in the wrong position. He recommends reconstruction to accord with the agreed design at an estimated cost of $1,026.00

150 I accept his evidence. The Builder must allow the Owner $1,026.00 for this item.

No 13 (second) Garage floor slab

151 Mr Lees reports that the garage floor has an infill section 90mm wide and that the apron to the front of the garage tapers from 200mm wide at the end to nothing at the other end. He raised the concern that this apparently untradesmanlike way of constructing the floor might be symptomatic of structural inadequacy, although there are no other indicators yet. He recommended that this floor and the floor of the painting room be scraped free of dags and painted with paving paint at an estimated cost of $2,191.00.

152 The floor is rougher than it should be to accord with standards of reasonable building work, containing some dags, pits and small cracks. It is reasonable that the cost of cleaning it of dags be paid by the Builder, but not that it be painted. In accordance with Mr Lees' calculations the Builder must allow the Owner $148.00 to clean and power wash the slab, plus a margin of 20% ($29.60), plus GST; a total of $195.36, to which is added 28% for preliminaries in accordance with Mr Lees' report. The total to be paid by the Builder to the Owner for this item is $250.00.

153 Mr Lees also recommended that the Owner check the footing construction, to ensure that the poor construction of the floor is not symptomatic of a greater problem. There is no evidence of failure of footings or foundations and the Owner has chosen not to undertake this work. The Owner has withdrawn the claim for an amount to pay for further testing.

No 14 Damp brickwork

154 Mr Lees reported that a small area of the painting room wall which also acts as a retaining wall has a high moisture reading. He concluded that there might be a failure in the tanking on the outside of that wall and recommended removal of the back filling, rectification of the waterproofing, installation of agricultural drains if necessary, installation of a protective layer against the tanking and back-filling at an estimated cost of $3,727.00.

155 The retaining wall was a variation for which the Owner has paid the Builder. A design was provided by the Engineers as drawing 01B, dated 2

February 2006. It called for steel-reinforced double brick with both a moisture barrier and bitumen tanking on the outside of the wall, an agricultural pipe at the base of the wall and compacted granular fill above it. The design has not been faithfully followed. It is not clear why this occurred, but I accept the Builder's evidence that he built the steel-reinforced double-brick wall and installed a plastic vapour barrier, but then instead of following the remainder of the design, concrete was used as back-fill and no tanking was applied. I accept Mr Lees' evidence that unprotected plastic in this position would be vulnerable to damage when the concrete was poured.

156 During the hearing the Builder drew the retaining wall and showed the agricultural pipe at the base of the concrete. When I remarked that it seemed logical to assume the pipe was now full of concrete, the Builder said that he had placed scoria above it. This was the first time the Builder had mentioned the use of scoria near the retaining wall, and it was not included in the claimed variation. I do not accept that he used scoria.

157 At the site inspection of 30 June 2008, the Owner identified an area on the north wall of the painting room approximately 1.2m above the floor that appeared to be the source of weak mortar running down the brick work. This area and the floor beneath it appeared dry on the day of that inspection, but no measurement was made. As the Builder remarked, there is no indication of general dampness in the wall, such as a growth of green algae.

158 I note that the Owner has had an agricultural drain installed to the north and west of the house, for which he has claimed $4,600.00. See below under the heading "Agricultural drain". The Builder said he offered to tank the wall with bitumen when it was constructed, but the Owner considered the cost of tanking too great and chose not to have it done. In the Builder's letter to the Owner of 19 January 2007, the Builder referred to a quotation from "Wet Spot Waterproofing" for between $5,800.00 and $6,000.00. Neither party provided a copy of the quotation and under cross-examination the Owner said that he did not put "the waterproofing quote" into evidence because he could not find it.

159 I accept Mr Lees' evidence that the amount the Builder said was quoted for tanking was excessive. This might have been because, as he said in evidence, the Builder sought a quote for fibre-glass based tanking, which was not called for in the design. I accept Mr Lees' evidence that bituminous paint could have been applied to this area for approximately $1,100.00.

160 I find that the Builder could not move responsibility for providing a dry wall to the Owner unless he had told the Owner, preferably in writing, of the consequences of refusing to pay anything for tanking. In the alternative, I find the Builder took responsibility for an alternate technique that did not work.

161 The Builder has provided no evidence concerning this wall and the proper method of rectification and a fair cost. Nevertheless, I am concerned that the method proposed by Mr Lees involves removing a substantial volume of concrete backfill in order to rectify a single wet patch approximately 1.5 meters wide by a similar height. In place of Mr Lees' estimate I order that the Builder allow the Owner $1,000.00 for rectification of this item.

No 15 Roof profile

162 Mr Lees reported that the roof profile over bedrooms 1 and 4 and the bathroom adjacent to bedroom 1 was designed to have a "v" shaped roof, but has been built with a single pitch from high in the north to low in the south.

163 The difference in height of the ceiling dictates the difference in height of the rooms below, and as discussed above, the changed floor levels do not necessarily allow these ceiling heights to be changed without substantial reconstruction of the front of the house. Mr Lees has estimated the cost of such reconstruction at $49,605.00.

164 The Builder and Owner disagree about what has happened with respect to the roof profile. The Builder's evidence at page 11 of his witness statement signed 15 June 2008 is that the Owner asked him to come to site in June or July 2006 to discuss the shape of the roof because a town planning official from the city council had raised concerns. His evidence is in part:

> … as we walked down the site at the north side coming down to south side we stopped and the council member [sic] asked [the Owner] what the roof looked like. I said it was a flat roof with box gutters in the roof. The council member replied by saying that there would be problems in the future by having such roof. [The Owner] asked him how that could be. The council member replied that during winter times especially with high winds lots of leaves from the surrounding trees will sit in the box gutters and cause blockages that would result in water leakages to inside the house. … The council member suggested that we should do the opposite to that on the plan.
>
> We kept walking towards the garage area at the front of the property. The council member again asked about the front roof there. I replied that there would be another box gutter like the other side.
>
> …
>
> [The Owner] told me if I was able to change the roof. I firmly rejected his idea and advised his that an amendment would be necessary. I told him to speak to Po about it.
>
> …
>
> On … 4 July 2006 Po and a female companion, who he introduced as a co-worker, was on site in the afternoon. … I pointed out to him what [the Owner] wanted on the plans. Po then pencilled marked the roof line to show the new design and instructed me to go ahead. This can be seen on Po's design drawing A.002 dated 8 November 2005.

The Builder did not call the council worker he referred to, to give evidence in support of his, and Mr Po Leong's female co-worker was not called either.

165 The witness statement of Mr Banda Rostom, differs from the Builder's evidence. The witness statement is dated 30 June 2008 and at paragraph 9 he said:

> I recall when we were fixing the frame work we came up with another problem with the box gutter. I remember the box gutter was too low and in the way from the top of window at bed 4. We stopped working and my brother called up Po to tell him about this. … Po took measurements to check the height. Po and my brother talked about how they could fix the problem. He told my brother to fix the problem any way he found good. My brother gave Po the idea of changing the roof to fix the problem.

166 The Owner denied requesting the change to the roof shape and said in evidence that the Builder carried out a number of changes to design without informing the Owner or seeking his consent. I prefer the evidence of the Owner to that of the Builder on this point.

167 The Builder agreed that he told Mr Leong that the Owner had asked for changes to the roof shape. The Builder said Mr Leong drew pencil marks on drawing A.002 to show the change to the roof shape.

168 Under cross-examination the Owner agreed that Mr Leong was his agent. There followed this exchange:

> Builder: If Mr Leong had said to the builder that it was all right to change the roof, that would mean that it would be all right to change the roof?
>
> Owner: If he discussed with me first.
>
> Builder**:** And Mr Leong knew that?
>
> Owner**:** Yes, apparently.

169 Later, in answer to my question, the Owner agreed that he had not told the Builder that there was a limit to Mr Leong's authority as agent. In his final submissions Mr Shaw referred me to *Colonial Mutual Life Assurance Society Ltd v The Producers and Citizens Co-operative Assurance Company of Australia Ltd* [1931] 46 CLR 41, regarding the limits to agents' authority, but I am not convinced that it applies to actions which appear to be legal and reasonable and are done with ostensible authority.

170 Mr Leong's first and third witness statements are inconsistent. The first is to the effect that he had no warning that the roof shape would change, but arrived on site to discover the roof had been changed. He said the Builder told him the Owner had ordered it, which the Owner denied as soon as Mr Leong spoke to him. In answer to my questions, Mr Leong said he discovered the change when the roof frames were built and before it was clad. I asked him how long it was between the conversations he had with

the Builder and then the Owner and he said "about a day". I asked why he did not order the Builder to demolish and rebuild and he said "We were agreed to settle it" then "… we let it go and said just construct it." He confirmed that "we" was himself and the Owner and said there was no deal with the Builder over this – no financial consequences.

171 Mr Leong's evidence took the Owner by surprise and I allowed him to file and serve a third witness statement. I accept the Owner's evidence that he did not agree to the roof being changed.

172 Mr Leong's third witness statement of 25 June 2008 is to the effect that the Builder showed him the roof drawing with pencil marks drawn in by the Builder and he said "To me it looked fine." He also said the Builder told him the Owner had requested it and he did not check this with the Owner.

173 As Mr Leong admitted under cross-examination, the roof was not an item on the defects list. Although this supports the view that the Owner has accepted the non-compliant roof profile, it does not prove that he asked for it or agreed that it should be a variation to the contract.

174 I am satisfied that the Owner did not authorise the Builder to change the roof shape, and I am also satisfied that nothing Mr Leong did as the Owner's agent justified the Builder's actions in changing the roof shape. Nevertheless, the Owner has accepted the roof as built. Substantial plastering has been undertaken, and although no painting has yet been done, no painting has been done in any substantial part of the interior of the house.

175 It is regrettable that the house was not built to the design. The design was more interesting and original than the built result, but I am not satisfied that there is any real possibility that the Owner will reconstruct the roof to match the design. Interior works are inconsistent with this and he would also need to overcome the problems caused by incorrect levels. There is a real risk that if the roof were reconstructed, there would be insufficient ceiling clearance in bedroom 4.

176 For these reasons the Owner is allowed an amount for this item under "Compensation for non-compliance."

Nos 16 and 17 Balcony roof and eaves

177 Mr Lees reports that the balcony roof (landing outside the front door) is incomplete and that the area is leaking and requires completion by a qualified roof plumber. He reported that the eaves linings were particularly damp which indicates roof leaks. At the site inspection the Owner pointed out water stains on the soffit of the balcony and the fascia of the area appeared to be unfinished blue board. Gaps were visible between sheets.

178 His recommendation for both alleged defects was that a licensed plumber be engaged to thoroughly inspect and repair as necessary at an estimated

total cost of $10,431.00 His evidence was uncontradicted by the Builder. The Builder must allow the Owner $10,431.00 for this item.

No 18 Windows to east elevation

179 Mr Lees reports that there are excessive gaps between the tops of windows W23, 24 and 22 and that 23 and 24 do not match the head height of W22. He recommends either removing internal architraves, adjusting the plaster board wall linings and adjusting the position of the windows within the wall frame or installing powder coated angle to the top of the windows to close the gaps at an estimated cost of $1,719.00.

180 Mr Lees' evidence is accepted and for the same reasons as given for item 1, the Builder must allow the Owner $1,719.00 for this item.

No 19 Front steps

181 In his report of 13 September 2007 specifically concerning the front stairs, Mr Lees said the concrete surface of the stairs is rough and the bottom riser is far in excess of the maximum height of 190mm. He recommended that a further landing and steps be constructed at the base of the stairs and that granolithic topping or tiles be laid to the existing stairs at an estimated cost of $3,183.00.

182 The steps are not as designed and are certainly problematic. As discussed above under Builder's variation claim No. 8, the original design was for a flight from the door landing down to the south, and landing and flight back down to the north, then a relatively short flight east, finishing closer to the house than the current steps as built. A new design was provided by Mr Leong which was exhibited to the Builder's witness statements as SR11.

183 In SR11 Mr Leong has designed the same number of risers for a shorter stairway than originally designed. If it is assumed that the risers were to be at the same height as on the original design, without allowance for a landing the stairs would have extended east approximately 7,200mm from the porch to the ground. The original design on drawing A.002 showed 5,400mm from porch to ground, without taking into account the additional length added by the north-south risers and surprisingly, SR11 is only 5,200mm from the porch to the ground.

184 I find the problem with the height of the last step has been created by defective design, but that the Builder is responsible for the rough surface of the concrete steps. I accept Mr Lees' evidence that a reasonable means of rectifying the rough steps is to provide granolithic topping. I accept his evidence that the cost of preparing and providing granolithic topping to the existing stairs is $1,545.00 plus 20% profit, being $1,854.00 plus 28% preliminaries, being $2,373.00.

185 The Builder must allow the Owner $2,373.00 for the front stairs.

No 20 Front entry doors

186 Mr Lees reports that the doors were to have side lights and be installed centrally in the entry hall, but they do not have side lights and are off centre. He recommended removal and relocation of the doors, with side lights, at an estimated cost of $4,752.00.

187 Given the position of the steps, the position of doors appears logical, although it is not what the Owner bargained for. I accept the Builder's evidence that the doors were purchased and provided by the Owner (or by Mr Leong on the Owner's behalf). However I also accept the evidence of Mr Leong that he told the Owner that he could not chose doors with side lights. An allowance is included under "Compensation for non-compliance".

No 21 Sub floor termite treatment

188 Mr Lees reports that there are many areas in the sub-floor where timber has been installed below the level of termite treatment, therefore compromising its efficacy. He recommended engaging a termite contractor to adjust the position of the termite barrier and remove any timber bridging the barrier. He estimates the cost at $1,456.00.

189 At the first site inspection the Builder drew my attention to the fact that some of the non-compliant timber had been plastered. I accept his evidence that this was not done by him or his employees, and I therefore reduce the amount the Owner may recover for this item, as I find it includes some rectification of work not done by the Builder. The Builder must allow the Owner $1,200.00 for this item.

No 22 Articulation joints

190 Mr Lees reports that the articulation joints have not been sealed with flexible sealant. He recommends its installation at an estimated cost of $1,592.00.

191 At the site inspection the Owner pointed out the joint to the north side of the garage wall. It contained a discontinuous strip of foam rubber, some of which was falling out. Mr Lees' evidence is accepted. The Builder must allow the Owner $1,592.00 for this item.

No 23 Remove over pour

192 Mr Lees reports that in many areas the footings have been allowed to flow outside the footing trenches, which he says could cause problems for future landscaping. He recommends breaking out excessive concrete at an estimated cost of $1,626.00.

193 At the second site inspection I was shown three areas of over pour, each of which is substantial. Mr Lees evidence regarding the extent of necessary work is uncontradicted. The Builder must allow the Owner $1,626.00 for this item.

Mr Lees' Second Report:

194 Mr Lees' second report of 4 October 2007, also started numbering at one - it is useful for experts to continue numbering in subsequent reports to minimise the risk of confusion. The items in this report are:

2nd report, No 1 - Window 35

195 This item is also the subject of the Builder's variation no 12 above.

196 Mr Lees reports that the design called for a four-panel clerestory window of 800mm high, but the construction of the roof has not allowed a window of that size. Four separate windows have been installed which are 300mm high, as was apparent at the site inspection. Mr Lees notes that removal and replacement of the roof to allow the correct height windows to be installed is a very extensive and expensive task and recommends that solar-rated skylights be installed instead at an estimated cost of $13,543.00.

197 The Builder said first that domestic windows of the size specified are not available. This is irrelevant – he must build to the design or point out why he cannot. He admitted under cross-examination that he was aware of this before the contract was signed, it follows that he agreed to provide a window other than a standard domestic element.

198 During the hearing he said that there is an error in the design which did not allow 800mm high windows to be installed. Mr Lees gave evidence at the hearing that there was adequate room for 800mm windows. However at the second site inspection of 17 July 2008, attended by Mr Lees, it became apparent that there is an error in the drawings in this area. The highest point on section B-B on drawing A.004 is 6008mm from floor level and Mr Lees' revised evidence is that the elements necessary to include to that point add up to 6198mm, a difference of 190mm. I accept Mr Lees' evidence that the pine stud wall shown beneath the window at Detail 01 on drawing A.004-A could have been reduced from 219mm, but also note he said the windows could have been reduced in size. Smaller windows is what the Owner complains of, although the actual reduction in size is much greater than the potential reduction because of the design fault. Mr Lees said that if the windows had been reduced in height by, say, 100mm instead of 500mm, substantially more light would have been available to the room.

199 At both site inspections conditions were sunny and clear and the window as installed allowed good light into the kitchen/dining area.

200 I find the lack of height in these windows is partly due to a design error and partly due to a construction error. As soon as the Builder became aware that the design contained an error, he should have asked the Owner or Mr Leong for instructions in accordance with clause 16.1 which is quoted above.

201 The Builder's failure to abide by the terms of the contract has left the Owner with smaller windows than necessary and without the choice that he was entitled to. The Builder must allow the Owner an amount for this item

as compensation for lack of opportunity to have larger windows. It is taken into account under Compensation for non-compliance, although this item accounts for only a modest part of the total.

2nd report, No 2 - Eaves linings - east side of garage

202 According to Mr Lees the contract documents called for eaves 800mm wide, but they have been built 500mm wide. As the second page of the Builder's quotation, referred to by the parties as the "specification" and signed by both, calls for all eaves to be 450mm wide, the Owner withdrew this part of his claim.

2nd report, No 3 - Eaves lining - west side of bedroom 5

203 Mr Lees had made no allowance for this item and it was withdrawn by the Owner.

2nd report, No 4 - Colorbond fascia

204 Mr Lees reports that the fascias as designed are Colorbond, but as installed are timber. He recommends installation of a Colorbond capping over the timber fascia, also necessitating removal and replacement of gutters. He estimates the cost at $29,528.00. The Builder did not give a good reason for installation of timber rather than Colorbond. He said that the fascia specified was unavailable, but that he had known that before he entered the contract.

205 In the course of Mr Lees' cross-examination, I asked him to estimate the number of times that the timber fascia would need to be painted during the expected life of a Colorbond fascia. He estimated the life of a Colorbond fascia as about 20 years and said that a wooden fascia would need to be painted every three to five years. On the assumption that it would be painted every four years, it would be painted four times during the life of a Colorbond fascia – years 4, 8, 12 and 16, then be replaced at year 20. I accept Mr Lees evidence that because of the difficult access, in today's figures it would cost about $7,000.00 a time to paint the fascia. From this I deduced that the total would be approximately $28,000.00, which is comparable with the cost of removing and replacing the fascia.

206 In the circumstances I find it is reasonable for the Owner to replace the fascia, should he choose to do so. The Builder must allow the Owner $29,528.00 for this item.

2nd report, No 5 - Footing depth

207 Although there was mention of a possible issue with the footing depth in Mr Lees' report, this claim was withdrawn on 3 July 2008. Withdrawal was on the basis that there has been no obvious damage caused by any defect in footings, and to avoid the possibility that the Owner could be considered to have claimed for an as yet unknown latent defect in the footings.

2nd report, No 6 - Bathroom Shower Wall

208 Mr Lees mentioned this item which was subsequently withdrawn by the Owner.

2nd report, No 7 - Damage to Public Asset

209 Mr Lees made mention of damage to the kerb and channelling and stormwater pit which was subsequently withdrawn by the Owner.

Mr Lees' Third Report:

210 Mr Lees' third report was filed on 18 July 2007 and also recommenced numbering. The Builder was given the opportunity to cross-examine Mr Lees concerning these items, but chose not to do so.

3rd report, No 1 - Box Gutter Holding Water

211 At the site inspection of 16 July 2008, the Owner pointed out that there is substantial ponding of rain-water in this gutter. Mr Lees said the gutter needs to have its levels adjusted so that water drains properly, which involves a substantial amount of demolition and reconstruction. He assessed the cost at $3,761.00. The Builder must allow the Owner this amount.

3rd report, No 2 - Sagging Eaves Lining

212 Since Mr Lees' second report two substantial sags have become apparent in the eaves to the south wall outside bedrooms one and four. Mr Lees assessed the cost of removing and replacing the eaves in this position at $1,944.00. The Builder must allow the Owner this amount.

3rd report, No 3 - Aluminium Trims to Windows

213 At the second site inspection of 17 July 2008, my attention was drawn to seven windows in the garage where there are obvious gaps between the top of the windows and the lintels. The claim also includes window W17, which is in the south wall of the living room where the same applies. Mr Lees estimated the cost of rectification at $880.00. The Builder must allow the Owner this amount.

Compensation for non-compliance

214 The items for which the Owner is entitled to compensation, but for which he has not been awarded the cost of replacement or demolition and re-construction are No 2, the south wall of the family room, No 5, south wall of study, No. 8 staircase location, No. 15 roof profile, No 20, front entry doors and 2nd Report no 1 - window 35. Mr Shaw left to me the question of how much should be allowed for *Bellgrove v Eldridge* damages. Some of these items are trivial but some, the roof profile in particular, are major. The Builder must allow the Owner $20,000.00 in total for these items.

Total allowance of items in Mr Lees' reports:

No 1 Sliding door to the meals/dining room	$3,480.00
No 3 Sliding door to west wall to living room	$3,391.00
No 4 Gap above windows	$1,549.00
No 6 Sliding door to master bedroom	$4,137.00
No 7 Damp flooring	$143.00
No 12 Stairs to garage	$2,503.00
No 13 (first) Dividing walls in garage	$1,026.00
No 13 (second) Garage floor slab	$250.00
No 14 Damp brickwork	$1,000.00
Nos 16 and 17 Balcony roof and eaves	$10,431.00
No 18 Windows to east elevation	$1,719.00
No 19 Front steps	$2,373.00
No 21 Sub floor termite treatment	$1,200.00
No 22 Articulation joints	$1,592.00
No 23 Remove over-pour	$1,626.00
2nd report No 4 Colorbond fascia	$29,528.00
3rd report No 1 - Box gutter holding water	$3761.00
3rd report No 2 Sagging eaves	$1,944.00
3rd report No 3 Aluminium trims to windows	$880.00
Compensation for non-compliance	$20,000.00
Total for defects:	$92,533.00

Agricultural drain

215 The Owner claims $4,600.00 which he says he has paid to install a new drain behind the retaining wall, as the drain installed by the Builder was defective. As the Builder's evidence is that the original drain was placed at the bottom of a substantial volume of concrete, it seems likely that the original drain is now solid concrete. The Builder must allow the Owner $4,600.00 for this item.

Building Permit

216 The Owner claims $2,800.00 that he says he paid the building surveyor for the permit. The parties agree it was the Builder's obligation to pay for the building permit, but there was some confusion over whether payment was made by the Owner, the Builder or both. I accept the Owner's evidence, supported by that of the surveyor, Mr Melchiori, that payment was made by the Owner. The Builder must allow the Owner $2,800.00 for this item.

Other claims made and withdrawn

217 The Owner had claimed for termite treatment and ceiling insulation, but both were withdrawn.

INTERPRETATION

218 Before the hearing commenced Mr Rustom, the Builder's wife, wrote to the Tribunal and requested that an interpreter who had been engaged by the Tribunal for a proceeding in the Civil Claims List, C4214/07, be engaged for this hearing as an interpreter who spoke the same dialect of Arabic. Unfortunately that interpreter was unavailable and it has since been brought to the attention of the Tribunal that it was because of an overseas trip. On the first day of the hearing the issue of interpretation was raised. On that occasion there was the following exchange:

> SENIOR MEMBER: I. Thank you Mr Altamimi. Let's just check that you speak the same language as Mr Rustom. Could you speak to each other. Mr Altamimi, which language do you speak and language does Mr Rustom speak?
>
> MR ALTAMIMI: I speak Arabic, Iraqi dialect. I am not going to use the Iraqi dialect, I will try to speak the Lebanese dialect.
>
> SENIOR MEMBER: Okay. Do you believe that you can adequately speak the Lebanese dialect?
>
> MR ALTAMIMI: It depends on the client. If they speak, what they call it standard Arabic or the press media Arabic, we can manage. But if they speak only the Lebanese dialect, I think that is going to be difficult for them.
>
> SENIOR MEMBER: All right. You're Mrs Rustom, aren't you?
>
> MRS RUSTOM: Yes.
>
> SENIOR MEMBER: Mrs Rustom, what is your understanding of Mr Rustom's use of Arabic. Is it the standard Arabic?
>
> MRS RUSTOM: Yes, it's the standard Arabic, common Arabic language, yes.
>
> SENIOR MEMBER: Thank you very much. Mr Altamimi, if you find that you're having difficulty with Mr Rustom, if you find you are having difficulty, you let me know straight away.
>
> MR ALTAMIMI: Okay.

219 On each day except day 9 and the last day of the hearing, the interpreter was Mr Al-Tamimi. On the last day of the hearing, after final submissions, Mrs Rustom again raised concerns about the accuracy of some interpretation. Mr Shaw said that concerns about interpretation should have been raised earlier and also said that if the hearing were adjourned, he would be seeking costs on behalf of the Owner.

220 The Builder also indicated that he believed his own English was quite good. On 2 July 2008, the third hearing day he said:

> (Through Interpreter) I just want to say something. I just want the interpreter to not to interpret what the barrister is saying because I can understand. If I can just reply to the question, and then the interpreter starts interpreting.

221 Later on the same day Mr Shaw sought an order for witnesses to leave the hearing room. The order was not made, but I explained to Mrs Rustom that her evidence would be likely to be of less weight if given after she had heard her husband's cross-examination. She chose to leave until her evidence was given but before she left she expressed concern that all matters should be interpreted for her husband. The following was the exchange between Mrs Rustom and me:

> MRS RUSTOM: I need the translator to translate every question that Mr Shaw is asking, to get a better clarification.
>
> SENIOR MEMBER: Yes. So that your husband understands precisely what is being said.
>
> MRS RUSTOM: At all times.
>
> SENIOR MEMBER: Right. So you are saying that all but the simplest questions need to be translated.
>
> MRS RUSTOM: Thank you very much.

By this stage Mr Al-Tamimi had interpreted for two days and no issue had been raised as to the accuracy of his interpretation.

222 On the last day I stood the hearing down to enable Mr Rustom to consider whether he wished to adjourn the matter for another day to raise specific issues regarding interpretation, and to enquire regarding the availability of Mr Al-Tamimi. When the hearing resumed, I asked Mr Rustom whether he had any concerns regarding interpretation. His response was that he wanted the hearing finished on that day and he did not want to go ahead with concerns about interpretation.

RECONCILIATION

	To Owner.	**To Builder.**
Contract price		$275,000.00
Variations		$37,690.00
Amount paid under the contract (including variations)	$300,610.00	
Agreed damages for delay	$13,650.00	
Interest on late progress payments		$2,139.91
Allowed defects in Lees Reports	$92,533.00	
Agricultural drain	$4,600.00	
Building permit	$2,800.00	

$414,193.00	$314, 829.91

The Builder must pay the Owner $99,363.09.

COSTS AND INTEREST

223 The question of costs and any interest under the *Penalty Interest Rates Act* 1983 is reserved and either party may apply to the Tribunal for them. The parties should note the provisions of s109 of the VCAT Act.

SENIOR MEMBER M. LOTHIAN