VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST **VCAT Reference: D799/2004**

CATCHWORDS

Variations not in writing, *Domestic Building Contracts Act* 1995 ss37 and 38, "significant hardship", "not unfair to the building owner", "recover any money", claim by owner for payment made for unwritten variations, whether builder should rectify defective work, measure of compensation for defects, independence of expert, obligation to insure materials supplied by owner, liquidated damages, commencement of building period, no written request for extension

APPLICANTS: Michelle Ryan, Justin Ryan

RESPONDENT: Edward John Lowe t/as Urbane Builders

WHERE HELD: Melbourne

BEFORE: Senior Member M. Lothian

HEARING TYPE: Hearing

DATES OF HEARING: 18-22 July 2005 and 29 July 2005

DATE OF ORDER: 29 September 2005

MEDIUM NEUTRAL CITATION: [2005] VCAT 2031

ORDERS

1. The Respondent must pay the Applicants $70,193.57 forthwith.

2. The Respondent's cross-claim is dismissed.

3. Costs and interest are reserved and there is liberty to apply.

SENIOR MEMBER, M. LOTHIAN

APPEARANCES:

For The Applicants Mr M Settle, Counsel

For The Respondent Mr S Turner, Counsel

REASONS

1. These proceedings consist of a claim by the applicants, Mr and Mrs Ryan ("the Owners") and a cross-claim by the respondent, Mr Edward John Lowe, trading as Urbane Builders ("the Builder").

2. The Owners claim $165,519.29, being $135,961.37 for rectification of allegedly defective and incomplete work, $132.00 for disconnection and reconnection of a heating system due to flooding of the garage and associated works on that level, $7,020.00 paid by the Owners to the Builder, allegedly in error for unauthorised variations, various consultants' fees totalling $18,513.10 and liquidated damages for delay at $250.00 per week from 17 March 2004 to 3 July 2004 totalling $3,892.82.

3. They also claim interest, damages for physical inconvenience and mental distress, and costs.

4. According to paragraph 7 of her final submission, Ms Turner says that the Builder claims costs plus $21,319.77 being $15,457.00 allegedly unpaid under the contract, $3,736.00 for variations, plus interest of $2,063.44. The Builder's cross claim gives the sums sought as $18,083.00 with interest of $2,063.44. At paragraph 38 of the final submission Ms Turner refers to variations not paid to date of $4,663.00.

History

5. The parties agree that on 20 July 2003 they entered a domestic building contract in HC-5 (Edition 3 – 2001) form. The Builder undertook to construct a house for the Owners at 1A Amy Street, Camberwell. The contract price, including GST, was $309,500.00 and the building period was 238 days. From the end of the

building period to completion of the works, the Owners were entitled to liquidated damages of $250.00 per week.

6. The Owners say they have paid the Builder $302,016.00. The Builder says he has been paid $302,018.00. To avoid confusion, it will be assumed that the Owners paid the Builder $302,017.00.

7. The house is double-storey, south facing with a garage at sub-floor level, making it three levels. The wall material is specified as rendered brick. The site slopes from north to south, so that the back door on the north side is at ground level whereas the front door is up a flight of steps. There is also a less pronounced slope from east to west.

Variations

8. Under cross-examination on the fourth day of hearing the Builder admitted he had a "difficulty with communication". His evidence about matters allegedly communicated to, or agreed with, the Owners was generally unsatisfactory and often contradictory. In contrast, Mrs Ryan's evidence was, on the whole, consistent and credible. In particular, it is impossible to believe both that the Builder did not keep a site diary (a document which was not listed in his discovery and whose existence he denied under cross examination) and that he had detailed recall of financial matters and the time progress of the project.

9. It was after cross examination regarding alleged invoices for materials used for variations (none of which were discovered by the Builder) and the admission that there were "other things", not pleaded by him, that still required rectification, that the Tribunal offered the Builder a break to obtain legal advice. Following the break, he made all the admissions regarding items for rectification which are referred to below.

- **Claimed by Builder**

10. The Builder alleges that the Owners agreed to pay him an additional $10,601.00 for variations, making the contract price as adjusted $320,101.00 (mistakenly described as $302,101.00 in the Builder's cross-claim).

11. There are 26 variations for which the Builder claims additional sums listed by Mrs Ryan in her evidence and confirmed in the Builder's final submission presented by Ms Turner. Not all items have been priced by Ms Turner, but those that are either concur with Mrs Ryan's prices, or give that price plus a stated percentage margin. Mrs Ryan's figures are taken to be accurate, and they total $16,518.00. Both Mrs Ryan and Ms Turner agree that the credit variations allowed by the Builder to the Owner consist of items which total $4,945.00. The difference is $11,573.00.

12. Contrary to section 12 of the contract and to sections 37 and 38 of the *Domestic Building Contracts Act* 1995 ("DBC Act"), none of the variations were in writing, although some were discussed. Under both sections, the Builder is not entitled to recover any money in respect of a variation which is not in writing or compliant with s38(2) of the DBC Act unless:

> "(3) the Tribunal is satisfied-
>
> (i) that there are exceptional circumstances or that the builder would suffer a significant or exceptional hardship …; and
>
> (ii) that it would not be unfair to the building owner for the builder to recover the money."

13. In *Pratley v Racine* [2004] VCAT 203, Senior Member R Young considered the effect of sub-section 3. He found that the onus is on the Builder to establish the exculpatory grounds of sub-section 3. As in Prately, no evidence was produced by the Builder to prove that there were exceptional circumstances. The questions remaining are whether the builder would suffer "significant hardship" and whether the result would be fair to the Owners. In the interests of consistency, I

find in accordance with the decision of Senior Member Young that any amount more than $200.00 is "significant". I also follow his reasoning that the Builder is entitled to the reasonable cost of each claimed variation which the Builder proves was discussed with, and approved by the Owners.

14. Failing to obtain written confirmation of variations is a very serious failing of some builders, and simply not getting around to completing the paperwork is not a good enough reason. No other explanation was provided by the Builder. Each of variations 14, 15, 19, 20, 23, 24 and 25 is significantly less than $200.00. Those which were requested or initiated by the Builder (19, 20 and 23) clearly offend the DBC Act and the contract and are not allowed.

15. The remainder were requested by the Owners and could fall within the exception to the need for a written variation which appears in section 38(2) of the Act. Clauses 12.1 and 12.2 of the building contract require that the Builder receive a written notice from the Owners, which he did not. However in circumstances where the Owners admit that they sought these variations, the lack of a written notice will not prevent them from being granted. The Builder withdrew his claim for variation 26.

16. The variations which have been claimed by the Builder but not paid are as follows:

- **Variation 10 - supply additional sump pump.**

(a) Mrs Ryan's evidence is that the cost of the additional sump pump was initially charged at $280.00, then it was invoiced for $580.00. Ms Turner's summary is that the Builder invoiced the Owners for "$580.00 plus 12% margin". Ms Turner says that the pump was installed because "On [the Builder's] advice the applicants agreed that he should install an additional sump pump to the one only specified in cl 28.3." Mrs Ryan said that the pump was not paid

for because two pumps were already provided for in the specification.

(b) The specification calls for only one sump pump and Mrs Ryan admitted under cross-examination that the Owners requested an additional sump pump. The Owners must allow the Builder $280.00 for this item.

- **Variation 12 - supply and install bulkheads to kitchen and laundry**

(c) According to Mrs Ryan, the Builder first invoiced $350.00 for this item, then re-invoiced for $380.00. The parties disagree about whether the Builder was aware that bulkheads had to be installed above the cabinets in the kitchen and laundry. They appear on drawings 1090.13 to 1090.17, which the Builder said he did not receive, and which are not contained in the set of drawings which form part of the exhibit MR2 to the witness statement of Mrs Ryan. The Owners must allow the Builder $350.00 for this item.

- **Variation 13, supply and install additional red gum sleepers to retaining wall.**

(d) The Builder says that he was instructed by "the Applicants" to install an additional row of sleepers to the red gum retaining wall to the north side of the property. Ms Turner says that the charge is "$280.00 plus 7% margin". Mrs Ryan says that they were invoiced $280.00, that the work was "completed without my approval" and that no verbal estimate was given. Mrs Ryan's evidence is accepted that she did not know why the Builder needed more sleepers, or why this cost was not included in the original contract. The Builder is not entitled to payment for this

item.

- **Variation 14 – install additional tiles to wc ground floor**

(e) Mr Ryan said that the Owners initially disputed this item as a variation but then instructed the Builder to go ahead, and that no estimate was provided. The Builder has charged $100.00. The Owners must allow the Builder $75.00 for this item.

- **Variation 15 – Install additional tiles to en suite**

(f) Mr Ryan said that the Owners initially disputed this item as a variation but then instructed the Builder to go ahead, and that no estimate was provided. The Builder has charged $100.00. The Owners must allow the Builder $75.00 for this item.

- **Variations 16 – Remove brickwork panel to front patio and make good electrical conduits.**

(g) The parties agree that an oral estimate of approximately $500.00 was given and accepted. The Builder has charged $550.00. The Owners must allow the Builder $500.00 for this item.

- **Variation 17, backfill courtyard area to height.**

(h) The area to the west of the house is shown on the drawings as decked. According to the Builder, the Owners instructed him to raise the ground level of the area as they intended to lay pavers instead. According to Mrs Ryan, the Builder told her the soil level had to be raised in order to obtain an occupancy certificate, but she was not given an estimate, orally or in writing. She said in her witness statement:

"I was informed this needed to be raised for me to gain occupancy, however the levels were indicated on the plan and are the height required for occupancy."

(i) It is noted that Architecture Works drawing 1090-1 shows an RL level for the surface of the deck and for the land to the west of the deck, but does not conclusively indicate the level below the deck.

(j) According to Ms Turner: "[the Builder] told them he would be unable to realistically price this work but would charge them his cost plus a 12% margin." Even if this statement is accurate, it is not accepted that the Builder needed to undertake this task on a cost-plus basis. He was in a position to know precisely how much material had to be imported to back fill the area, and any complications of undertaking the work. On the other hand, he did do the work and the Owners were aware that he was going to do it. In the absence of better evidence about the cost of undertaking this work, it is ordered that the Owners allow the Builder $500.00 this variation.

- **Variation 18, Additional labour and materials for ceramic tiles over fibreglass membrane**

(k) The Builder says that while he was not on site the Owners instructed the waterproof membrane contractor to apply membrane to the whole of the shower walls which is not required by the Building Code of Australia. Mrs Ryan says; "Disputed this as a variation but we then advised the Respondent to go ahead however no verbal estimate given". The Builder has claimed $250 for this item and it is ordered that the Owners allow that amount for this variation.

- **Variation 21, Supply and install qasair vent kit and install rangehood.**

(l) The Builder said the rangehood was installed into the overhead cupboards by a cabinetmaker who was a separate contractor to the Owners. According to the Builder, neither the venting kit nor the unit were ducted to the outside air by the cabinetmaker. The Builder said he told the Owners and agreed to travel to Ringwood to buy the required kit and install it, which involved disassembling the cook top, removing the rangehood, breaking out an opening in the brick wall, installing the duct and making good. The Builder said the kit cost about $150.00 and it involved four hours work.

(m) Mrs Ryan said that the charge was $290.00. She said: "Respondent argued that this was not part of his work. Respondent had discussions with cabinet maker and then completed work." Her evidence that no verbal estimate was given is accepted.

(n) The Builder's evidence is accepted that this was work undertaken by the Owners' cabinetmaker that he rectified after discussion with the Owners. The Owners must allow the Builder $290.00 for this variation.

- **Variation 22 - Supply additional labour to external lights.**

(o) Mrs Ryan's evidence is that she has accepted a verbal estimate of $70.00 each for four lights and has failed to pay the invoice of $240.00. Given that the invoice is less than the estimate, albeit oral, it is ordered that the Owners allow the Builder $240.00 for this item.

- **Variation 24 - Fit off phone points**

(p) Mrs Ryan's evidence is accepted that the work relating to this variation has not been undertaken. There is no allowance for it.

- **Claimed as a credit by Owners**

17. In addition to the variations allowed by the Builder as credits, the Owners claim:

- **Concrete bricks substituted for clay bricks**

(a) The specification called for the walls of the house and the fences to be constructed of "second hand clay commons". The parties agree that the bricks used have been concrete blocks, also described by the Builder as "rendabricks". There was no variation in writing. The Builder says that the Owners consented to the substitution. The Owners say they did not and their evidence is accepted. The Owners say further that the costs of concrete blocks and their laying is substantially cheaper than clay bricks.

(b) In her final submission Ms Turner said: "No credit is applicable because the price for the concrete bricks was in the quote, and not the price for second hand pressed clay commons." Clause 7.1 of the specification called for "Second hand pressed clay commons" and this submission is not accepted.

(c) As admitted by Mr Coghlan, the Builder's expert, the credit to the Owners for the substitution of concrete blocks for second hand clay bricks is $4,157.00. In considering this figure during the

hearing, the amount which Mr Coghlan suggested should be paid in addition by the Owners ($3,564.00) was also added back, giving a nett difference to Mr Coghlan's figures of $7,721.00, however that is not the basis upon which entitlements are being calculated in this determination.

(d) The Builder must pay the Owners $4,157.00 for this item.

18. It was remarked for the Owners that the Builder did not consult with them about the credits allowed by the Builder, but no submissions were made about alternate sums for these items.

- **Claimed as a refund by Owners**

19. The Owners have paid the Builder for variations 1 to 9, 11 and 16, which according to Mrs Ryan's evidence total $11,630.00. Of this they say they are entitled to have $7,020.00 repaid for the following variations:

Variation Number and Item	Amount	Reason for Dispute by Owners
1. Sashless double hung windows	$380.00	Should have been part of original contract.
3. Frame fix out for storage rooms	$2,000.00	Inconsistent with estimate.
4. Plaster for storage rooms	$1,500.00	Inconsistent with estimate.
6. Sound insulation	$300.00	Should have been part of original contract.
7. Additional work to front fence	$2,000.00	No estimate.
9. Additional brick work to front garden and remove soil	$840.00	No estimate.

20. There is no argument that all these items of work were undertaken by the Builder for the Owners. Further, the Owners have paid for them. S37(3) and s38(6) of the DBC Act both commence: "A builder is not entitled *to recover*[1] any money in respect of a variation …". These sections give owners rights in

[1] Emphasis added

addition to their contractual rights.

21. The Builder is not seeking to recover money; the Owners are attempting to recover money from the Builder for variations not in writing. If they have a right in contract they may do so, but it does violence to the plain meaning of those sections to give the Owners a further right to take back that which has already been paid to the Builder. In the words of Senior Member R Young in *Pratley v Racine* [2004] VCAT 2035 at paragraph 7.16:

> "I take "recover" in the context of Sections 37 and 38 of the Act to mean that a builder secures a judgement in a Court, Tribunal or other adjudication for such variations against the opposition of the owners: *Pavey and Matthews Pty Ltd v Paul* (1987) 162 CLR 221"

22. Variations 1 and 6 might have been recoverable if the Owners had pleaded and proved misleading conduct, but they did not do so. It is also possible with respect to variations 3 and 4 that the Owners have paid more than was discussed with the Builder. Mrs Ryan's evidence is accepted that figures in the region of $1,400.00 and $1,200.00 respectively were originally discussed. However work has been requested, done and paid for. No reason has been pleaded which justifies re-visiting the bargain.

23. In her final submission Ms Turner raised arguments regarding estoppel and waiver which were neither pleaded nor supported by evidence, and they have not been taken into consideration.

24. In the absence of any other reason why the Builder should disgorge these amounts, the Owners' claim for $7,020.00 is dismissed.

25. The nett sum of variations is $2,403.00 to be paid to the Owners.

Whether the builder should be ordered to return to rectify and if not, the measure of compensation for the Owners

- **Should the Builder return to rectify?**

26. Unsurprisingly, Mr Lowe was enthusiastic about the possibility of returning to rectify defects found to exist by the Tribunal. The financial saving to the Builder in rectifying, rather than paying an amount for another builder to rectify, is substantial. At paragraph 61 of his witness statement the Builder said, with respect to chipped render:

> "I offered to fix this at no cost to the Applicants by the have not allowed me to do this work."

27. It is accepted that this statement is accurate, and it is also accepted that the evidence of Mrs Ryan is accurate when she said in her witness statement in reply:

> "Given the number of issues in dispute and the fact that this offer related to only one aspect of my claim and the [then] impending mediation I did not believe it was appropriate for the Respondent to make this offer."

28. Unless there are compelling reasons otherwise, it is usually sensible to afford a builder the opportunity to rectify items that are not in dispute, however in this matter the item the Builder offered to rectify is so minor in the context of all rectification items, that the Owners' failure to allow him to rectify is not taken into account.

29. With respect to the remainder of rectification items, the Builder denied liability for loss or damage to the Owners, either denying the alleged defects, or stating that the Owners had not notified to him of defects before receipt of the application.

30. In his closing submissions, Mr Settle for the Owners said: "The Applicants were never asked whether they are prepared to have the Respondent back to repair the defective work; they are not". I will not order the Builder to return

when the Owners are unwilling to have him complete the work. The issue is therefore whether their attitude is reasonable.

31. As Mr Settle went on to say, the Respondent conceded that a number of the items complained of are defective, but did not do so until the fourth day of the hearing, after the Owners and their witnesses had undergone cross-examination. Further, a number of the concessions were limited to the work being rectified in accordance with the Builder's technique, or the technique recommended by his expert.

32. While this is not necessarily a matter for criticism, the Builder's tendency to act as he saw fit, regardless of the terms of the contract, are a matter or concern. An example is the waterproofing of the west wall. As is discussed in detail below, the specification called for a product called Bituthene – a sheet method of waterproofing – but the Builder used "Conrpo 100" – a paint-on product. There is no evidence that the Builder obtained consent to variation or even discussed substitution of the materials with either of the Owners before going ahead and doing so. Further, the Builder and his expert have recommended rectification using Conpro, rather than removal and replacement with the specified product.

33. In the course of the hearing I asked the Builder if he would be willing to rectify any items ordered by the Tribunal and by any method the Tribunal ordered. His response was that he would for "90%" of the items.

34. The Builder's attitude in ignoring the terms of the contract during construction and again when rectification is contemplated, plus the Builder's consistent refusal to admit most of the defects until well into the trial demonstrates that the Owners' attitude is reasonable in refusing to consent to the Builder rectifying the work.

- **Measure of compensation**

35. The learned authors Dorter & Sharkey[2] say:

> "..if the [owner] denies the [builder] a contractual right to rectify the defects, the [owner's] quantum of damages for breach of contract will generally not be allowed to exceed what would have been the cost to the [builder]: *Pearce & High Ltd v Baxter* [1999] BLR 101(CA, UK)"

36. The difference in this case is that the Owners have reasonably refused to consent to have the Builder rectify outstanding defects. The measure of damages is thus the reasonable cost to them of having an independent builder complete or rectify items which the Tribunal finds are incomplete or defective.

37. In costing the rectification items, it is found that the margins allowed for by Mr Hargrave, expert witness for the Owners, are reasonable.

- **The independence of Mr Coghlan's evidence**

38. Mr Settle criticised the evidence of Mr Coghlan, who gave expert evidence for the Builder about the costs and methods to rectify defective or possibly defective items. A substantial reason for criticism was the allegation that Mr Coghlan's evidence was not arrived at independently, but relied substantially on costings provided by Mr Mangan, a builder, in his capacity as a principal of Mapico Constructions Pty Ltd. Mr Coghlan's estimate (exhibit R7) does state that he was provided with an estimate prepared by Mr Mangan.

39. While a building expert should not be criticised for incorporating costings from a builder who is ready and willing to undertake rectification, it is important to ensure that those costings reflect a reasonable market price, and to acknowledge the degree to which the expert has relied upon the builder.

[2] *Building and Construction Contracts in Australia,* Law Book Co at 11.170

40. It was admitted by the Builder that he did his apprenticeship with Mr Mangan. There were also references in Mr Coghlan's reports to the presence of Mr Mangan when he inspected the house with the Builder. Mr Coghlan referred to Mr Mangan as the Builder's "adviser". It is also clear that there had been a substantial degree of collaboration between Mr Mangan and Mr Coghlan. Nowhere was it clearer than in the same mistakes made in the two sets of costs. For example, both Mr Coghlan and Mapico made the error, in determining the value of the variation for concrete bricks, of allowing to the builder the saving in laying concrete bricks, whereas that sum should have been allowed to the Owners.

41. Because of this perceived lack of independence of Mr Mangan from the Builder and therefore of Mr Coghlan in this matter, Mr Coghlan's evidence has been given less weight than would usually be the case.

42. Mr Coghlan was also criticised by counsel for the Owners for including a table of costed items listing each items as, in his view, accepted, rejected or arguable. This table was of assistance and Mr Coghlan is commended for including it. Experts sometimes fall into the trap of not costing items which they believe are not sustainable, thereby leaving the Tribunal with evidence from the other party only. Full costing with a clear indication of which items the expert considers are unacceptable or doubtful, is of assistance.

Work alleged to be defective or incomplete

43. The item numbers which appear in the headings are from the report of 8 July 2005 of Mr Laurie Hargrave, a building and cost consultant engaged for the Owners.

- **Efflorescence to façade of house and garden walls – item 2**

44. On the fourth day of the hearing the Builder admitted that the render on the

garden walls (described as “fences”) is a defect. Until then the Builder had pleaded “Any efflorescence is either normal for such rendering or within industry acceptable tolerances”. The Builder’s admission did not extend to the façade of the house.

- **What result did the contract call for?**

(a) The specification called for 3 coats of acrylic render. As mentioned above, it is agreed by the parties that Mrs Ryan asked the Builder to provide render colour similar to that at Walnut Street. The result at Walnut Street is “distressed”, that is, it looks as though the building is substantially older than it is. Mr Lowe gave evidence that he asked Mrs Ryan if the distressed look was acceptable to her and she said it was. Mrs Ryan disagreed, but it is inconceivable that the effect the Owners wished to achieve was a flat even colour, when the model they presented to the Builder was the opposite. The colour at Walnut Street is not even, there are patches which look similar to mould and there are prominent fine lines in some areas, larger than but similar to crazing in china.

(b) I note in particular that there are marks beside and below the fixed lights which appear to be at least partly composed of copper sulphate. The same model of light fitting has been used both at the subject house and at Walnut Street, and the same staining is visible. These stains were not complained of. I therefore find that a distressed appearance is not inconsistent with the requirements of the Owners, but only if the result is consistent with age rather than poor building practise.

- **The result achieved – the house**

(c) Having visited the house and the property at Walnut Street, and examined photographs of the house, I find that the appearance of the house, as distinct from the garden walls, is acceptable. The only areas on the house which were brought to my attention were on the south face, and the only variations in colour visible was slight lightening below the first floor window sills. The result was not unattractive and did look like the result of age rather than poor building practise.

(d) In the absence of compelling contradictory evidence, the Builder's evidence is accepted that the render consisted of two coats of acrylic and a top coat of the cement-based render. It is found in particular that apart from efflorescence, the ability to see the bricks of the garden walls and some chipping, there is no evidence that the render is defective.

(e) Mr Mudge gave evidence on behalf of the Owners that concrete blocks are more likely to be associated with efflorescence as they contain more cementitious material. His evidence is accepted. Mr Coghlan said that second hand bricks are more likely to contain salts associated with efflorescence than new clay bricks. In circumstances where there was no indication that he was going to give such evidence in his witness statements, less weight is attributed to it that would normally be attributed to a witness of Mr Coghlan's experience and reputation.

(f) Mr Mudge raised the possibility that there could be further efflorescence, particularly on the house, in future. In his report of 2 June 2004 he said at paragraph 1:

"The building and retaining walls to the southern aspect were of rendered blockwork and that material displayed white streaks on many vertical faces, particularly those of the retaining walls *with minor occurrences only on the residence proper*[3]."

(g) And at paragraph 3.2:

"On the residence itself the noted minor deposits are present beneath doors and windows where there is a small horizontal ledge present which allows the above detailed absorption procedure to occur, however should the walls of the residence have copious quantities of water applied (in the form of heavy and persistent rain) then it is possible that similar deposition of efflorescence will occur in these areas."

(h) The possibility that there might be a defect falls short of the burden placed upon the applicant of proving that there is one, either latent or patent. Nevertheless, it is accepted that the unauthorised use of concrete blocks means that the Owners have not got what they bargained for, and in particular the house is more vulnerable to the possibility of efflorescence. In addition to entitlement to a variation to represent the saving to the Builder of using this product, they are entitled to a sum to compensate them for their disappointment over the increased vulnerability of the house to efflorescence. In accordance with the decision in *Bellgrove v Eldridge*(1954) 90 CLR 613 it is found that rather than allow an expensive means of rectification, it is reasonable to order for the payment of a sum that will place the Owners in the position they would have occupied if the Builder had not breached the contract. The Builder must pay the Owners $3,500.00 for this item.

- **The result achieved – the garden walls**

[3] emphasis added

(i) The fences and garden walls were another matter entirely. As Ms Ryan said, they looked as if someone had poured milk over the horizontal surfaces, and it had dribbled down the sides. Further, the outline of the brick sub-surface is clearly visible on the garden walls, although it is not on the house walls.

(j) The Owners are entitled to the cost of rectification of the render on all walls south of the three storey wall which contains the garage door.

- **The difference between the house and the garden walls**

(k) In his final submission Mr Settle said:

> "Mr Hargrave [expert *for the Owners*] gave evidence that if two adjoining walls are rendered on consecutive days they will not look the same. The Respondent is proposing to render all but the building. There is no doubt that if that is done, the render to the building will look different to that of the remaining structure."

(l) Mr Hargrave's evidence is accepted but again, the possibility of a slight difference in appearance does not justify the great cost of providing scaffolding and/or cranage to enable the walls of the house to be re-rendered. In accordance with the rule in *Belgrove v Eldridge* the Owners are entitled to compensation for the fact that the result they receive will not be quite what they bargained for. The Builder must pay the Owners $1,500.00 for this item.

- **Cost of rectification**

(m) Mr Hargrave has costed rectification of the house and walls together at $66,199.92. $28,000.00 of this sum, plus GST and a 25% profit margin, a total of $38,500.00, is for scaffolding to the

house. Mr Hargrave's report does not indicate how much of the cost relates to the house, and how much to the garden walls. It follows that the cost of remaining work and materials to the house and the garden walls is $27,699.92.

(n) Mr Coghlan has calculated the cost of render to the house as $6,330.00 and to the garden walls as $1,164. He has also adopted Mr Mudge's base quotation for the application of sealer to the house and garden walls. Of the $6,33000, $3,534.96 represents the cost other than scaffolding and related costs. Mr Coghlan has therefore allocated 32.93% of the cost, exclusive of scaffolding, to the garden walls.

(o) Using Mr Hargraves costs and Mr Coghlan's proportions, the Builder must pay the Owners $9,210.00 for rectification of render to the garden walls.

- **Chipped render – item 3**

45. This item was admitted by the Builder on the fourth day of the hearing. Mr Hargrave's costing is accepted. The Builder must pay the Owners $770.00 for this item.

- **Garage internal, main sump pit – item 4.2**

46. This item was admitted by the Builder on the fourth day of the hearing. Mr Hargrave's costing is accepted, with the exception that the installation of a back-up pump was not called for in the design and is not so obvious that a reasonably competent builder would necessarily undertake this work. The cost of a new replacement pump is not allowed either. Two hours of electrician's time is allowed.

47. The Builder must pay the Owners $3,705.00 for this item.

- **Garage – external pit and strip drain– item 4.12**

48. The Builder has admitted that the strip drain needs to be rectified.

49. The external pit was designed to allow silt to settle in order that the relatively clean water would drain to the internal sump pit. The Owners' submission is accepted that the bottom of the silt pit had to be below the level of discharge to the sump pit, but it is not. Their evidence is also accepted that the silt pit is of insufficient depth to enable the agricultural drain to the west of the house to drain properly into it.

50. Mr Hargrave's costing calls for the disconnection of the pump and relocation of wiring to inside pit for bell system. Disconnection is allowed, relocation is not. One hour of electrician's time is allowed for this item

51. Based on Mr Hargrave's costings, the Builder must pay the Owners $5,618.00 for these items.

- **Subfloor drainage – perimeter excavation install ag drain – item 4.19**

52. The design of the sub-floor space to the north and east of the garage is for walls which do not extend all the way to garage floor level, and from which the clay soil is battered at a 45 degree angle down to a spoon drain parallel with the north and east walls and a little lower than the level of the garage floor. As designed, the L-shaped spoon drain was to run to a pit at its junction in the north east corner, and the water collected there was to be piped under the garage floor, south-west to the sump pit, from which it would be pumped into the storm water system. The floor plan of the design is on drawing 1090-3 by Architecture Works and the batter is shown on sections 1-1 and 2-2 of drawing

7.

53. The spoon drain is not operating as designed. Instead of the two arms of the drain falling to the north east corner pit, the whole drain has been built to drain to the south east, but the drain is not very efficient and is blocked by clay residues. The Builder did not seek the permission of the Owners to vary the design in this manner. It is found that it is not acceptable building practice to leave the drain in a condition where, at best, it must be regularly cleared of excess clay by the Owners.

54. It is obvious from inspection and the parties agree that the angle of the sub-floor clay walls is not 45 degrees, but is significantly steeper. There is also evidence of clay lumps falling off the clay walls and into the spoon drain.

55. Mr Hargrave's costings are based on:

- disconnection, removal and reconnection of the central heating system from the work area to enable the work to be undertaken,
- hand digging soil to provide a 45 degree slope, and
- re-digging the existing drain to have it fall to the existing pit. The open spoon drain would be replaced with an agricultural drain.

56. Mr Hargrave's evidence is accepted that the spoon drain as constructed is inadequate and that the costs of either constructing the agricultural drain or properly reconstructing the spoon drain are very similar.

57. Mr Coghlan gave evidence that excavating to a 45 degree batter is not necessary and might even endanger the stability of the perimeter walls of the house. As indicated at the hearing, this late oral evidence which was not foreshadowed in the witness statements provided by the Builder, has not been taken into account for the purpose of costing, but is something the Owners are urged to consider. There is evidence that the method of rectification proposed

by Mr Bonaldi and costed by Mr Hargrave will overcome the Builder's failure to construct the spoon drain in accordance with the design.

58. Mr Hargrave's costing is accepted, and the Builder must pay the Owners $4,952.75 for this item.

59. It is noted that Mr Bonaldi has made recommendations about drainage which far exceed the solutions for which it is ordered that the Builder must pay. While the excellence of Mr Bonaldi's proposed solutions are not doubted, the Builder is only obliged to build in accordance with the contract and with reasonably competent building practice.

- **Garage plaster walls replace – item 4.28**

60. This item was admitted by the Builder on the fourth day of the hearing. Mr Hargrave's costing is accepted. The Builder must pay the Owners $3,835.30 for this item.

- **Ag drain between north wall of house and north boundary wall – item 5.2**

61. Architecture Works drawing 1090-3 shows that agricultural drains were to be installed on the east, north and west sides of the house. In his report of 22 June 2005 Mr Hargrave said at 3.7:

> "From an inspection under the sub floor water has been entering the building along the north, east and west walls. The west wall concerns will be dealt with separately. However , in an attempt to stop the water entering along the north and east walls external drains should be installed **outside** the home."

62. He then went on to suggest that a deep agricultural drain should be installed between the house and the northern retaining wall for the full width of the house. This is more than is provided for under the building contract. It is accepted that the north and east walls are not designed to keep the sub-floor

area completely dry. Having regard to Architecture Works drawing 1090-7, sections 1-1 and 2-2, the founding depth of the north wall is at least one meter higher than the surface of the garage floor. Even if the agricultural drain is in place in the position it is designed for, there remains a meter of undrained soil that can allow water to travel under the wall and enter the basement area. The incursion of water into the sub-floor area alone is therefore not enough to establish that this drain is insufficient.

63. Mr Hargrave's evidence is accepted that:

> "The AG drain installed by the builder, across the north wall of the house is actually holding some 40-50 mm of water which cannot drain away through the piping but is seeping down to under the concrete footings."

64. The Owners are entitled to what the contract affords them; a drain at the base of the footings which follows the footprint of the house. Mr Hargrave's evidence under re-examination is accepted that the drain should be approximately 700 mm below ground surface level, but that it is approximately 300 mm deep.

65. In his costing Mr Hargrave suggested that the drain should be 700 mm north of the house line. Mr Coghlan said that if this method were used, the retaining wall would need to be shored up to prevent collapse. Mr Coghlan's evidence in this matter is accepted, but in the absence of evidence about the need for shoring when the drain is against the footings, it is assumed that it is not. Mr Hargrave's evidence of the cost of installing the drain at a greater depth is otherwise accepted.

66. The Builder must pay the Owners $3,565 for this item.

- **Ag drain to east wall using strip drain – item 5.9**

67. The Builder has conceded that the drain needs to be connected, not that a new

one needs to be installed. As with the drain to the north, the design does not contemplate a completely dry sub-floor area. However Mr Hargrave's evidence is accepted that this drain was 30mm above the footings, when good building practice dictates that it should have been adjacent to the base of the footings; at least 300 mm lower.

68. Mr Hargrave's solution provides an outcome which is significantly better than the design the Builder was obliged to build to. Mr Hargrave's solution is costed by him at approximately $5,900.00. In the absence of better evidence of the cost of reinstating the drain as it was designed, the Builder must pay the Owners $3,500.00 for this item.

- **Ag drain to under front terrace and rockery garden – item 5.17**

69. This item was admitted by the Builder on the fourth day of the hearing. Mr Hargrave's costing is accepted. The Builder must pay the Owners $4,676.50 for this item.

- **Front planter box – item 6**

70. The Builder admitted the crack in the planter box and the protruding electrical conduit, but not the tanking. It is found that in order to provide a reasonably competent job, the tanking is necessary. It is noted that there are no electrical wires obvious that are not in conduit. Mr Hargrave's technique and costing is accepted, with the exception of the allowance for the electrician. The Builder must pay the Owners $2,371.18.

- **Ceiling fan to laundry – item 7**

71. This item was admitted by the Builder on the fourth day of the hearing. Mr Hargrave's costing is accepted. The Builder must pay the Owners $1,526.25 for this item.

- **Hot water service replacement – item 8**

72. The evidence of the Owners is accepted that the hot water service was stolen from site before the Owners took possession of the house from the Builder. Under clause 6.2 of the building contract that Builder was obliged to obtain a contracts works policy which can be expected to cover all materials on site. Clause 6.3 requires the Builder to obtain insurance which, among other things, indemnifies the Owners against liability for loss of property. While it is usually loss of property of others that will be covered by clauses such as 6.3, it is noted that until owners gain possession of houses it is difficult if not impossible for them to obtain insurance for items such as the hot water service they provided. Both policies were obliged to be held until the earlier of completion or the Owners taking occupation. As found below, both occurred on the same date.

73. If the Builder failed to obtain such insurance, he is obliged to pay the cost of the item that should have been insured.

74. The Builder must pay the Owners $1,266.92 for this item.

- **West wall, repairs to waterproofing – item 10**

75. On the fourth day of the hearing the Builder accepted responsibility for the leaking west wall, but asserted that it should be rectified using “Conpro”.

76. The west wall from the level of the garage floor up to the ground floor level acts as a retaining wall as well as a structural member for the house above. The specification called for a double-brick wall, with the cavity filled with cement grout up to the top of the retaining wall, and the outer skin lined on the west side with Bituthene to provide waterproofing. Instead, it is accepted that the Builder did not grout to ground level, and he admits that he used a product

called “Conpro” which is neither specified nor the subject of a variation.

77. The Builder said that he used Conpro because the outer skin of the west wall was not dry enough to apply Bituthene and Conpro was better in the circumstances. The Builder’s assertion is not accepted, although it is noted that Mr Bonaldi said at page 5 of his report of 20 January 2005:

> “The architect’s requirement was also to lay Bituthene under the footings and basement slab. However this is impossible since Bituthene is a sheet membrane with adhesive face than can not be stuck onto the 50mm sand bed.”

78. The Conpro was not installed up to ground level, but stopped at leat three brick courses below, giving a ready means of access of water into the west wall. It is also noted that there is a crack at least one meter below ground level which extends through the Conpro and the outer skill of the wall, and there is a pipe penetration which has not been sealed to prevent water access.

79. Mr Bonaldi’s evidence is accepted that water flows into the hollow part of the wall and down through the unfilled cavity to exit into the garage. The Owners are entitled to have the wall cleaned of Conpro, filled with cement grout to ground level, repaired to eliminate the crack and the gap around the pipe penetration and lined with the specified product.

80. Mr Hargrave’s technique and costing is accepted for this item. The Builder must pay the Owners $13,295.91.

- **Stormwater downpipes location – item 11**

81. This item was accepted by the Builder on the fourth day of the hearing with the exception of the down pipes to the south side of the house. The Builder said that he was instructed by the Owners to install the down-pipes that were to be on the south ends of the east and west walls, around each corner and to be located on the east and west ends of the south wall instead. The Owners

contradict this evidence and their evidence is preferred.

82. The techniques and costings of Mr Hargrave are accepted. The Builder must pay the Owners $1,457.57 for this item.

- **Wall tiling to laundry, bathroom and en suite not sealed – item 12**

83. The Owner's evidence is accepted that the builder has failed to use flexible sealant at the corners of panels of tiles and around taps and outlets. Mr Hargraves costing is accepted. The Builder must pay the Owners $312.12 for this item.

- **Cabin latches on French doors – item 13**

84. This item was admitted by the Builder on the fourth day of the hearing. Mr Hargrave's costing is accepted. The Builder must pay the Owners $110.00 for this item.

- **Chipped window pane – item 14**

85. This item was admitted by the Builder on the fourth day of the hearing. Mr Hargrave's costing is accepted. The Builder must pay the Owners $206.25 for this item.

- **External dampcourse in brickwork covered by render - item 15**

86. This item was admitted by the Builder on the fourth day of the hearing, but with the proviso that the technique recommended by Mr Coghlan should be used. This technique calls for great care and skill and I was not convinced that most tradespeople would be able to execute the work without causing more extensive damage to the render. Mr Hargrave's recommended technique and costing is

accepted. The Builder must pay the Owners $1,230.62 for this item.

- **Exhaust fans – timer delay switch – item 16**

87. This item was admitted by the Builder on the fourth day of the hearing. Mr Hargrave's costing is accepted. The Builder must pay the Owners $742.50 for this item.

- **Laundry – ducting for clothes dryer – item 17**

88. This item was admitted by the Builder on the fourth day of the hearing. Mr Hargrave's costing is accepted. The Builder must pay the Owners $171.88 for this item.

- **Cracking in ceiling plaster**

89. This item was withdrawn by the Owners.

- **Cost to rectify, excluding preliminaries**

90. The total cost to rectify is $62,523.75.

- **Contract preliminaries and total cost of rectification**

91. The Builder has admitted that preliminaries are payable, subject to the value of the remainder of the cost to rectify. On the basis of the total cost to rectify, excluding preliminaries, the preliminaries are:

o 2 No copies of contract to complete works	$ 30.00
o Builder's Warranty Insurance	$1,700.00
o Permit application fees and inspections	$1,000.00
o State Government Building levy (0.128% of Building cost)	$ 80.00
o HIH Building permit levy (0.032% of Building cost)	$ 20.00
o Council asset inspection fee	$ 150.00
o Profit margin 25%	$ 745.00
Total preliminaries:	$3,725.00

92. The total cost of rectification is therefore $66,248.75.

Disconnection and re-connection of heating due to flooding of garage on 21 April 2005

93. In accordance with the evidence of Mrs Ryan, the Builder must pay the Owners $132.00 for this item.

Alleged delay in completion of the works

94. The building period was 238 days. The Owners plead that the end of the building period – the date by which the house should have been completed – was no later than 17 March 2004. They also say that at the date of the application to the Tribunal, which was 25 November 2004, the house was still not complete. They claimed liquidated damages for 15.57 weeks, ending on 3 July 2004 when according to Mrs Ryan's witness statement in reply, the Owners took possession of the house.

95. According to appendix item 17 of the building contract, the amount for liquidated damages was $250.00 per week and pro rata for parts of weeks. The total claimed by the Owners is $3,892.82.

96. The Builder pleads that "…after allowance for delays and variations, the building period ended on no later than 2nd July 2004". The Builder claimed that the works were completed on 5 May 2004.

97. In her final submission, Ms Turner said that the building period did not start to run until the later of 23 July or 14 days from the date of the building permit, but that is not what clause 8.1 provides. The words "the later" do not appear there. By filling in a date in "anticipated commencement date" in 9.1 of the appendix, the Builder undertook to start on that day, and time runs from that day. It therefore follows that the unextended date for completion was by 17 March 2004.

98. Clause 18 of the contract provides that the Builder who fails to bring the works to completion by the completion date must pay or allow the Owner liquidated damages. "Completion date" is the date determined in accordance with clause 8.4. Under 8.4, completion date is the commencement date, plus the construction period, plus all extensions of time. Under clause 15.1 of the contract various occurrences, such as an act, default or omission by the Owner, give the Builder an entitlement to a time extension if the Builder notifies the Owner of the cause and likely length of the delay within a "reasonable time" and/or gives written notice of the effect of the delay upon completion within 14 days of becoming aware that completion will be delayed.

99. There were no written requests for time extensions and no evidence of oral notifications either. Further, the Builder had undertaken to provide the Owners with a "project plan" which he did not do, and he admitted under cross examination that the alleged delay in obtain the cabinets for the kitchen did not cause him to stop the job. The Builder is therefore not entitled to any time extensions.

100. Under clause 1 of the contract:

> "Completion – means when the Works to be carried out under the Contract:
>
> - have been completed in accordance with the Plans and Specifications; AND
> - if a building permit was issued for the Works, the Owner is given an Occupancy Permit …"

101. An occupancy permit was issued on 16 April 2004, but it excluded the back retaining wall. A revised occupancy permit was issued on 30 June 2004 which included the rear retaining wall.

102. The occupancy permit is evidence that the work was completed on that day, as submitted by Ms Turner, but it is not conclusive evidence. Both bullet points of the definition of completion must be satisfied. The question is therefore when the house was sufficiently complete to satisfy the first bullet point.

103. Given that the lack of an occupancy permit which included the retaining wall meant that the area to the rear of the house could have been dangerous, it is found that the first date upon which the house could have reached completion was 30 June 2004. However the Builder failed to notify the Owners of receipt of the unqualified occupancy permit until the hearing. They are therefore entitled to liquidated damages until they took possession, being $3,892.82.

Physical inconvenience and mental distress

104. Although claimed as an item in the Owners' prayer for relief, it was not otherwise pleaded and no evidence was led. The claim for physical inconvenience and mental distress is dismissed.

Summary of amounts awarded

105.

	Builder's Entitlements	**Owners' Entitlements**
Contract sum	$309,500.00	
Less Paid by Owners	$302,017.00	
Total of Builder's entitlements	$7,483.00	
Nett variations		$2,403.00
Damages instead of rectification		$5,000.00
Cost of rectification		$66,248.75
Liquidated damages		$3,892.82
Disconnection and reconnection of heating system		$132.00
Total of Owners' entitlements		$77,676.57
Less total Builder's entitlements		$7,483.00
Total payable to the Owners		$70,193.57

Interest

106. I have not yet been addressed on behalf of the Owners regarding interest. This issue is reserved and there is leave to apply.

Notes on evidence

107. Evidence was given in the form of witness statements. Each was sworn to at the hearing and then the witness was cross-examined. At the commencement of evidence given by Mr and Mrs Ryan, Counsel for the Builder handed up "Respondent's objections to evidence of applicants" listing paragraphs from their witness statements and reasons for objections. For example, objection 8 to the evidence of Mr Ryan is "H, C". The key to these objections indicates that H

is “hearsay”, and C is “Not proper evidence of conversation”. Although, pursuant to s98 of the *Victorian Civil and Administrative Tribunal Act* 1998 the Tribunal is not bound by the rules of evidence and may inform itself as it sees fit, such submissions are taken into account on the question of weight.

108. In her closing submission Ms Turner suggested that a failure by the Owners’ lawyers to cross-examine the Builder’s witnesses on certain matters offended the rule in *Brown v Dunne*.[4] This submission is not accepted. The rule in Brown v Dunne affects a party who cross examines before putting its evidence in chief, such as the respondent, because that party must put to the applicant’s witnesses any matters which will later be contradicted in direct evidence. Where evidence was given on the same point for the Owners and the Builder, I am not constrained by this rule to prefer one over the other.

109. I was not assisted by Ms Turner’s assessments of whether witnesses were impressive, and was not influenced for or against any witnesses upon who she passed comment. Remarks from both counsel drawing attention to inconsistencies in witnesses’ evidence were of assistance.

Consultants’ fees

110. I indicated in the hearing that any claims for consultants’ fees would be dealt with as part of a claim for costs.

Costs

111. Costs are reserved and there is liberty to apply.

SENIOR MEMBER M. LOTHIAN

[4] (1894) 6 R 67