

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D394/2007

**CATCHWORDS**

Domestic Building – claim by the builder for variations – failure to seek variations pursuant to clause 16.0 of the building contract – failure to comply with sections 37 of the *Domestic Building Contracts Act* 1995 by giving notice of a claim for a variation – claim by the owner for the cost of rectification defects – failure by the builder to follow the plans and specifications – whether the cost of rectification of some defects was unreasonable – whether compensation more appropriate - *Bellgrove v Eldridge*

<b>APPLICANT</b>	Sayed Rustom (trading as Snab Home Improvements)
<b>RESPONDENT</b>	Mohammed Ismail
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Judge P Misso, Vice President
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	6, 7, 8,11, 12, 20, 21 & 22 September 2010
<b>DATE OF ORDER</b>	12 October 2010
<b>CITATION</b>	Sayed Rustom (trading as Snab Home Improvements) v Ismail (Domestic Building) [2010] VCAT 1896

**ORDER**

1. The Applicant pay the Respondent the sum of \$99,546.00.
2. Any application for costs is to be made by giving 7 days written notice by the party making the application on the other party and to the Associate to His Honour Judge Misso on or before 8 November 2010.

Judge P Misso  
**Vice President**

**APPEARANCES:**

For Applicant

Ms S Kirton

For Respondent

Mr J Shaw

## REASONS

### Introduction

- 1 Before the Tribunal is a claim and cross-claim arising out of a domestic building contract.
- 2 The applicant is a builder. The respondent is the owner of land at 3 Aylesbury Drive, Warrandyte.
- 3 Ms Kirton of counsel appeared for the applicant. Mr Shaw of counsel appeared for the respondent.
- 4 The proceeding was heard by a member of the Tribunal which began on 30 June 2008 and concluded on 22 July 2008. Reasons were published and orders were made on 3 December 2008.
- 5 The applicant appealed. The appeal was heard by a Justice of the Supreme Court. The appeal was upheld. Orders were made remitting the proceeding for re-hearing by the Tribunal.
- 6 At the commencement of the proceeding on 6 September 2010 before me, Mr Shaw and Ms Kirton informed me that the preferred course of the applicant and the respondent was to rely on the Tribunal Books which were prepared for the first hearing; the transcript of that proceeding which occupied over 1000 pages of evidence; the exhibits tendered during the previous hearing, and some further exhibits.
- 7 The only exception was that Ms Kirton informed me that she was waiting upon an opinion from Mr M Mitchell , building consultant regarding estimates of the cost of various items which the respondent says he is entitled to recover from the applicant.
- 8 The evidence which was adduced before me on the rehearing is as follows:
  - Mr Mitchell, building consultant gave evidence and was cross-examined.
  - The applicant tendered the following exhibits:
    - tax invoices relevant to the delivery of bricks to the land: Exhibit A1
    - cheque statements covering the period from 1 November 2005 to 30 November 2005: Exhibit A2
  - the respondent tendered the following exhibits:
    - diary notes of the respondent relevant to payments made to the applicant: Exhibit R1
    - letter of the respondent to the applicant dated 18 January 2007: Exhibit R2

- facsimile transmission from Mr P Leong of Princeton Design Group Pty Ltd to the respondent dated 9 March 2007: Exhibit R3
  - three dimensional pictorial illustration of the respondent's proposed domestic dwelling: Exhibit R4
  - invoice of B.V. Gow Plumbing Pty Ltd dated 3 April 2008: Exhibit R5
  - drawings made by Mr Lees, building consultant re highlight windows and costing: Exhibit R6
  - further drawings made by Mr Lees re highlight windows and costing: Exhibit R7
  - notes taken by Mr Mitchell at a site inspection conducted by him on 18 August 2010: Exhibit R8
  - letter of instruction of Graham Legal to Mr Mitchell dated 14 July 2010: Exhibit R9
  - hand written annotations made by Mr Mitchell on the reports of Mr Lees: Exhibit R10
- in addition to the foregoing Ms Kirton identified the other evidence before the Tribunal relevant to the applicant's case:
    - the witness statements of the applicant dated 30 May 2008 with 23 Exhibits; 13 June 2008; a further statement dated 13 June 2008 with 3 Exhibits; 15 June 2008 with 15 Exhibits, and 17 July 2008.
    - the witness statement of Nahiba Rustom dated 30 June 2008.<sup>1</sup>
    - the witness statement of Banda Rostum dated 30 June 2008.<sup>2</sup>
    - the witness statement of Boulos Saad dated 30 June 2008.
    - The Applicant's Tribunal Book.
  - in addition to the foregoing Mr Shaw identified the other evidence before the Tribunal relevant to the respondent's case:
    - the witness statements of the respondent dated 29 May 2008; 10 June 2008 and 15 July 2008.
    - the witness statements of Mr Leong dated 29 May 2008; 10 June 2008 and 24 June 2008.

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<sup>1</sup> Paragraphs 5, 10, 13, 14 and 15 were deleted as inadmissible.

<sup>2</sup> Part of paragraph 6 was deleted as inadmissible. The applicant and the respondent agreed to be bound by the conclusion reached by the previous Tribunal member that the contents of paragraph 9 was to be given limited weight.

- the witness statement of Mr R Melchiori, building surveyor dated 2 July 2008.
  - the respondent's Tribunal Book.
- 9 Ms Kirton and Mr Shaw informed me that the applicant and the respondent intended to undertake the rehearing by reference to the transcript which occupied 1032 pages of evidence and submissions. They also informed me that they intended to rely on the material contained in the Tribunal Books which contained, among other things, witness statements; exhibits; plans and miscellaneous documents relevant to the issues raised by the applicant and the respondent.
- 10 I decided not to give each of the documents in the Tribunal Books separate exhibit numbers because of the number of documents. I accepted the submissions made by Ms Kirton and Mr Shaw that they simply form part of the evidence in addition to the transcript.

### **The Formation of the Contract**

- 11 The applicant and the respondent were introduced through Mr Po Leong. Mr Leong is an architectural draughtsman. The applicant was introduced to Mr Leong in about 1996 by Mr Leong's former employer.
- 12 Mr Leong approached the applicant on land in Preston and showed him plans which Mr Leong had prepared for the building of a domestic residence on the respondent's land.
- 13 The applicant was concerned to understand more about the proposed building work. Mr Leong provided him with plans he had prepared numbered A.001, A.003, A. 004, and A.005 and engineering plans prepared by Structural Systems Pty Ltd dated 18 July 2005.
- 14 The applicant's concerns were also directed to knowing something about the respondent's financial circumstances. It was at that time that Mr Leong described the respondent as his uncle. He says he would be supervising the building work on behalf of the respondent.
- 15 When the applicant was satisfied of the respondent's capacity to meet the cost of the building work he indicated to Mr Leong that he would prepare a quote. It was at that time that Mr Leong introduced the subject of a sum of commission payable to him being included in the quote which the applicant intended to prepare.
- 16 The applicant says that he was prepared to include a sum for commission, but to a limit of \$10,000. Mr Leong encouraged the applicant to increase the sum of commission beyond that sum, but the applicant refused. An agreement was then struck between them that the applicant would pay Mr Leong \$10,000 by way of commission.
- 17 The applicant then began investigating what the building work involved. He obtained a price for the necessary steel work. He enquired of Mr Leong whether the building was to be constructed by double brick work to all

external walls. Mr Leong informed him that the respondent did not want double brick because of the cost, and that the applicant should follow Mr Leong's architectural drawings which required brick veneer only.

- 18 On the footing of the foregoing the applicant prepared a quote which he signed on 4 November 2005, and which the respondent signed on 7 November 2005.<sup>3</sup> The quote was to undertake building work to lock-up stage.
- 19 The quote is in writing bearing quote no. 163 on the letterhead of the applicant. It contains a number of hand written additions each of which were initialled by the applicant and the respondent. It also contains hand written variations.
- 20 The first variation is for the preparation of the site to base stage at a sum of \$2500. The second variation is relevant to achieving an energy rating at a cost of \$4200.
- 21 The price quoted for the building work before the introduction of the two variations was \$275,000. The variations brought the price quoted up to \$281,700.
- 22 The quote was submitted to the respondent. He accepted the quote. Subsequently, the applicant and the respondent executed a New Homes Contract on 18 October 2005 which incorporated the quote and set out the terms upon which the parties intended to be bound ("the building contract").
- 23 The building contract provided that the time for completion of the building work to lock up stage was 210 days with an allowance for delays for inclement weather, days off, and due to the nature of the building work.

### **Mr Leong**

- 24 The respondent appointed Mr Leong to act as his agent to liaise with the applicant while the building work was being undertaken by the applicant. The applicant understood that Mr Leong had been appointed as the respondent's agent.
- 25 However, the applicant and the respondent disagree regarding the extent of the authority which Mr Leong was to exercise, and did exercise, in the function that he performed as the respondent's agent.
- 26 The respondent authorised Mr Leong to monitor the progress of the building work; to liaise with the applicant with respect to progress of the building work; to deal with issues which might arise from time to time relevant to the applicant's conduct of the building work, and to liaise with both the applicant and the respondent should any variations to the contract be sought by either the applicant or the respondent.

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<sup>3</sup> There is an earlier quotation also signed by the applicant and the respondent. It was superseded by this quote.

- 27 The applicant, on the other hand, formed the opinion that Mr Leong was the applicant's project manager. He reached that conclusion not because the respondent or Mr Leong chose to describe Mr Leong's role in that way, but because of the way Mr Leong conducted himself in liaising with the respondent, and in the provision of instructions to the applicant when issues arose which required a decision to be made for the building work to progress.
- 28 Mr Leong agreed that he was engaged by the respondent as his agent in connection with the building work. In general terms he agreed with the description of his role given by the applicant and the respondent.
- 29 In the end I consider that it is unnecessary for me to determine whether Mr Leong was a project manager or that the role he played required any other particular description. It seems tolerably clear from the evidence of the applicant, the respondent and Mr Leong himself that he was intimately involved as a conduit for both the applicant and the respondent when issues arose which required a decision to be made for the building work to progress.
- 30 The nature of the role played by Mr Leong will become clearer in the course of these reasons as I deal with the claims made by each of the applicant and the respondent.

### **The Applicant's Claim**

- 31 The applicant makes a number claims against the respondent. Each claim is a micro dispute requiring an individual finding. I intend to deal with each claim/issue in the order they were raised by the applicant.

### **The Building Permit**

- 32 Clause 18.0 obliged the applicant to obtain the building permit. It is in the following terms:

"Unless shown otherwise in Items 4 and 5 of Schedule 1 the **Builder** has included in the **Contract Price** fees payable for the building permit and planning approvals."

- 33 Item 5 in Schedule 1 required the applicant to obtain the building permit within 14 days of the date of the contract.
- 34 The applicant says that in about November 2005 Mr Leong made a request for money to pay a building surveyor. The applicant invited Mr Leong to his home. He gave Mr Leong a cheque bearing number 764 and dated 4 November 2005 for \$3854.00 payable to Mr Melchiori, building surveyor.
- 35 The applicant says that the request for money to pay the building surveyor was for building permits for a job in Preston and the building work for the respondent.
- 36 A building permit was issued to the respondent bearing number BS 1067/06/0143 dated 24 November 2005. The applicant did not receive a receipt for payment of the building permits.

- 37 The applicant referred to a photocopy of a cheque butt confirming that he gave such a cheque for that sum to Mr Leong payable to Mr Melchiori for building permits.
- 38 The respondent has given entirely contrary version. He says he gave sufficient moneys to Mr Leong to pay for the building permit, and that Mr Leong then went ahead and obtained it. Mr Leong confirmed that he in fact physically obtained building permit.
- 39 Mr Melchior says that the cost of the building permit was \$2800. It was paid in two instalments. The first instalment was \$800 received by him on 24 November 2005, and the second instalment was \$2000 received by him on 29 November 2005.
- 40 I think it is more likely than not that the respondent paid for the building permit for the following reasons - firstly, Mr Leong has given entirely plausible account of receiving monies from the respondent and the method of payment to Mr Melchiori by two instalments; secondly, the respondent says that he gave moneys to Mr Leong consistent with the amount required to obtain me building permit, and thirdly, it strikes me as very odd that something as important as a receipt was not kept by the applicant.

#### **Timing of the Works**

- 41 The applicant and the respondent agree that the applicant commenced the building work on or about 5 December 2005. The building contract required the applicant to complete the work on or about 3 July 2006, which is 210 days post 5 December 2005.
- 42 There seems to be little disagreement between the applicant and the respondent that the applicant did not complete the building work by 3 July 2006, but was still undertaking work by January 2007.
- 43 Schedule 1 of the building contract provides an entitlement to the respondent for \$500 per week as agreed damages for late completion of the building work.
- 44 The respondent claims that he is entitled to \$500 per week from 3 July 2006 until January 2007 when he claims that the applicant abandoned the building works.
- 45 The respondent says that he met the applicant on the land on 23 December 2006 at which time the applicant made a request for some money. He says that the applicant did not return to the land until 24 February 2007. Mr Leong says that the applicant abandoned the building works altogether in or around late February 2007.
- 46 The respondent says that he was renting in accommodation and incurring storage costs while the building work is being undertaken by the applicant. As a result of the applicant abandoning the building work, and not attending to rectification work which the respondent wanted the applicant to attend to, he took possession of the land. Mr Leong says that he attempted to have the

applicant return to the land to perform some rectification work. The applicant failed to do so after which he says the respondent moved into the house.

- 47 The respondent says that as a consequence of the conduct of the applicant that he took possession of the land on 23 March 2007. The delay from 3 July 2006 to 23 March 2007 is 37 weeks and 2 days. The claim made by the respondent is for 33 weeks calculated from 31 July 2007 by giving an allowance of four weeks to the applicant for an allowable extension of time under the building contract.
- 48 The potential in the claim by the respondent for delay of 33 weeks at \$500 per week amounts to \$16,500.
- 49 The applicant admitted that he is guilty of delay in completing the building works beyond 31 July 2006. However, the extent of the delay is limited to a period between 31 July 2006 and October 2006 when the applicant says that the respondent entered into possession of the land.
- 50 The applicant says that the respondent took possession of a land in October 2006 and commenced undertaking electrical, plumbing, plastering, tiling and the installation of a kitchen, among other work.
- 51 The applicant employed his brother, Banda Rustom, on the land to undertake some of the building work. He says that the respondent began living in the house in about October 2006. He saw him move his belongings into the house at around that time.
- 52 He was cross-examined on what belongings he saw the respondent moving into the house. The impression I have from his answers is that he is unable to say what belongings he saw the respondent move into the house, and what it was that he saw the respondent doing in the house which led him to conclude that the respondent was actually living in the house in about October 2006.<sup>4</sup>
- 53 Both Ms Kirton and Mr Shaw submitted that if the respondent had taken possession, as defined in the building contract in about October 2006 then his claim for damages for late completion would cease as at October 2006.
- 54 Possession is defined in the building contract to include "*occupancy, use or control*". What amounts to occupancy or use or control is obviously a question of fact.
- 55 The impression I have from reading the statements of the applicant, Banda Rostum, the respondent and Mr Leong is that the applicant continued to perform building work at the land after July 2006 and up to January 2007, however, the impression I have is that the building work which the applicant performed from July 2006 was spasmodic.
- 56 It was during that period that the respondent was doing some work on the land. It was work which he was entitled to undertake by arrangement

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<sup>4</sup> Transcript 371-374.

between himself and the applicant which was at least implied by their conduct, that is, the applicant did not object to the respondent entering onto the land for that purpose.

- 57 The position of the applicant is that the respondent physically moved into the house and was either living there, or had at least put himself in a position where he could do so, and at the same time was undertaking finishing work himself and through a number of tradesmen. If the respondent had in fact moved in to the house then that would clearly amount to occupancy and use and control of the land.
- 58 I think it is likely that all the respondent did was to undertake the finishing work. No doubt for that purpose he was at the land often, and perhaps giving the appearance of having assumed occupancy or use or control. However, what is very clear to me is that a lot of building work which the applicant had contracted to undertake had not been completed.
- 59 The evidence of the applicant and Banda Rustom are not reconcilable. On the one hand the applicant describes the conduct of the respondent as amounting to taking possession of the land because he began doing the finishing work in October 2006, but also by having tradesmen attend on the land to perform the finishing work. He does not say that the respondent was actually living in the house as Banda Rostum would have it.
- 60 I do not accept the evidence of Banda Rostum that the respondent was living in the house from about October 2006. During cross examination he was given the opportunity on a number of occasions to describe when the respondent moved his goods into the house, and what goods he actually moved in, and what he says amounted to the respondent actually living there.
- 61 On no occasion did he give a responsive answer, but chose to give a very general answer on each occasion. It is remarkable to describe the conduct of the respondent as living in the house which would lead to an assumption that there were characteristics of the respondent's conduct clearly demonstrating that he was doing so, yet Banda Rostum was unable to give any evidence with any real particularity on that score.
- 62 Furthermore, it is evident from the evidence of the applicant that if the respondent was doing finishing work which involved electrical, plumbing, plastering, tiling and the installation of a kitchen among other work that speaks volumes of the state of the house being well short of enabling the respondent to move in and live there. It is difficult to conceive of how the applicant could have lived there without electricity and plumbing.
- 63 I think it is likely that the respondent did no more than commence doing the finishing work. It must be remembered that by October 2006 the applicant was responsible for significant delay amounting to at least two months. It is understandable that the respondent was anxious to have the applicant complete the building work pursuant to his contractual obligations so that

the finishing work could be undertaken expeditiously enabling of the respondent to move into his new house.

- 64 Ms Kirton did not submit that the respondent had taken possession of the land in the sense of "*occupancy*" or "*control*". She submitted that by bringing in his own tradesmen by October 2006 was consistent with the "*use*" of the land.
- 65 Ms Kirton referred me to a dictionary definition of the word "*use*" which is a helpful starting point, however, I think it rather misses the point. The meaning which should be given to the word "*use*" must be derived through the prism of the building contract and the obligations under it imposed upon the applicant and the respondent.
- 66 I do not think there can be any doubt that the applicant was in possession of the land from the time he commenced undertaking the building work. However, it is not clear to me from the evidence whether possession of the land was given to the applicant by the respondent pursuant to clause 25.0 of the building contract. It required the respondent to give possession of the land to the applicant upon the respondent receiving a request from the applicant for possession, if that event occurred then the applicant would have had exclusive possession of the land.
- 67 The evidence clearly demonstrates that the respondent entered onto the land if not every day certainly with great frequency. The applicant appeared to be unconcerned by the frequency of the respondent's movements on and around the land.
- 68 Despite the course of conduct engaged upon by the applicant and the respondent, relevant to the question of possession of the land, it seems to me that the applicant was in possession of the land for the purpose of undertaking the building work. I suspect that if the respondent impeded the progress of the building work that the applicant would have insisted upon the respondent desisting and removing himself from the land.
- 69 There was no clear event which occurred between the applicant and the respondent which demonstrates that the applicant handed over possession of the land to respondent, or that they arrived at an arrangement that because the applicant had not completed the building work by the end of July 2006 that the respondent could the "*use*" of the land.
- 70 The question then is whether the course of conduct undertaken by the respondent in October 2006 amounts to "*use*". I put two examples to Ms Kirton to demonstrate what I consider "*use*" to be. If the respondent merely visited the premises or engage in a game of football with one of his children in the front yard that could hardly be said to be "*use*". However, if the garage was lockable and he deposited items which were used in pursuit of a hobby, such as painting, and he went to the garage often and used it for that purpose then it is clear that he would be applying the physical features of the house to his own benefit and "*use*".

- 71 I think the better view is that what the respondent was actually doing was having tradesmen undertake work so that he could bring the house up to a standard in order to then be able to "use" it. It must be remembered that the word "use" was intended by the draughtsman of the building contract to create a test consistent with possession of the land. Otherwise it would mean that any step taken by the respondent, and permitted by the applicant, which contributed to the completion of the house could be construed as "use".
- 72 I am fortified in reaching that conclusion because some meaning can be given to the word "use" by the other words used by the draughtsman of the building contract in defining what constitutes possession. Possession includes "occupancy" or "control". Each of those three words speak of a state of affairs existing consistent with a real level of dominion exercised by the respondent over the land, and to a real extent an alienation of possession of the land by the applicant.
- 73 I am not convinced that the respondent took possession of the land in October 2006. Therefore, I accept the evidence of the respondent that he took possession of the land in March 2007 by which time the applicant had effectively abandoned the work which he was required to undertake under the building contract.
- 74 I will allow the claim made by the respondent for damages from 31 July 2006 to 23 March 2007 which totals 33.5 weeks. I will round the allowance of the claim to 33 weeks at \$500 per week and allow respondent the sum of \$16,500.

### **The Variations**

- 75 The applicant claims that he is entitled to recover the cost of variations of the building contract.
- 76 An issue which has been raised by the respondent is whether of the respondent complied with sections 37 of the *Domestic Building Contracts Act* 1995 which has been embodied in 30 building contract in paragraphs 23.0 - 23.5.
- 77 Section 37 is in the following terms:
- "(1) A builder who wishes to vary the plans or specifications set out in a major domestic building contract must give the building owner a notice that—
    - (a) describes the variation the builder wishes to make; and
    - (b) states why the builder wishes to make the variation; and
    - (c) states what effect the variation will have on the work as a whole being carried out under the contract and whether a variation to any permit will be required; and

- (d) if the variation will result in any delays, states the builder's reasonable estimate as to how long those delays will be; and
  - (e) states the cost of the variation and the effect it will have on the contract price.
- (2) A builder must not give effect to any variation unless—
- (a) the building owner gives the builder a signed consent to the variation attached to a copy of the notice required by subsection (1); or
  - (b) the following circumstances apply—
    - (i) a building surveyor or other authorised person under the **Building Act 1993** requires in a building notice or building order under that Act that the variation be made; and
    - (ii) the requirement arose as a result of circumstances beyond the builder's control; and
    - (iii) the builder included a copy of the building notice or building order in the notice required by subsection (1); and
    - (iv) the building owner does not advise the builder in writing within 5 business days of receiving the notice required by subsection (1) that the building owner wishes to dispute the building notice or building order.
- (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.
- (4) If subsection (3) applies, the builder is entitled to recover the cost of carrying out the variation plus a reasonable profit.

(5) This section does not apply to contractual terms dealing with prime cost items or provisional sums."

78 The respondent made a twofold attack upon the claim by the applicant with respect to the variations. First, even if I accepted the legitimacy of the variations claimed, a failure to comply with section 37 must see the variation claims fail. Secondly, the time when the variations were claimed occurred at such a significant time subsequent to the time when the respondent alleges that the applicant abandoned the building works, that the claims are fallacious.

79 The applicant's position was, firstly, that he entered into an arrangement with Mr Leong which made it unnecessary for any notices to given pursuant to section 37 relevant to any proposed variations to the building work. He says the following:

"Q. SENIOR MEMBER: All right, thank you. The next thing that you wanted to tell me about was Mr Shaw says, "The contract says that what you have to do when the owner asks for a variation" and you says, "Yes" and he says, "You didn't comply with what you were supposed to do, not even once. "You says, "Correct" and you wanted to say why. So if you want to say why now? ---

A. If we go back to the first variation about clearing the site and the window variation, I don't know the owner, I don't know Mr Ismail. I know Mr Leon. I ask them about anything that he wanted to do with the variations to be in writing. This is what the law says and Mr Leong replied he knew before 12 years that we worked together and went on to say I believe you, whatever I say, you believe me. On that day, he says that he didn't have enough time and I says I don't want any headaches about this matter and he was in my place and my wife was there and my wife says that - to him that we don't any headaches, we had enough. For that reason that we didn't send him any written notices and we - because he guaranteed and he promised. And my wife asked him that maybe there is going to be problems with the payments and he says, I guarantee that. (Direct) Thank you very much."<sup>5</sup>

80 Secondly, to the extent that I am satisfied that there was non compliance with section 37, the applicant relies upon subsection 3 (b) (i) and (ii).

81 Ms Kirton very helpfully set out the variations claimed by the applicant in a table.<sup>6</sup> The following is a reproduction of the table:

5	Plumbing works (\$1000 in dispute) <sup>7</sup>	\$1500
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<sup>5</sup> 306-307.

<sup>6</sup> The table is reproduced from Ms Kirton's written submissions. The numbering is consistent with the identification of the variations in the pleadings and by the building experts. The items not referred to (1-4) are not an issue.

8	Front entrance stair extension	\$5000
9	Additional bricks	\$38,914
10	Eave linings	\$8066
11	Concrete to garage stairs	\$2520
12	Window 35	\$3500
13 <sup>8</sup>	Additional three concrete steps and concrete landing support on brickwork	\$5000
14	treated pine double fascia 240 x 19 mm	\$18,708.80

- 82 I will firstly deal with the evidence of the applicant that although notices were not given by him to the respondent he is nonetheless entitled to the variations claimed because of the arrangement he came to with Mr Leong that there was no necessity to give notices.
- 83 The statements made by the applicant, the respondent, and Mr Leong describe extensive negotiations before the building contract was executed and up until January/February 2007. A great amount of time was spent by them in negotiating variations. However, what is evident from the statements of the applicant and Mr Leong is an absence of any clear statement by either of them that there was an arrangement that Mr Leong represented to the applicant that notices were not necessary.
- 84 The issue regarding the arrangement between the applicant and the respondent points up the very reason why the legislature considered it was prudent to ensure that a builder give such a notice to the homeowner in order to avoid the very issue that I am now asked to consider.
- 85 Ms Kirton submitted that the purpose served by section 37 is to avoid the conduct of unscrupulous builders who would give a competitive quote which in fact was an under quote in order to obtain a job of building work, and then claim for variations. It put the homeowner in a precarious position of committing to a building contract and then seeing the cost of the building work blowing out.
- 86 Conduct such as this was considered by the legislature to warrant placing onerous conditions on the builder to quote accurately or run the risk that the builder would not be entitled to recover any monies the subject of variations, except where the builder was able to establish the circumstances referred to in subsection (3).
- 87 In *Sevastopoulos v Spanos*<sup>9</sup> Beach J considered section 19 (1) of the *House Contracts Guarantee Act 1987*<sup>10</sup> which in the following terms:

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<sup>7</sup> The written submissions of Ms Kirton and Mr Shaw state that the respondent paid for the plumbing work. I assume that item 5 has been concluded by mistake.

<sup>8</sup> Variation 13 is an alternative to variation 8.

- " (1) Subject to subs(2), if at any time after a domestic building work contract is entered into a variation is made to the contract, the builder is not entitled to recover in any court the cost of any work performed or materials supplied under the variation unless the variation is in writing and signed by the builder and the building owner personally or by an agent authorised to act on behalf of the builder or building owner.
- (2) subs(1) does not apply to a variation that is made necessary by--
- (a) any written directions lawfully given by a building surveyor; or
  - (b) circumstances that could not reasonably have been foreseen by the builder at the time the contract was entered into-- if the builder gives to the building owner within seven days after the variation is made a statement setting out the reason for, and the cost to be incurred in consequence of, the variation and a copy of the directions (if any) given by the building surveyor."

88 Section 19 (1) is obviously cast in different language. It spoke of the entitlement to recover the cost of work being dependent upon the builder ensuring that the variation was in writing and signed by both the builder and the owner. Section 37 (1) requires the builder to give a notice incorporating each of the matters referred to in paragraphs (a)-(e), and if the builder fails to do so then subsection (3) provides that the builder is not entitled to recover any money in respect of a variation, save in the circumstances referred to in paragraph (b).

89 The difference in language, however, does not create any significant distinction with the obligation imposed upon the builder under both sections to inform the owner of the variation, and in the absence of taking that step there is no right to recover any money with respect to that variation.

90 Beach J, firstly, considered the objects of the Act, which are essentially the same as the objects in *Domestic Building Contracts Act 1995*, and then observed:

" In my opinion, the meaning of s19(1) is clear, namely that unless a variation to a domestic building work contract is in writing and signed by the builder and the building owner personally or by an agent, the builder is not entitled to recover in any court the cost of any work performed or materials supplied under the variation, and it does not matter whether any claim by a builder in respect of such cost is brought in contract in *indebitatus assumpsit* or otherwise."<sup>11</sup>

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<sup>9</sup> (1991) 2 VR 194

<sup>10</sup> The enactment which preceded the *Domestic Building Contracts Act 1995*

<sup>11</sup> *Sevastopoulos v Spanos* has been applied by the Tribunal, for example, see *Pratley Constructions v Racine* [2004] VCAT 2035; *Lloyd L Watkins Pty Ltd v Vondrasek* [2006] VCAT 2479, and *Konko v Kamay* [2007] VCAT 524

- 91 However, Ms Kirton submitted that although no notices were given by the applicant to the respondent the builder relied on Mr Leong's representation that no notices were required.
- 92 Whether such a representation was made or not is not to the point. Section 37 (1) and (3) are drafted in the clearest terms. There is no provision which permits the builder to abrogate his mandatory obligation to provide "*a notice*". The word "*notice*" is not defined, but it must at least mean that the builder must bring to the attention of the owner each of the matters referred to in subsection (1) (a) - (e).
- 93 The applicant's failure to give any notice, whether in writing or given orally, deprived the respondent of the opportunity to make an assessment of the nature of the variation; the reasons for it; the effect it would have upon the building work as a whole; whether it would result in any delays in the conduct of the building work, and the cost of the specific variation and its effect upon the contract price.
- 94 For the builder to have avoided his responsibility based upon a casual conversation with Mr Leong is staggering given that the evidence discloses that he was aware of section 37 (1) and the obligations it imposed upon him. Furthermore, the quantum of the variations is very significant. It amounts to \$76,208.80.<sup>12</sup>
- 95 It is also staggering that the builder considered that the casual conversation with Mr Leong meant that he could have the respondent incur significant cost relevant to each variation without taking the very simple step of giving a notice which provided the respondent with all that was required to then give or withhold his consent for the work to be undertaken.
- 96 It is for these reasons that I find that section 37 (1) and (3) have not been complied with by the applicant, and therefore, he is not entitled to recover any money in respect of any variation unless he can satisfy me of the relevant matters in subsection (3) (b).

### **Subsection (3) (b)**

- 97 All of the variations claimed by the applicant are contested in one way or another. I will deal with each of them in turn before turning to the questions raised by subsection (3) (b).

### ***Item 8 front entrance stair extension***

- 98 The front flight of stairs to the house was designed as a straight flight of stairs. The respondent asked the applicant to construct the flight of stairs consistently with a flight of stairs in a photograph which the respondent produced which showed a flight of stairs fanning out at the bottom. Mr Leong was present when this discussion occurred.

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<sup>12</sup> Less \$1500 for the plumbing work which was mistakenly included in the table in Ms Kirton's written submissions.

- 99 The applicant agreed to construct the flight of stairs which were to fan out rather than being straight. Mr Leong produced a drawing consistent with the agreement.<sup>13</sup>
- 100 The applicant says that he constructed the flight of stairs in accordance with the drawing, but that the riser on the last step was higher than shown on the drawing. The applicant called the respondent and Mr Leong to inspect the stage reached in the construction of the flight of stairs. The problem encountered by the applicant was due to a fault in the design prepared by Mr Leong.
- 101 The applicant says that if he continued constructing the flight of stairs in accordance with the drawing that further labour and materials would be required. He quoted \$5000. The respondent refused to accept the quote. Mr Leong offered to pay \$1500 out of his own pocket. The applicant refused the offer. Subsequently, Mr Leong accepted the quote of \$5000. The applicant then completed the flight of stairs.
- 102 The applicant subsequently rendered an invoice no. 14 dated 12 February 2007 for \$5000. It has not been paid.
- 103 The respondent and Mr Leong give an entirely different version of what occurred. They both say that Mr Leong agreed to pay the applicant \$1500 which offer he accepted.
- 104 Mr Lees says that to construct the flight of stairs would cost more as designed when compared with Mr Leong's drawing. It was my impression from his evidence that there was no extra work required to construct the stairs to fan out at the bottom, and in general terms whether the flight of stairs was constructed straight or fanned out would probably not amount to much difference in terms of cost.<sup>14</sup>
- 105 It seems odd that the applicant considered that the flight of stairs would cost \$5000 to construct, consistent with the drawing prepared by Mr Leong, given the evidence of Mr Lees. The applicant did not provide a breakdown of a costing of the construction of the flight of stairs amounting to \$5000.
- 106 I think it is likely that no more work was required to construct a flight of stairs fanning out at the bottom than as originally designed. Therefore, I do not accept the evidence of the applicant that to do so would cost \$5000.
- 107 Furthermore, I do not accept the evidence of the applicant that he reached an agreement with Mr Leong to construct the flight of stairs for \$5000. I accept the evidence of the respondent and Mr Leong that Mr Leong agreed to personally pay an extra \$1500.
- 108 The applicant is entitled to \$1500, however, not pursuant to a variation arrived at by agreement with the respondent, but a variation arrived at by agreement with Mr Leong. It is clear from the evidence of the respondent

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<sup>13</sup> Exhibit SR 11 to the witness statement of the applicant dated 12 June 2008.

<sup>14</sup> Transcript 619-620.

that he was not going to pay the applicant any further money to construct the flight of stairs.

***Item 9 additional bricks***

- 109 The applicant was provided with all of the relevant plans save for plan no. A.002. He provided a quote, and subject to some variations, entered into the building contract.
- 110 The applicant says that the plans contained two serious faults. The first, showed internal timber walls rather than internal brick walls. It was not until he obtained plan no. A.002 that he appreciated that the internal walls were brick. Secondly, the ground level drawn on the plans did not show what he later appreciated to be the depth of the brick work which was later required.
- 111 On a view which I attended on 21 September 2010 my attention was directed to two matters - excavation below the surrounding ground level, and in particular, below the floor line of the house; and about 20 skins of bricks on the southern side and about 9 skins of bricks on the northern side which were required in excess of what the plans indicated to the applicant were needed to be laid below the floor line of the house.
- 112 Essentially, the point made by the applicant was that if he had known of the excavation and the necessity to lay so many skins of bricks below the floor line of the house then his estimate that he needed 55,000 bricks would have been an underestimate by a significant margin.
- 113 The applicant says that he ordered a further 23,000 bricks.<sup>15</sup> He rendered an invoice to the respondent no. 14 dated 12 February 2007 for \$46,000 plus a 20% margin for 23,000 bricks. However, at the hearing before me I was informed that the invoices proved a delivery of 18,600 bricks not 23,000 bricks. As a consequence the claim for this variation was reduced to \$38,914.
- 114 Mr Lees and Mr Morris, building estimator disagreed with evidence of the applicant that the absence of plan no. A.002 and the ground level drawn on the plans would prevent a reasonably accurate estimate being made of the number of bricks required to build the house.<sup>16</sup>
- 115 Mr Shaw submitted that the invoices showed a delivery of 73,600 bricks. An analysis of the invoices suggests that no additional bricks were delivered to the land.
- 116 Interestingly, Mr Morris estimated that approximately 85-90,000 bricks were used to construct the house. He says that could be ascertained from the drawings which were provided to the applicant. Mr Lees estimated about 89,000 bricks.

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<sup>15</sup> Exhibit A1.

<sup>16</sup> Mr Lees at transcript 634 and Mr Morris at 386.

- 117 A comparison between the evidence of the applicant and that of Mr Lees and Mr Morris is perplexing because on one view there was no reason why the applicant could not have made an estimate of the number of bricks needed based upon the plans he was provided. If approximately 90,000 bricks were needed to construct the house then 55,000 were wholly inadequate, and the total actually delivered of 73,600 was also wholly inadequate. However, there is one thing that is certain, and that is, that a quantity of bricks were delivered which were adequate to construct the house.
- 118 Mr Mitchell, on the other hand accepted the instructions he was given by the applicant that the original plans he was given were different from the end result of the construction of the house. By inference it would appear that he accepted the applicant's instructions that a further 18,600 bricks were required. It is not clear to me how Mr Mitchell's evidence assists applicant save for estimating the cost of the additional bricks.
- 119 The evidence on this issue is confusing. Firstly, the applicant says he ordered 55,000 bricks; secondly, the applicant says that he needed more bricks and ordered a total 73,600; thirdly, that is in contrast to his claim when originally drafted that he ordered a further 23,000 bricks (invoice no. 14), and fourthly, Mr Morris and Mr Lees estimated the need for considerably in excess of 73,600 bricks to construct the house.
- 120 I think it is likely that the applicant made an estimate of the number of bricks that were required and ordered them accordingly. I do not accept his evidence that he ordered further bricks. I think the fact that he initially claimed a further 23,000 bricks, but can only prove allegedly ordering a further 18,600 bricks was done to try to fit his claim into the sum of the invoices, yet even with 73,600 bricks it is well short of the estimates given by Mr Morrison and Mr Lees to construct the house in its present state.
- 121 I understand from some of the evidence that because of other variations, such as, the altered roof line that there was a saving in the number of bricks used, but it seems to me that does not account for the remarkable and gross disparity in the number of bricks that it did take to construct a house when compared with what the applicant now says he actually ordered both initially and then by a further order of 18,600 bricks.

### ***Item 10 Eave Linings***

- 122 Initially the applicant's quote did not provide for the supply and fixing all of the eaves to the house. After some negotiation between the applicant and Mr Leong the applicant's quote was altered by a hand written addition - "*Supply and fix 450 mm eaves*".
- 123 The applicant supplied and fixed eaves which are 500 mm wide. Mr Mitchell made an estimate that the cost of labour and materials incurred by the applicant amount to \$8066 over and above the cost of supplying and fixing eaves of 450 mm.

- 124 The controversy surrounding what the applicant actually did as opposed to what he was required to do appears to centre around the applicant following the plans rather than the specifications. The specifications provided that the eaves were to be 450 mm.
- 125 Mr Shaw submitted that the building contract provides, in clause 16.0, that the specifications take precedence over the plans. Furthermore, clause 16.1 provides that if there is any deficiency or conflict between the plans and specifications the builder "*must promptly notify the owner in writing*", and then it is for the owner to advise the builder in writing how the problem is to be resolved and which documents are to be followed. If the owner fails in his obligation then the onus is on the builder to decide what to do and then to notify the owner in writing within seven days of the decision he has reached.
- 126 There is no evidence that the applicant had regard to the specifications as having precedence over the plans. It would appear that he simply went ahead and supplied and fixed the eaves in accordance with the plans when there was a clear conflict between the plans and specifications. It follows that the procedure provided for in clause 16.1 was not followed.
- 127 In this instance the applicant claims a variation, however, in order to do so he was required to follow clauses 16.0 and 16.1, and where there was an additional cost incurred by him he was required to request a variation pursuant to clause 23.2.
- 128 It seems to me that it was the applicant's fault in not working with the specifications and the plans side by side in order to determine whether they married up or not, and if they did not then he should have consulted the building contract to determine how the inconsistency was to be resolved. If he had looked at the specifications closely he would have discovered that there was an inconsistency with the plans.
- 129 The extent to which the applicant supplied and fixed eaves in excess of the specifications is not a claim he can maintain. His mistake cannot constitute a valid variation.

### ***Item 11 Concrete to Garage Stairs***

- 130 Mr Leong says that the plans supplied to the applicant provided for two flights of stairs from the house to the garage which were to be constructed of timber. However, the applicant constructed the stairs using concrete.
- 131 The applicant pointed to an inconsistency between the plans when compared with the structural plans. The plans provided for timber, but the structural plans provided for concrete. He says he was told by Mr Leong to follow the structural plans and to ignore the other plans.
- 132 The applicant has claimed \$2520 as a variation for building the stairs using concrete. It seems to me that the applicant must have known that the plans and structural plans were inconsistent. He was driven to seek instructions from Mr Leong regarding which of the plans he was to follow. I can only

infer that the quote he gave included the cost of building the stairs. I can see no basis for the applicant claiming the building of the stairs using concrete as a variation.

***Item 12 Window 35***

- 133 Window 35 was intended to be 800 mm in height and 10,100 mm long. The applicant says that he ordered the window to those dimensions. The window was manufactured accordingly at a cost of \$3500. He paid for the cost of the window.
- 134 After the applicant obtained delivery of the window, he says that he discovered that it could not be installed because there was insufficient space to accommodate a window of that size. Instead the applicant fitted four windows each being 300 mm in height.
- 135 The applicant referred to a quotation for the manufacture and supply of such a window, but no invoice or receipt evidencing its purchase was produced.
- 136 The applicant says that the window was useless. He simply threw it away. He says that it had a single application and could not be used otherwise.
- 137 It seems to me to be odd that the applicant held on to a quotation, but did not hold onto an invoice or receipt evidencing the purchase of the window. The former is some proof that the applicant took steps to at least investigate the cost of the manufacture and supply of such a window, but it falls well short of proof that he actually had it manufactured and supplied.
- 138 Furthermore, if he in fact had it manufactured and supplied it would have been a simple matter to have obtained a replacement invoice or receipt from the manufacturer, or better still a witness statement from the manufacturer that it in fact manufactured such a window for \$3500.
- 139 I do not accept the applicant's evidence that he did any more than obtain a quotation for the manufacture and supply of the window. I consider it to be remarkable that the applicant did not hold onto it to use it on another building project, or at least alter it to suit another application.

***Item 13 Additional Three Concrete Steps Etc***

- 140 This claim was put as an alternative to "***Item 8 Front Entrance Stair Extension***". The amount of the claim is \$5000, that is, the same amount as the primary claim.
- 141 I do not accept an alternative claim can be raised. The applicant was to build a straight flight of stairs. He agreed to build a flight of stairs fanning out at the bottom. The evidence which I accept was that there was no additional expense incurred by the applicant building a flight of stairs fanning out at the bottom.

***Item 14 Treated Pine Double Fascia Etc***

- 142 The applicant says that he did not quote for the installation of fascia to the house. The quotation does not refer to the installation of fascia, however, nor does the quotation refer to each and every item of building work on which the applicant quoted based on the plans and specifications on which his quote was based.
- 143 It is clear to me from looking at the plans and specifications, and from the occasions when I was taken to the plans and specifications or by Ms Kirton and Mr Shaw, and also by Mr Mitchell during the course of his evidence, that there were many aspects of the building work which are not referred to in the quotation.
- 144 The evidence of the applicant points up the need to understand what a quotation is and the purpose it serves. I think it is trite to say that when a builder is provided with plans and specifications and is asked to give a quotation based on the cost of building a house to those plans and specifications that the quotation will encompass all the work embodied in the plans and specifications.
- 145 The fact that the quote refers to major features of the building work, and not the specific detail does not mean that the quotation does not encompass the detail as well. It would make nonsense of a quotation if a builder could say that because an item of building work was not referred to in the quotation, but was referred to in the plans and specifications that he is not responsible for undertaking an item of building work.
- 146 Inevitably that would lead to the builder having to exhaustively describe each and every major feature and specific detail which I am sure every builder would rail at saying it is not necessary and is not the purpose served by a quotation. To that end I accept the submission made by Mr Shaw that a quotation does not need to be so exhaustive.
- 147 I do not accept the evidence of the applicant that the plans do not refer to fascia, and more importantly, fascia constructed of colourbond material. Plan A.004-A refers to "DETAIL 03-TYPICAL ROOF AND EAVE". To the left of the drawing is the following "SELECTED COLOURBOND GUTTER & FASCIA BOARD".
- 148 On the face of those words the reference to "*colourbond*" appears to me to qualify both the words "*gutter*" and "*fascia board*", in other words, the gutter was to be colourbond as was the fascia board. I do not think that any other interpretation is open. That seems to be consistent with the rest of the detail which describes the materials to be used in particular instances.
- 149 One of the issues that arose during the hearing was a deficiency in the specifications which are silent as to the materials to be used to build the fascia. Here again is an example of where the builder was obliged pursuant to turn to clause 16.0 to resolve such an inconsistency if this amounted to an inconsistency in his view.

- 150 In any event the applicant appears to have concluded from the plans that the fascia was to be built of colourbond. He approached J.A. Sheet Metals and A. & J. Building Products neither of whom could provide him with the colourbond fascia that was required. He then approached Melville Timber and was told the same thing.
- 151 It was after speaking to someone at Melville Timber that it was suggested that he could use 240 mm and 190 mm timber fascia on top of each other to achieve the required dimensions. The applicant says that he spoke to Mr Leong who approved of the use of timber instead of colourbond.
- 152 The applicant says that the cost associated with using timber was more than the cost associated with using colour bond.<sup>17</sup>
- 153 It seems to me that the applicant's quote was made on the basis of the plans and specifications he was provided which included fascia. Logically his quote incorporated the installation of fascia.

***Conclusion - subsection (3) (b)***

- 154 In order to have the tribunal consider subsection (3) (b) it is trite to say that the applicant must firstly establish that the sums claimed are for variations. Whether they are variations depends upon findings of fact, and as it can be seen in the foregoing I have rejected the applicant's evidence that any of the claims the variations were in fact of variations, and consequently subsection (3) (b) does not arise for consideration.

**The Defects**

***Item 1 Sliding Doors to Meals/Dining***

- 155 Plan no. A.002 shows that the sliding doors to the west wall of the meals/dining room are to be double sliding doors with fixed side lights. The applicant installed a single sliding door only. This clearly constitutes a defect.
- 156 Mr Lees was the opinion that the existing doors should be removed and a unit installed to conform with the plans. The cost of doing so amounts to \$3596.
- 157 Mr Mitchell took instructions from the applicant that Mr Leong told him that the single sliding door was acceptable, and therefore, it was Mr Mitchell's opinion that the departure from the plans was not a defect.
- 158 The sliding doors lead from the meals/dining area onto a balcony. I observed that on the view from both inside and outside the house. It appeared to me that the double sliding doors were to be a feature.<sup>18</sup>
- 159 The respondent did not get what he bargained for. I accept the opinion of Mr Lees because it appears to me to be a well considered opinion, and the costing appears to me to be fair and reasonable.

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<sup>17</sup> Transcript 273 and 309.

<sup>18</sup> The same is the case with items 3 and 6.

### ***Item 2 South Wall***

- 160 The meals/dining area and the living room had been designed to be a split level arrangement with the meals dining room leading down via stairs into the living room. This is clearly shown on the plans.
- 161 For some reason the applicant built a wall dividing the meals/dining area from the living room with double doors providing access between the two areas.
- 162 There is no doubt that the building of the wall constitutes a major departure from the plans and has seriously altered the effect which should have been achieved by what was likely to be an attractive design in a large open living area.
- 163 Mr Lees was of the opinion that the wall should be removed. Two structural columns should be installed on either side of the stairs with direct support to the footings below. New beams should be installed directly over the top wall plate. The plaster ceiling should then be repaired, and plaster applied to the new columns and beams all at a cost of \$20,258.
- 164 Mr Mitchell took instructions from the applicant that this was a variation authorised by Mr Leong, and therefore, it was Mr Mitchell's opinion that the departure from the plans was not a defect.
- 165 The applicant accepts that building the wall was a mistake on his part. It was only after the wall had been built that he says there were conversations between himself, Mr Leong and the respondent at which time he says that the respondent approved of the building of the wall. The next step which the applicant says he took was to have the wall plastered.
- 166 Mr Leong says that he did not give approval for the building of the wall. He says that the applicant told him that the reason why he built the wall was to support the wall truss.<sup>19</sup> I reject the evidence of the applicant. I find that the wall was built by him by mistake and without resort to any discussion with Mr Leong or the respondent.
- 167 The respondent did not get what he bargained for. I accept the opinion of Mr Lees because it appears to me to be a well considered opinion, and the costing appears to me to be fair and reasonable.

### ***Item 3 Sliding Doors to the West Wall***

- 168 This defect is the same as Item 1. Again the applicant installed a single sliding door only. This clearly constitutes a defect.
- 169 For the same reasons given above in relation to the other sliding door I accept the opinion of Mr Lees that the existing door should be removed and a unit installed to conform with the plans. I accept the costing of Mr Lees \$3504 as being fair and reasonable.

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<sup>19</sup> Transcript 701-710.

#### ***4 Gap between Windows and the Steel Lintel***

- 170 Mr Lees and Mr Mitchell agree that the gaps between the window frame and the steel lintel amount to a defect requiring rectification.
- 171 Mr Lees was of the opinion that the defect could be overcome by providing a powder coated aluminium section pop riveted to the window frame to close the gaps between the lintel and the window frame at a cost of \$1601. Mr Mitchell was of the opinion it would cost \$286.
- 172 The difference between Mr Lees and Mr Mitchell is remarkable considering they are both talking about the same job of work. I accept the opinion of Mr Lees regarding the cost of rectifying this defect.

#### ***Item 5 South Wall***

- 173 The South wall of the study was designed to have four equal sized openings in the wall. Instead there are three equal sized openings.
- 174 The applicant says that he built the wall in accordance with the plans providing four openings. He could not explain why there are only three openings. He speculated that someone had altered the stud wall reducing the number of openings.
- 175 Mr Lees ran a stud finder over the stud wall and concluded that no provision was made for four equal sized openings. It seems to me to be extraordinary that someone unknown entered onto the building site and altered the stud wall. The only conclusion that I think is reasonably open is that the applicant did not provide four openings.
- 176 Mr Lees was of the opinion that the plaster lining of the wall should be removed; the wall frame altered, and then the wall should be re-plastered at a cost of \$3984.
- 177 Mr Mitchell accepted the applicant's instructions that someone else had altered the stud wall. He did accept that three openings and not four was a departure from the plans.
- 178 I accept the opinion of Mr Lees regarding the cost of rectifying this defect.

#### ***Item 6 Window Sliding Door Unit***

- 179 This is the same as Items 1 and 3. Again the applicant installed a single sliding door only. This clearly constitutes a defect.
- 180 For the same reasons given above in relation to the other sliding doors I accept the opinion of Mr Lees that the existing door should be removed and a unit installed to conform with the plans. I accept the costing of Mr Lees of \$4275 as being fair and reasonable.

#### ***Item 7 Damp Flooring Master Bedroom***

- 181 Mr Lees measured the dampness on the particle board flooring in the master bedroom in front of the sliding door unit. He used a protimeter moisture

meter which gave a reading of 26 which he considered indicated a relatively high moisture content.

182 Mr Mitchell also took moisture readings. The readings he took varied between 10.5% to 14.3% using his measuring device. He was of the opinion that the higher readings were the result of moisture entering the flooring when the door was open allowing damp air to enter which was retained by the flooring. He recommended monitoring of the floor over 12 months.

183 Mr Lees recommended that the articulation joint within the brick work in the north-west corner be sealed with a polyurethane sealant. He also referred to rebuilding the brick sill outside the window and the installation of sill flashings which he considered would be part of the work involved in item 6.

184 I accept Mr Lees estimate of the cost of sealing the articulation joint of \$148 regarding the cost of rectifying this defect.

#### ***Item 8 Staircase/Deletion of window 27***

185 Mr Lees and Mr Mitchell agreed that there are discrepancies in the width of the passageway leading to stairs located part of the way down the main passageway from the front doors.

186 Both Mr Lees and Mr Mitchell were of the opinion that the defect was not so obvious as to warrant rectification and should be accepted as it is.

187 However, Mr Shaw submitted that the respondent is entitled to compensation for the lack of conformity with the plans.

188 Window 27 should have been installed to the north wall of the passageway. Mr Lees was of the opinion that the amount of work required to reconstruct part of an adjacent bedroom, ensuite and store area to install the window was out of proportion to the defect.

189 However, Mr Shaw submitted that the respondent is entitled to compensation for lack of conformity with the plans, and more particularly, because it is evident that the window was to provide light in a particularly dark area of the passageway.

#### ***Item 12 Stairs to Garage***

190 I have dealt with this item in paragraphs 130-132 above. Essentially, the plans required the two flights of stairs to be built of timber. They were constructed using concrete.

191 Mr Lees and Mr Mitchell agree that the Building Code of Australia provides for maximum allowable riser height of 190 mm. The bottom most riser is 215 mm. Mr Lees referred to the lower flight of the stairs being constructed with nine risers yet the plans show four risers. Mr Lees was of the opinion that the two flights of stairs should be demolished and rebuilt at a cost of \$2586.

- 192 Mr Mitchell took instructions from the applicant that this was a variation authorised by Mr Leong. Therefore, it was Mr Mitchell's opinion that the departure from the plans was not a defect. Even if that were so Mr Mitchell concedes that the risers constitute a defect requiring rectification.
- 193 There is no evidence from Mr Mitchell regarding the cost of rectifying the defect in the risers. I am left with the means of rectifying the defect referred to by Mr Lees. His costing appears to be fair and reasonable.

***Item 13(1) Walls between Painting Room and Garage***

- 194 The plans show that the area at the base of the two flights of stairs to the garage was to be enclosed. There was to be a door leading from the enclosed area into the painting room and another door into the garage. The applicant did not construct the enclosed area.
- 195 Mr Mitchell took instructions from the applicant that this was a variation authorised by Mr Leong. It was Mr Mitchell's opinion that the departure from the plans was not a defect. The applicant says that Mr Leong told him not to build the enclosed area because the respondent no longer wanted the area enclosed because it would make the garage smaller.
- 196 However, this was not the subject of a variation sought by the applicant from Mr Leong or the respondent.
- 197 Mr Lees and Mr Mitchell appear to agree regarding the cost of building the enclosed area. Mr Lees was of the opinion that it would cost \$1060. His costing appears to be fair and reasonable.

***Item 13(2) Garage Floor Slab***

- 198 Mr Lees and Mr Mitchell agree that the concrete floor slab in the garage shows poor workmanship. There is a 90 mm concrete infill section along the south wall, and a tapering section of concrete along the eastern side of the garage door opening tapering from 200 mm at one end to 0 mm at the other.
- 199 Mr Lees was of the opinion that the garage and painting room floors should be thoroughly cleaned and scraped of any loose material and be painted with an appropriate paving paint at a cost of \$718. Mr Mitchell agrees with Mr Lees costing. His costing appears to be fair and reasonable.

***Item 14 Damp Brickwork***

- 200 The north wall in the paint room shows the leaching of material due to dampness approximately fifteen skins of brick above the concrete floor slab. It was very evident on the view I had.
- 201 Plan A.004-A shows that the other side of the wall was to act as a retaining wall. It was to be tanked with bitumen based waterproofing material and a moisture barrier. The applicant says as a result a conversation he had with the respondent he backfilled the retaining wall with concrete with the respondent's approval. He says he warned the respondent that it would not

stop moisture building up inside the garage. He says that the respondent was more interested in doing the job cheaply. He says they agreed on a price which the respondent paid.

- 202 The respondent denies that he approved the variation. Mr Leong spoke to the applicant who told him of the agreed variation, but when he spoke to the respondent he denied that he gave approval for the variation.<sup>20</sup>
- 203 I do not accept the applicant's evidence that he obtained the approval of the respondent for a variation to back fill the retaining wall with concrete rather than following the plans.
- 204 Mr Lees gave evidence that the use of concrete would be ineffective in creating a waterproof membrane. If the plans had been followed then the moisture levels he found in the north wall would have been avoided.<sup>21</sup> Mr Lees found high moisture readings in the part of the wall which shows the leaching of material through the brick work. Mr Mitchell was unable to gain access to the north wall to test it for moisture content, however, parts of the wall he did have access to showed very slight dampness.
- 205 I accept the evidence of Mr Lees the defect is to be rectified by removing the back filling; installing a protective layer between the bituminous tanking and granular back filling, and the installation of agricultural drains at a cost of \$3851. His costing appears to be fair and reasonable.

### ***15 Roof Profile***

- 206 The three-dimensional profile of the roof line clearly shows that the roof line to the south of the front door is designed to have two levels. Mr Shaw and Ms Kirton described the effect as being like a "tick".<sup>22</sup>
- 207 The applicant says that when he came to measuring that part of the roof line he discovered that the roof over bedroom four would measure 1850 mm from the subfloor which he believed would prevent the house from passing final inspection.
- 208 The applicant says that he called Mr Leong who told him to do whatever was required to fix the problem. Mr Banda Rostum was present and confirmed the instructions given by Mr Leong to the applicant. The applicant says that Mr Leong made a pencil marking on a plan to demonstrate the redesigned roof line.
- 209 Mr Leong says that the applicant told him that the respondent had approved the roof profile being changed demonstrated by the pencil marking on a plan. He otherwise denied ever giving approval to the applicant to alter the roof line or making any pencil markings on the plan. The respondent also denied ever giving such approval to the applicant.

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<sup>20</sup> Transcript 790-791.

<sup>21</sup> Transcript 591-592.

<sup>22</sup> Exhibit R4.

- 210 It is clear that the applicant says that the respondent approved the redesign of the roof line, and that subsequently it was redesigned by Mr Leong in pencil on the plan.
- 211 However, the respondent categorically denies that he gave such approval, and Mr Leong categorically denies redesigning it in pencil on the plan. Mr Leong accepted the applicant's representation that he had the respondent's approval.
- 212 Mr Lees says that the cost of building the roof line as it is now would have been far cheaper, less complex and easier to build, and at a significantly reduced cost of something less than \$10,000.<sup>23</sup>
- 213 I do not accept the evidence of the applicant. It is met with categorical denials by the respondent and Mr Leong. The inference that I draw is that the applicant went about building the roof line differently because it was cheaper and easier.
- 214 I do not accept the applicant's evidence that he was forced to build the roof line in the way it is now because of a diminished roof height from the sub floor. Mr Lees was opinion that if the applicant had followed the plans that the diminished roof height would not have presented itself was a problem.
- 215 Mr Lees is of the opinion that to build the roof line according to the plans would cost \$51,254. Mr Shaw submitted that the respondent should accept the roof line as built. He submitted that an amount of compensation should be awarded in the region of \$25,000-\$30,000. I will deal with this matter in some greater detail later in these reasons.

### ***16/17 Balcony Roof/eaves linings***

- 216 The applicant says that there was some controversy as to whether the balcony roof was shown on the plans. However, he built the balcony roof. He did so by agreement with the respondent.<sup>24</sup> His bricklayer refused to build the brick pier to the southern end of the balcony.
- 217 During Mr Mitchell's evidence I was invited to look at the plans for the purpose of determining whether the balcony roof is actually shown on any of the plans. Mr Mitchell says that the plans do not show a balcony roof, but there was a drawing consistent with a roof over the balcony as far as I could see.
- 218 It seems to me that the applicant must have built the balcony roof because he interpreted the plans as showing a balcony roof. It seems odd that he would have built a balcony roof as a matter of simple generosity to the respondent or under some mistaken belief as to what the plans showed given that it involved a significant amount of work.
- 219 If it is the applicant's case that the balcony roof was not shown on the plans he sought no variation. Mr Shaw submitted that the issue of the balcony

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<sup>23</sup> Transcript 606-607.

<sup>24</sup> Transcript 242.

roof being shown on the plans was not raised during the previous hearing, and the claim only came about after Mr Mitchell's inspection of the house on 18 August 2010.

- 220 I think it is likely that the applicant correctly interpreted the plans as showing a balcony roof. He went ahead and began building it, but left it in an incomplete state at the time when it is alleged that he abandoned the building work.
- 221 Mr Lees inspected the house on 9 July 2007. He observed that the balcony roof was incomplete and that an area of it was leaking. I observed the roof line directly above the balcony roof on the view. The south-eastern corner of that part of the roof showed that a portion of the eaves material had come adrift, and there was water staining on that material consistent with leaking of the roof through the eaves.
- 222 Mr Lees is of the opinion that a licensed roof plumber needed to check and repair the balcony roof to complete the roofing and drainage of it. He was of the same opinion in relation to the eaves lining.
- 223 Mr Mitchell observes that the work required in relation to the balcony roof and the eaves had been completed by the builder. He did not observe any water stains or dampness in the areas referred to by Mr Lees.
- 224 Mr Lees is of the opinion that the work required would cost \$10,778 in relation to both the balcony roof and the air eaves. Mr Mitchell is of the opinion that it would cost about \$2000 less. I prefer the opinion of Mr Lees. His costing appears to be fair and reasonable.

### ***18 Windows East Elevation***

- 225 Mr Lees and Mr Mitchell agree that there are large gaps between the top of the windows and the steel lintels.
- 226 Mr Lees is of the opinion that the internal architraves should be removed; the plaster board wall linings be adjusted, and the position of the window was in the wall frame also be adjusted. The foregoing will also require the brick sill to be broken and rebuilt.
- 227 Mr Lees alternative solution is the installation of powder coated angle to the top of the windows to close the gap between the window and the lintel. Mr Mitchell preferred that solution.
- 228 Mr Lees preferred solution would cost \$1776. Mr Mitchell's preferred solution would cost \$286 which is a costing which includes item 4.
- 229 The photographs of the gaps and my viewing of the same show a very significant and obvious gap. I prefer the opinion of Mr Lees because it re-establishes the situation of the window as should have been the case from the outset rather than a simple fix it solution which I consider to be inadequate in the circumstances. His costing appears to be fair and reasonable.

### ***19 Front Steps***

- 230 The Lees and Mr Mitchell agree that the flight of stairs as constructed does not conform with the plans, and furthermore, the bottom riser is in excess of the accepted standard of 190 mm.
- 231 I dealt with this matter in some detail in paragraphs 98-108 above. Despite the departure from the plans it would appear that there was agreement between the applicant, Mr Leong and the respondent for the flight of stairs to be accepted as built with a variation requested by the respondent to have the flight of stairs to fan out at the bottom.
- 232 Mr Lees is of the opinion that the flight of stairs should be demolished and built in accordance with the plans is contrary to the conclusions I have reached. However, the alternative that there be a landing and further steps at the base of the stairs including hand rails as required that appears to be fair and reasonable.
- 233 Mr Lees costing of the alternative of \$4219 is a fair and reasonable costing. Mr Mitchell considered that landscaping at the base of the steps would be a reasonable solution because it would bring up the level of the ground level below the last step to an acceptable height.
- 234 I reject that alternative because when I took a view it was apparent to me that the gradient of the ground leading up to the last step is steep and would require very significant landscaping to achieve the result which Mr Mitchell so blithely says is appropriate. From a practical point of view landscaping would not achieve a reasonable result.

### ***20 Front Entry Doors***

- 235 The plans show that a set of double entry doors with side lights was to be centrally located in the east wall of the entry hall to the house. The doors which have been installed are not centrally located and do not include side lights.
- 236 The applicant was to build the house to lock-up stage. He says that did not include providing the doors, but only a temporary door. The respondent provided the doors. He also says that Mr Leong instructed him not to follow the plans because the respondent did not want the side lights. Mr Leong denies that he gave any such instructions to the applicant.
- 237 Mr Lees and Mr Mitchell both agree that there are no side lights contrary to the plans. Mr Mitchell was of the opinion that the plans do not show that the doors were to be centrally located. He pointed to the plans which he says showed that the doors were to be installed off centre.
- 238 I accept the applicant's evidence that the doors were supplied by the respondent without side lights. However, I do not accept his evidence though he was instructed to ignore the plans, and I do not accept the evidence of Mr Mitchell that the plans show that the doors are not to be located centrally. Furthermore, the applicant did not seek a variation.

- 239 Mr Lees is of the opinion that there are two solutions to this problem. The first is to remove the doors and door frame; selectively demolish brickwork and install a doorframe, reconstruct the brickwork and install doors. The second, is to accept the doors as installed.
- 240 On the basis of the finding that I have made that the respondent supplied the doors the real issue is the location of the doors. I think the doors should be accepted as installed. I will deal with this matter separately later in his reasons.

### ***21 Termite Treatment***

- 241 Mr Lees is of the opinion that the installation of termite treatment has been compromised in many areas where timber has been installed below the level of termite treatment. He is of the opinion that a termite control contractor should be engaged to adjust the position of the termite barrier and remove timbers that breach the termite barrier.
- 242 Mr Mitchell does not appear to disagree with Mr Lees. Where they do disagree is that Mr Lees is of the opinion that a costing for the rectification work would be \$1505. Mr Mitchell considered that what is required is a termite inspection costing \$352.
- 243 I prefer the opinion of Mr Lees because it goes beyond that an inspection and attends to the rectification of the defect in the installation of the termite treatment. His costing appears to be fair and reasonable.

### ***22 Articulation Joints***

- 244 The applicant says that Mr Leong told him that he would attend to the sealing of the articulation joints in the brick work at a later date. However, it was obviously part of the building work which the applicant was required to undertake, and a simple and inexpensive step in the building work. I do not accept the applicant's evidence.
- 245 Mr Lees and Mr Mitchell agree that the articulation joint should be sealed with a flexible sealant. Mr Lees was of the opinion that the cost of doing so would be \$1645. His costing appears to be fair and reasonable. Mr Mitchell appears to agree with that costing.

### ***23 Over pours***

- 246 On the view I was shown three areas where there were over pours of the concrete footings which flowed outside the footing trenches.
- 247 Mr Lees and Mr Mitchell agree that there are over pours, and that the same should not have occurred and are the responsibility of the applicant.
- 248 Mr Lees is of the opinion that they should be removed because they will create problems for future landscaping and should be removed at a cost of \$1680. Mr Mitchell is of the opinion that future landscaping will cover the over pours.

249 The simple fact is that the over pours should not have occurred. It is not the point to assume that future landscaping will not suffer interference by the over pours or that the over pours will be covered by future landscaping. I prefer the opinion of Mr Lees. His costing appears to be fair and reasonable.

### **Bellgrove v Eldridge Compensation**

250 In *Bellgrove v Eldridge*<sup>25</sup> Dixon CJ, Webb and Taylor JJ observed:

"In the present case, the respondent was entitled to have a building erected *upon her land* in accordance with the contract and the plans and specifications which formed part of it, and her damage is the loss which she has sustained by the failure of the appellant to perform his obligation to her. This loss cannot be measured by comparing the value of the building which has been erected with the value it would have borne if erected in accordance with the contract; her loss can, prima facie, be measured only by ascertaining the amount required to rectify the defects complained of and so give to her the equivalent of a building on her land which is substantially in accordance with the contract."<sup>26</sup>

251 Their Honours then added a very important qualification:

"The qualification, however, to which this rule is subject is that, not only must the work undertaken be necessary to produce conformity, but that also, it must be a reasonable course to adopt. 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 or it would, to use a term current in the United States, constitute "economic waste". (See Restatement of the Law of Contracts, (1932) par. 346). We prefer, however, to 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", for the expression "economic waste" appears to us to go too far and would deny to a building owner the right to demolish a structure which, though satisfactory as a structure of a particular type, is quite different in character from that called for by the contract. 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."<sup>27</sup>

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<sup>25</sup> [1954] 90 CLR 613.

<sup>26</sup> 617.

<sup>27</sup> 617.

- 252 The question that now arises for my consideration is whether the respondent should be allowed the cost of rectification, or whether that would be an unreasonable in which case I should award the respondent compensation.
- 253 The defects which I consider fall into this context are as follows:
- Item 8 Staircase/Deletion of Window 27.
  - Item 15 Roof Profile.
  - 20 Front Entry Doors.
- 254 Mr Shaw conceded that the cost of rectification relevant to Item 8 Staircase/Deletion of Window 27 is unreasonable. He submitted that an allowance of something in the region of \$1000-2000 would be fair.
- 255 It is difficult to determine the narrowness of the main passageway on even the closest visual examination. It was certainly not obvious to me on the view.
- 256 However, the loss of window 27 was very obvious. The area where the window should have been situated is very dark. It would have illuminated considerably by a window. I noticed, that even though the weather conditions were overcast, there was some ambient light from the front door and from other meals/dining area.
- 257 I think compensation in the region of \$2000 would be a fair and reasonable amount for the loss of the effect of lighting to the steps leading from the passageway up into the meals/dining area in the context of Mr Lees opinion as to the cost of rectification which he considered was out of proportion to the defect.
- 258 The roof profile was part of the design of the house to create attractiveness by having a roof line which is unusual in shape and design were undoubtedly a feature from the street and as one enters into the property by the front gates.
- 259 As the roof line presently stands it probably does not immediately strike the onlooker as being strange or out of keeping with the general design of the other roof lines, and to that end the respondent is rather fortunate.
- 260 However, the departure from the plans is extraordinary. I assess compensation at \$10,000 because it is the most visible roof line of the house to an onlooker and was to be one of the striking features of the design of the house. Its loss is significant and cannot be underestimated in its detraction from the overall intended design and impact to onlookers.
- 261 The front entry doors are also part of the design of the house intended to create attractiveness and be a striking feature. However, again the respondent is rather fortunate that an onlooker would not necessarily consider that the front entry doors are located in the wrong position.

- 262 I assess compensation of \$2000. Although the impact of the front entry doors are intended to have the effect which I have described they function well and are inherently attractive where they are presently located.
- 263 Just so that it might be understood why I have not taken a simple approach to the south wall in the meals/dining area I consider that the wall has utterly destroyed what was intended to be a very significant internal feature between two rooms which were intended to work together as the centrepiece of the respondent's house. I do not consider that the cost of rectification is unreasonable.

### Reconciliation

- 264 The following is a reconciliation of the defects and the cost of rectification/compensation which the applicant is liable to pay the respondent:

Item	Amount
Building permit	\$2000
Timing of the works	\$16,500
Item 1 sliding doors to meals/dining	\$3596
Item 2 south wall	\$20,258
Item 3 sliding doors to the west wall	\$3504
Item 4 gap between windows and the steel lintel	\$1601
Item 5 south wall	\$3994
Item 6 window sliding door unit	\$4275
Item 8 staircase/deletion of window 27	\$2000
Item 12 stairs to garage	\$2586
Item 13 (1) walls between painting room and garage	\$1060
Item 13 (2) garage floor slab	\$718
Item 14 damp brickwork	\$3851
Item 15 roof profile	\$10,000
Item 16/17 balcony roof/eaves linings	\$10,778
Item 18 windows east elevation	\$1776
Item 19	\$4219

Item 20 front entry doors	\$2000
Item 21 termite treatment	\$1505
Item 22 articulation joints	\$1645
Item 23 over pours	\$1680
<b>Total</b>	<b>\$99546</b>

### General Observations

- 265 The applicant and the respondent expended a great deal of time and money running this proceeding for some 13 days in the Tribunal. The decision to rely upon the transcript, Tribunal Books, exhibits and the previous hearing and sundry other documents was an intelligent approach for which the applicant and the respondent are to be congratulated.
- 266 However, the approach raised very considerable difficulties for me in reading the transcript, and the documents to which I was taken, in order to obtain the flavour of what occurred during the previous hearing.
- 267 One of the considerable difficulties I experienced in taking the approach urged upon me was dealing with individual claims and making a sensible determination of those claims based upon the evidence which was put before me. Inevitably, some of the findings I have made are based upon preferring some evidence over other evidence, and in most cases based upon what I made of the witnesses and their evidence, even though the only witness I saw in the flesh was Mr Mitchell.
- 268 After reading the transcript, and principally the evidence of the applicant, Mr Leong, the respondent and Mr Lees I was left with a strong impression that the applicant's approach to the building work was to cut corners and to undertake parts of the work as he saw fit ignoring his strict responsibility under the building contract, and to follow the plans and specifications as closely as he was able to.
- 269 In nearly every case where the applicant sought a variation claimed in this proceeding before me, he did not seek the variations as he was required to under the building contract and the *Domestic Building Contracts Act 1995*.
- 270 In most cases he says he obtained a variation through conversation with Mr Leong, and in a few cases with the respondent himself. However, the evidence discloses a dramatic and often stark disparity in the versions of what actually occurred.
- 271 It was my impression that some of the building work posed difficulty for the applicant in its undertaking, and rather than work through those difficulties he approached it from what he considered to be a practical solution to suit himself. The most glaring examples are the south wall in the meals/dining area and the roof profile.

272 Mr Leong was attacked by both sides during the previous hearing with some justification. On my reading of his evidence it was unreliable and unsatisfactory in many respects. However, where I preferred his evidence was in the instances where the applicant failed to obtain approval for variations as he was required to do under the building contract and the *Domestic Building Contracts Act 1995*.

273 I was not particularly impressed by the evidence of Mr Mitchell. He seemed to me to be rather defensive when cross-examined, and showed a partiality towards the applicant and his case. I considered his approach to assessing the items in dispute between the applicant and the respondent to lack balance.

### **Final Disposition**

274 I propose to make an order that the applicant pay the respondent the sum of \$99,546.

275 I will have the proceeding relisted for mention to determine whether costs ought to follow the event.