VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1647/2015

CATCHWORDS

Domestic building - termination of building contract - repudiation - whether builders conduct repudiation - election by owner to affirm the contract - election to terminate instead under s.41 – s.41 termination - time exceeded - increased cost and time because of variations under section 38 not counted – "under section 38" - meaning - neither party entitled to damages for termination - builder entitled to reasonable price for work to date of termination - how assessed - cost to rectify defects to be deducted - cost of completion not relevant - stages as specified by section 40 not relevant - entitlement under contract not to be exceeded - meaning of

APPLICANT	Wenli Shao
RESPONDENT	A G Advanced Construction Pty Ltd (ACN 089 153 597)
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	27 March - 4 April and 7 April 2017
DATE OF ORDER	21 June 2017
CITATION	Shao v A G Advanced Construction Pty Ltd (Building and Property) [2017] VCAT 1903

ORDERS

1. Order the Respondent to pay to the Applicant the sum of $93,153.00.
2. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Mr N. Phillpott of Counsel
For the Respondent	Mr C. Fenwick of Counsel

REASONS

Background

1. The Applicant ("the Owner") is the owner of a partially completed house in North Balwyn ("the House"). The Respondent ("the Builder") is a builder. Its director is a Mr Gurleyen, who is a registered builder.
2. The House was built to its present stage of construction by the Builder pursuant to a major domestic building contract ("the Contract") that it entered into with the Owner on or about 31 August 2013. It is common ground that the Contract is at an end, although the circumstances of its termination are disputed. The House is incomplete.
3. By this proceeding, the Owner seeks damages from the Builder for the cost of rectifying allegedly defective building work, the cost of completing the construction of the House and other damages for breach of contract.

The hearing

4. The matter came before me for hearing 27 March 2017. Mr N. Phillpott of Counsel appeared on behalf of the Owner and Mr C. Fenwick of Counsel appeared on behalf of the Builder.
5. I visited the site with the parties and their experts on the second day of the hearing. The hearing then continued until 4 April when it was adjourned for preparation of submissions which were made on 7 April 2017. Following submissions I informed the parties that I would provide a written decision.

Witnesses

6. Expert evidence was given concurrently by Mr K Ryan on behalf of the Owner and by Mr D Horley on behalf of the Builder.
7. Apart from the experts, evidence in support of the Owner's case was given by the Owner and by a Mr Wilson, a building consultant, who assisted her in dealing with the Builder towards the end of the construction. A number of his reports were also included in the evidence. The only witness called on behalf of the Builder was Mr Gurleyen.
8. The Owner said that she had limited English and did not understand the Contract at the time she went through it with the Builder and signed it. That was disputed by the Builder who said that she had perfect English. Although she gave evidence through an interpreter Mr Wilson said that, in his dealings with the Owner, he understood her and she appeared to understand him. The emails that she sent were all in English.
9. Throughout the construction period there were numerous meetings and discussions between the Owner and Mr Gurleyen and there is no email, letter or other contemporaneous document to suggest that the Owner did not understand what was taking place or what was said to her. Indeed, there was a continuing correspondence by email between the Owner and Mr Gurleyen which indicates an understanding by the Owner of the matters discussed.

10. Moreover, this was a major project and the Owner struck me as being an astute woman. I do not believe that she would have proceeded with the construction in the way she did if she had not known what was going on. I am not satisfied that the events which occurred were as she tried to portray them or that things were done contrary to her wishes, or at the whim of the Builder, as she would have me believe. It seems to me that she took a great personal interest in the construction, changing her mind frequently about what she wanted, and there is nothing in all of the documents to indicate any concern on her part about how long the construction was taking.

11. Despite his role acting on behalf of the Owner, Mr Wilson was relatively independent of the parties and there is no reason not to accept his evidence.

12. Mr Gurleyen was an unsatisfactory witness in that he did not answer questions directly and seemed more intent on getting his own point across. On a number of occasions I had to ask him, quite firmly, to answer the question put to him.

13. Nevertheless, I do not think that this is a case that turns significantly on the credibility of witnesses. There is an abundance of documentation establishing what occurred and much of the evidence was uncontroversial.

The Architect

14. The Contract was entered into following discussions that the Owner had with an architect, Mr Nackovski ("the Architect"). At the start of the hearing, there was a dispute between the parties as to whether the Architect was acting on behalf of the Builder in this regard or whether he was an independent architect retained by the Owner. The first plans prepared are silent as to authorship but were sent to the Owner by the Architect. There is nothing in them to suggest that it was not the Architect who prepared them.

15. The Contract states that the plans were prepared by a Mr Jessmi, but it appears on the evidence that they were drawn by a Mr Janiszevski who, according to the Builder, had done some work for him in the past but was not acting for him in the preparation of these plans. There was no clear evidence as to the connection between these various people and the Architect was not called by either side.

16. The town planning drawings, which appear on pages 702 to 707 of the Tribunal Book, bear the name of the Builder. Mr Gurleyen denied ever having seen them until they appeared in the Tribunal book. He said that Mr Janiszevski had used his format in the plans without his permission. These plans were sent to the Owner by the Architect. The accompanying email stated that they were for discussion and asked for her availability on the following day. The Builder was not copied in on the email.

17. On 27 July the Architect sent to the Owner specifications for appliances, including a gas heater and a design for the wrought iron for the balcony and stairs.

18. On 3 August 2013 the Architect sent some amended plans to the Owner. The accompanying email states:

> "Please find attached the amended plans, note the stairs have been amended, as discussed, the butler's pantry, small kitchen has smaller appliances, large sink in main kitchen with 900 wide appliances, bigger 4 car garage below, large showers upstairs bedrooms, available to catch up tomorrow". (sic.)

19. The following day the Architect sent further amended plans to the Owner showing relocated stairs and laundry and suggesting a meeting after 4 PM that day.

20. On 6 August 2013 the Architect sent more amended plans to the Owner. On the evening of the same day he sent to the Owner a breakdown of costs together with a document entitled "STANDARD INCLUSIONS LIST" setting out what appeared to be the specifications for the construction.

21. On 8 August 2013 the Owner sent a reply by email to the Architect making detailed suggestions for changes. The Architect replied with amended plans on 10 August which the Owner accepted. The Architect then said that he was "finalising the fixed price". The Owner asked for a copy of "the contract" to look at before the meeting and the Architect sent her a copy of a contract relating to another job in Burwood. The document he sent was a copy of a contract entered into by another building company that does not appear to be connected to the Builder at all. It is also a different form of contract from the one the Builder ultimately used.

22. On 12 August the Owner told the Architect that the floorplan was acceptable to her and her husband and asked what she needed to do in order to finalise the drawings. The following day the Architect sent the Owner amended specifications.

23. On 27 August the Architect sent through a three-dimensional model of the proposed house to the Owner. Then, on 29 August, the Architect wrote to the Owner to say:

> "We went thru the prices last night with my building partner, are you available this evening about 6 to go through the Contract or if it is easier for you the weekend".(sic.)

    He did not say in the email who his business partner was.

24. The Builder is not shown as having been copied into any of these communications.

25. The Owner paid the Architect $5,000 in July 2013 and a further amount of $7,500 on 7 August 2013. These amounts were not treated as payments under the Contract that she later entered into with the Builder. The Architect's account, dated 4 August 2013, is in his own name and is for an amount of $15,100.00. It does not appear from the evidence whether the balance of $3,100.00 has been paid.

26. Sometime in the past the Architect had worked in the Builder's office and he was present when the terms of the Contract were discussed and the Contract was signed. Apart from that, and the appearance of the Builder's name on some plans that Mr Gurleyen said he had never seen, there is nothing in all of these communications to indicate that the Architect was anything other than an architect engaged directly by the Owner.

27. The only clear evidence that I have on this issue is that the Architect sent an account to the Owner in his own name for fees for his architectural services and the Owner paid him. Thereafter, the Architect played no part in the project.

28. Although the matter is not free from doubt, it has not been established on the balance of probabilities that the Architect was a representative of the Builder. The best evidence that I have, which is of the communications between the Owner and the Architect, which did not include the Builder, and the rendering of the Architect's bill and the payments made to him by the Owner, would suggest that the contract for architectural services was between the Owner and the Architect.

Signing the Contract

29. The Owner first met Mr Gurleyen on the date the Contract and the Standard Inclusions List were signed. She said that it was a short meeting on 31 August 2013 and that they did not discuss the Contract at any great length. Mr Gurleyen disputed that and said that the meeting lasted three or four hours and the Contract was discussed at length. The Contract price was $970,000.00 (inclusive of GST) and the construction period was to be 320 days.

30. The building permit drawings which bear the stamp of the relevant building surveyor have a handwritten notation to the effect that they were received on 16 September 2013.

31. The engineering drawings (Exhibit "E") do not bear any stamp of the relevant building surveyor and are dated 9 December 2013. Mr Gurleyen said that they were not the approved engineering drawings but no other engineering drawings have been produced.

Changes to the design

32. Thereafter there were numerous versions of the drawings. On 5 December 2013 the Builder sent to the Owner some plans making substantial changes to the design and layout of the ground floor and the first floor. The Owner said that these changes were suggested by Mr Gurleyen and that she agreed to them. She did not suggest any reason why the Builder would want to change the plans, other than saying that he told her that he thought that the design "was not very good". Mr Gurleyen said that the changes were at the Owner's request. I think that is more likely.

33. The changes were as follows:

(a) the front steps were narrowed to the distance between the two front pillars and extended in an L-shaped in front of the House

(b) design of the kitchen and living room was substantially altered on the ground floor;

(c) bedroom two on the second floor was changed to an office and each of the four bedrooms had an ensuite;

(d) the front balcony was widened and brought closer to the House;

(e) the windows on the east elevation were substantially changed:

(f) the windows on the front elevation were changed to a different design;

(g) the rear balcony was extended to the full width of the House and the windows and double doors were changed;

(h) the rendered portico facade on the west elevation was removed and the windows were substantially changed.

34. On 11 December 2013 further plans were sent by the Builder to the Owner, incorporating the following further changes:

(a) additions to the window schedule;

(b) additional windows to the west elevation;

(c) changes to the laundry on the ground floor.

35. On 12 December the Owner sent an email to Mr Gurleyen saying that the new design was “great” and that she really appreciated what he had done. She enclosed some photographs of various pages of the plans with her handwritten annotations on them, setting out further changes that she wanted. This seems to have been acted on immediately because a full set of further amended plans was sent to the Owner by the Builder’s designer later that day.

36. According to Mr Gurleyen, he had a meeting with the Owner on 6 February 2014 at which he requested an updated list of inclusions and specifications for the project and suggested that she engage a consultant to assist her in this regard. He said that she did not do so.

37. On 23 February 2014 the Owner sent another email to Mr Gurleyen asking whether it was then possible for substantial changes to be made on the ground floor. Mr Gurleyen responded with reasons why her suggestions were not a good idea. The proposed changes were not made.

38. The Owner said that these various changes were at the Builder’s suggestion but Mr Gurleyen said that changes were not made by him. He said that the Owner kept changing her mind about what she wanted.

39. On this issue, I prefer the evidence of the Builder. No reason was suggested by the Owner as to why the Builder would want to make these sorts of changes. It seems more likely that the Owner had changed her mind about what she wanted.

Variations

40. It is quite clear that what has been built is quite different from what was in the Contract drawings. A meeting took place between Mr Gurleyen and the Owner on 4 December 2014 when they agreed that the Owner would pay the Builder an additional $175,409.00 for variations which are listed in the document they signed. Mr Gurleyen alleges that there were further variations after this document was signed.

41. I am satisfied that the variations that resulted from changes in the plans were made at the request of the Owner. It does not appear that any of the variations were at the request of the Builder.

42. Variations by an owner are governed by Clause 12 of the Contract and by s.38 of the *Domestic Building Contracts Act* 1995 ("the Act"). That section, where relevant, is as follows:

> "Variation of plans or specifications—by building owner
>
> (1) A building owner who wishes to vary the plans or specifications set out in a major domestic building contract must give the builder a notice outlining the variation the building owner wishes to make.
>
> (2) If the builder reasonably believes the variation will not require a variation to any permit and will not cause any delay and will not add more than 2% to the original contract price stated in the contract, the builder may carry out the variation.
>
> (3) In any other case, the builder must give the building owner either—
>
> (a) a notice that—
>
> (i) 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
>
> (ii) if the variation will result in any delays, states the builder's reasonable estimate as to how long those delays will be; and
>
> (iii) states the cost of the variation and the effect it will have on the contract price; or
>
> (b) a notice that states that the Builder refuses, or is unable, to carry out the variation and that states the reason for the refusal or inability.
>
> (4) The builder must comply with subsection (3) within a reasonable time of receiving a notice under subsection (1).
>
> (5) A builder must not give effect to any variation asked for by a building owner unless—

> (a) the building owner gives the builder a signed request for the variation attached to a copy of the notice required by subsection (3)(a); or
>
> (b) subsection (2) applies.
>
> (6) A builder is not entitled to recover any money in respect of a variation asked for by a building owner unless—
>
> (a) the builder has complied with this section; or
>
> (b) VCAT 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.
>
> (7) If subsection (6) applies, the builder is entitled to recover the cost of carrying out the variation plus a reasonable profit.
>
> (8) This section does not apply to contractual terms dealing with prime cost items or was in writing provisional sums."

43. Clause 12 of the Contract generally follows this provision but requires the notice under sub-section (1) to be in writing. That is not an express requirement of the section.

44. There is no evidence that any of the variations carried out at the request of the Owner was in writing and it seems clear that neither the formal requirements of the clause nor of s.38(3) were met. Indeed it appears from his cross-examination that Mr Gurleyen had an imperfect understanding of how the Contract was intended to operate.

45. At a meeting between the parties in December 2013, a list of variations totalling $175,409 was agreed to but the Builder claims that there were further variations after that and seeks payment of $462,721.47, including builder's margin, for all the variations. The evidence in support of this further claim however is sparse.

46. In his witness statement in reply Mr Gurleyen acknowledged that there were no written variation notices. He said that he trusted the Owner and her husband that they would be true to their word. He said that all the changes were documented on the working drawings and new selection upgrades on quotes and invoices, which he said could be compared with the Standard Inclusion List. He said that every variation they required was agreed upon in regard to both price and time.

47. An extensive schedule was exhibited to one of his witness statements setting out a large number of variations and attributing prices to each, nearly all in round figures, without any breakdown to show how the amount sought in each case was calculated. This was revised during the hearing.

The Owner was not cross-examined as to these and Mr Gurleyen's own evidence in the witness box did not provide any detailed explanation of them.

48. It is unnecessary to consider whether, in these circumstances, the discretion conferred by s.38(6)(b) should be exercised in favour of the Builder because I have concluded that the rights of the parties must be determined in accordance with the provisions of s.41 of the Act, and so it is the value of the work as a whole that must be assessed rather than whether an amount should be allowed for any particular claimed variation.

The progress of work

49. The deposit was paid on 5 September 2013 and construction was due to commence on 30 September but the existing house on the site had to be demolished first and that did not occur until 22 October. Mr Gurleyen said that demolition was delayed because the Owner had not organised for the disconnection of the services. He also complained that the soil report and engineering drawings had not been provided, for which he blamed the Architect.

50. A meeting took place at a coffee shop on 9 November 2013 at which the Owner requested a program for the construction of the House and gave the Builder and the Architect a list of kitchen and bathroom fittings that she wanted. After this meeting the Owner dealt directly with the Builder rather than through the Architect.

51. The building permit was issued on 22 November 2013 and work commenced on 6 December. No notice of delay or request for extension of time was ever given by the Builder to the Owner. According to the Builder, this was because he had a very good relationship with the Owner and they would meet frequently to discuss the project in a nearby coffee shop. He said that he trusted her.

52. As stated above, up to December 2013 there were substantial changes made to the design at the request of the Owner. Then, between mid-December 2013 and 26 January 2014, the Owner was in China on holiday.

53. On 25 February 2014 the Owner visited the site and criticised some aspects of construction in an email that she sent to the Builder.

54. The Owner said that the Builder suggested that she have a swimming pool and a roof above the balcony. She said that she did not agree to the roof above the balcony but she found when she returned from holiday in January 2014 that the Builder had built it. This is denied by Mr Gurleyen who said that he only built what the Owner requested. No reason was suggested why the Builder would incur the expense of constructing a roof over the balcony if the Owner had not requested it to do so. In any case, nothing seems to turn on this evidence.

55. The Owner said that although she preferred the colour of render chosen by the Architect, the Builder said that it was no good and he used a colour of

his own choosing. Mr Gurleyen denied that and said that the colours were not chosen at that stage and that he was still waiting for the Owner to make a decision about what she wanted which she eventually did with the assistance of her husband.

56. She said that the Builder used grey ironbark for the flooring whereas she had requested spotted gum. She also said that the laundry trough and the kitchen sink were not as ordered. Mr Gurleyen denied that and said that the items in question were as chosen by the Owner.

57. Apart from the changes to the plans, it is apparent that there were many details not decided upon and numerous other changes continued to be made. Quotations were obtained by or behalf of the Owner from suppliers that did not match the inclusions list that formed part of the Contract.

58. Mr Gurleyen said that the Owner was talking about internal design in February and March 2014 and was not happy with the kitchen and vanities on the inclusions list. He said that when he asked her about these matters she said that she had not made up her mind and would have to wait for her husband to come from China. He said that it was not until 26 February 2014 that the Owner finally approved the amended design.

59. The frame of the House was inspected on 27 March 2014 and not approved because the south-east corner of the frame exceeded the maximum permissible envelope by 800 mm and a dispensation was required from the Council. This appears to have been due to a mistake in levels at the planning stage. There are a number of other requirements stated by the Building Surveyor in the report of the inspection.

60. Mr Gurleyen said that he informed the Owner on 29 March 2014 that an application would have to be made to the Council for a dispensation in regard to the encroachment outside the building envelope and that she told him that she would handle the matter through the Architect. The Owner denied that but I prefer the evidence of Mr Gurleyen. He said that at that stage, the plans were "still evolving", that the Owner kept making changes and would not choose her appliances.

61. Mr Gurleyen said that on 16 April 2014 he was told by the Owner that consent from the Council had not been obtained, that thereafter he raised the matter with her on numerous occasions and when he finally took charge of the matter himself in November 2014 he discovered that the Architect had not provided necessary documentation to the Council and he had to submit a fresh application which was not approved until 2 April 2015. It is difficult to understand why a Builder would proceed with the construction past frame stage without having the frame approved. However, the problem was that the frame exceeded the building envelope and the Owner had agreed to attend to that through the Architect.

62. Mr Gurleyen said that the bricklaying started on 19 June 2014. He said that on about 28 June 2014 he asked the Owner to finalise all undecided items

such as interior selections, colours and landscaping. He said that she insisted that he provide consultancy services to her and that she told him that he would be adequately compensated for doing so.

63. Examples that Mr Gurleyen gave of the Owner not making up her mind about what she wanted are as follows:

    (a) Mr Gurleyen said that, in about late May 2014, he requested the design for the front fence and landscaping from the Owner but did not receive them;

    (b) Mr Gurleyen said that the failure of the Owner and her husband to make a window selection delayed the start of the bricklaying by approximately two months;

    (c) On 3 July 2014 he met the Owner and her husband to make selections and asked the Owner for the landscaping plans and details of the front fence and to arrange for these to be drawn so that a building permit could be obtained.

    (d) On 9 July 2014 he visited various showrooms with the Owner and her husband to select fittings and appliances. He said that many of the items chosen exceeded the cost allowed for in the Contract and they assured him that they would meet the extra cost.

    (e) On 4 September 2014 Mr Gurleyen said that he met with the Owner because the inclusion list had still not been finalised and fixing items had not been chosen which was delaying fixing works.

    (f) Following the meeting on 4 September 2014, the Owner wrote to the Builder in the following terms:

        "I am still thinking about the cooling system. Could you please tell me about the type of cooling system before it is installed in the House? Can the cooling system be zoned? We have central cooling system in China, each room has its own control panel to adjust each room temperature. So, I would like to learn some information about cooling system. I hope the cooling system can be zoned as well.

        Thank you very much for your help."(sic.)

    (g) Mr Gurleyen said that, after selections were made for plumbing, electrical, heating and cooling, the Owner requested feature bulkheads throughout the house. The Owner denied that she requested the bulkheads but they are there and there is no complaint in any of the emails that they were built without instructions. I prefer the evidence of Mr Gurleyen.

    (h) Mr Gurleyen said that on 16 September 2014, he met the kitchen Contractor with the Owner. He said that, during September, she made further changes to the kitchen.

(i) On 2 October 2014 the Owner gave the Builder details of the tiles she had chosen and the doors and stairs to be used. Mr Gurleyen said that these were later changed.

(j) At a meeting on 9 October 2014 the Owner made further changes to the cabinetry.

(k) On 11 October 2014 the Owners changed her selection of tiles again and sent photographs of the changed tiles that she had chosen to the Builder.

(l) On 16 October 2014 the Owner requested a further sample of timber flooring because she did not wish to go ahead with her previous selection.

(m) Mr Gurleyen said that on 19 October 2014 the kitchen design was finalised. On the following day, the Owner sent an email to the Builder requesting that the kitchen design be changed again and also asking for substantial changes to the cabinetry in the kitchen, butler's pantry and laundry.

(n) On 21 October 2014 the Owner sent the Builder photographs of various exteriors and asked for some landscaping ideas.

(o) Mr Gurleyen said that the selection details of the stairs were not provided until the end of October 2014 and the stairs were installed by mid-November.

(p) A further meeting took place with the kitchen supplier on 7 November.

(q) By an email dated 17 November 2014 to the Builder, the Owner confirmed that she wanted spotted gum flooring and asked him to order tiles, the flooring and the fireplaces. She also asked him to book tradesmen for interior wall painting, plaster for the basement, the plumber, the kitchen supplier and the front yard retaining wall and landscaping.

(r) On about 18 November 2014 the Owner requested Mr Gurleyen to design the front fence. The Builder's design was sent to the Owner on 19 November 2014.

64. An email from the Owner to the Builder dated 4 December 2014 asked about tiles, basins and other matters and the response on the same day by the Builder was that everything should be put on hold until all the details were clarified. By this stage, work had been going on for almost a year.

65. In December 2014 the Builder sent to the Owner a list of the variations she had requested with prices but said that the prices did not include an allowance for a builder's margin. At a subsequent meeting between the Owner and the Builder, they agreed on a figure of $175,409 for all variations made up to that date.

66. Mr Gurleyen said that work then continued on the front fence, the retaining wall, the flooring and various other parts of the construction. The Owner said that in April 2015 she engaged a gardener from a nursery to provide her with landscaping ideas.

67. On 26 April 2015 the Owner asked the Builder for a schedule of works to complete the project which the Builder provided on that day. The list contemplated that the items of work listed would be completed by 27 May 2015, subject to there being no further changes. Thereafter, Mr Gurleyen complained in an email to the Owner that she was not responding to his calls.

68. On 29 April 2015 the Owner's then solicitors sent a letter to the Builder noting that the construction period had extended for more than one and a half times the Contract period and complaining that the Builder had:

    (a) failed to proceed with the work with due diligence or in a competent manner; and

    (b) unreasonably suspended the carrying out of work on a number of occasions.

    The author of the letter stated that the Owner was entitled to terminate the Contract pursuant to s.41 of the *Domestic Building Contracts Act* 1995 ("the Act") and said that, unless by 13 May 2015 certain documents were provided and the works were completed, the Owner would have no alternative but to serve a notice of intention to terminate the Contract and would then look to the Builder for any loss or damage suffered by her as a result of the Builder's breach. In the final paragraph it was stated that nothing in the demand was intended to limit or waive the Owner's contractual and common law rights to seek damages.

69. Notwithstanding the sending of this letter, the Owner did not seek to terminate the Contract at that time and work continued.

Mr Wilson's involvement

70. Following the involvement of her solicitor, the Owner engaged Mr Wilson, a building consultant, to inspect the House and provide a report. He carried out an inspection on 27 April 2015 and his report is dated 5 May 2015.

71. The report identified 8 items of incomplete electrical fit off, 6 items of incomplete plumbing fit off, 4 items of incomplete painting and 36 other items of incomplete work. He noted some damage that had been sustained through vandalism and identified a number of respects in which the appearance of the House differed from the architectural drawings. He also identified 23 other items that he said were defective.

72. Following the preparation of the report Mr Wilson was engaged by the Owner to liaise with the Builder with a view to supervising rectification of the defects and the completion of the House.

73. On 8 May 2015 the building surveyor issued the stop-work order previously referred to because the frame inspection had not been passed. The problem was resolved when the Council finally granted the required dispensation following the Builder's intervention. The order was lifted on 20 May 2015 and nothing seems to turn on this.

74. Also on 8 May 2015, the Owner's solicitors sent to the Builder a comprehensive list of works that needed to be done in order to complete the construction of the House and the landscaping. This document was prepared by Mr Wilson. A large number of the items listed have a notation next to them, saying that instructions with regard to the particular item were required from either the Owner or the Builder. It is clear from this document that a great many matters had still not been decided upon, even at that late stage.

75. A further amended schedule prepared by the Builder was sent to the Owner's solicitors on 12 May which listed all the remaining work to be done and contemplated that it would be completed by 17 June 2015.

76. There were a number further lists prepared on both sides thereafter. The suggestion was made that landscaping be removed from the Contract and that the Owner pay a supplier directly for plumbing fixtures.

77. According to Mr Gurleyen the following work was carried out during the period Mr Wilson was involved:

    (a) completion of the rendering, the front balcony pillars and the roof, all mouldings, plaster patching, painting, electrical fit-off and most of the retaining walls for the garden;

    (b) installation of the drainage;

    (c) preparation of the driveway;:

    (d) construction of the concrete stairway to the front door,

    (e) floor polishing;

    (f) the kitchen;

    (g) installation of most of the heating and cooling systems; and

    (h) installation of the balcony balustrades.

Termination

78. In August 2015 the Owner's solicitors prepared a draft deed of variation to the Contract which Mr Wilson gave the Builder. It incorporated a proposed amended Contract price, a list of alleged outstanding work, stated how further monies due to the Builder would be paid and provided for certain other matters. In particular, it provided that completion was to be achieved on 4 September 2015, a little less than a month later.

79. On 19 August Mr Gurleyen sent an email to the Owner's solicitors refusing to sign the draft deed of variation but indicating a willingness to continue with the Contract.

80. On the following day, 20 August 2015 the Owner's solicitors sent a registered letter to the Builder purporting to determine the Contract. Of particular importance is the second paragraph, which is as follows:

> "While the total construction period including delay days in the new homes contract stipulated 321 days, the work that you have done has taken much longer than this time period and the contract is still yet to be completed. The time you have spent on the contract already exceeds one and a half times of the original construction period and accordingly, our client hereby ends the contract in accordance with section 21.1 of the contract and section 41 of the Domestic Building Contracts Act 1995." (sic.)

81. In reply, on 25 August 2015, Mr Gurleyen wrote to the Owner's solicitors in the following terms:

> "Pursuant to your letter dated 20 August 2015, despite our continued frustration in your client's failure to undertake further fruitful productive discussions and numerous attempts by us to progress works in good faith with our continued wish to bring works to a successful conclusion, it appears that your client is resolute in instruction to terminate our contract, under section 41 of the Domestic Building Contracts Act, for building works at *[address of House given]*.
>
> Please note that it is with the utmost disappointment and regret that as a result, and at your explicit instruction, we have made arrangements for the keys to site to be handed to you and for our plant and equipment to be removed from site.
>
> If you could please make prompt arrangements to remit to us all unpaid invoices within 7 days with final accounts for Building Works to follow.
>
> We reserve all our rights and entitlements for works both on and off site also for any loss and damage suffered as a result of your/your client's actions in this matter." (sic.)

82. Thereafter no further work was done by the Builder and, on 16 December 2015, the Owner issued this proceeding claiming damages of $547,450.00.

83. In the accompanying Points of Claim it is asserted that the notice of termination was given under Clause 21 of the Contract and s.41 of the Act or in the alternative, that the Builder had repudiated the Contract and (*in paragraph 10*) that the repudiation was accepted on 20 August 2015, from which I conclude that the act of acceptance of the repudiation is said to have been the sending of the notice referred to.

The claims made by the Owner

84. The Owner makes the following claims against the Builder:

(a) the cost to rectify the defects and complete the House: $281,655.00 ($355,564 less the amount outstanding under the Contract, of $73,909);

(b) the requirement to obtain additional insurance for the House: $7,182.67;

(c) extra rent paid by the Owner after 17 August 2014: $23,082;

(d) cost of retaining Mr Wilson to attempt to project manage the construction: $17,700.45.

85. In the alternative, the Owner claims that the rights of the parties be adjusted in accordance with s.41 of the Act but it is not specified how this should be done.

Defective and incomplete work

86. The Owner's complaints of defective and incomplete work are set out in a Scott Schedule prepared by the experts. Their evidence was given concurrently on an item by item basis. The defects alleged are as follows.

Water proofing of above ground areas - $40,800.50

87. Mr Ryan said that:

(a) although there appears to be membranes under the tiles they have not been turned up at the door entrances and at the junctions where the tiles meet the walls of the House, as required by the relevant Australian Standard;

(b) the tiled surfaces have an inadequate fall and the external edges have no drip line. During the site inspection he pointed out that there was calcification in the grout lines which he said was due to the inadequate fall.

(c) between 15% to 20% of the tiles on the front porch were drummy;

(d) there were no expansion or movement joints installed on the alfresco tiled floor;

(e) in regard to the front porch, consideration should be given to removing the timber frame and installing a suspended concrete floor slab that will allow for an appropriate step down from the front door sill;

(f) the external tiled areas were exposed to wind driven rain and the first floor rear tiled balcony was admitting water and causing damage to the ceiling. He indicated some areas on the back tiled porch where water appeared to be ponding;

(g) the brick sills should be removed and new waterproofing should be installed under the external door sills before re-tiling. He said that the water-proofing needs to be brought up the face of the walls and sills;

(h) the waterproofing membrane in the alfresco area has been penetrated by fixing brackets;

(i) the first floor rear tiled balcony has loose or missing grout and has been penetrated by two downpipes;

(j) the tiled areas need to be re-laid in order to provide a proper fall.

He also said that the brick sill under the laundry window has been laid too flat and needs to be re-laid in order to achieve an appropriate water run-off.

88. Mr Horley said that the tiled areas were incomplete and agreed that there was no waterproofing upturn against the external masonry walls as required by the relevant Australian Standard. However he said that that was simply a "deemed to satisfy" method of construction and that the performance requirements can be met for the external tiled areas of the House by an alternate solution, being a silicon bead to seal the junction between the tiled areas and the exterior doorways and walls of the House. He did not suggest that this had been accepted by the relevant building surveyor as an alternate solution for the interfaces between the tiles surfaces and the House

89. Mr Horley attributed the calcification of the grout lines to lack of maintenance on the part of the Owner and the fact that the Contract was terminated before the tiles were sealed. I cannot see what maintenance the Owner should have undertaken in order to prevent rain from falling on the exterior balconies. I prefer Mr Ryan's explanation that it is due to lack of fall which allows the water to remain on the surface instead of running away

90. Mr Ryan said that installing caulking under the floor sill and around the perimeter of the tiled areas was not appropriate due to exposure to the weather and the fact that water penetration would cause deterioration to the timber frame of the substrate. It would also not address the problem of lack of fall or drummy tiles.

91. Although I accept that the work is incomplete, I prefer Mr Ryan's evidence in regard to the necessity of a sufficient fall on the tiled surfaces and the upturn of the membrane at the interfaces between the tiled surfaces and the House. I accept that the scope of works set out in his report is necessary and I also accept his costing of $40,800.50 for the carrying out of the work.

Brickwork and subfloor ventilation - $5,779.00

92. Mr Ryan said that the area at the rear tiled porch and the family and meals areas have inadequate subfloor ventilation. He said that the vertical vents the Builder had installed in the brickwork were partially blocked, either with mortar or by a decorative moulding fixed to the House at the same level. He said that this decorative moulding would need to be lowered and additional pressed metal vents incorporated into the brickwork. He also noted that some external black tanking material painted on the brickwork at the front of the House was too high. Finally, he said that the Builder had not installed agricultural drains at the base of the site cuts.

93. Mr Horley said that the vents require minimal clearing of mortar spoil and that additional vents could easily be installed in the brickwork under the rear deck. He said that the bituminous waterproofing at the front of the House might prove to be appropriate because the final level of the garden in that area has not been determined. Finally, he said that the agricultural drains under the decking and under the House have been installed but are yet to be connected to a silt pit prior to connection to the legal point of discharge. He described this as being incomplete works.

94. I accept that the agricultural drain is in place but I also accept that the work described by Mr Ryan in his scope of works will be necessary and I accept his costing of $5,779.00.

Weep holes to external masonry walls - Included in next item

95. Mr Ryan pointed out on site that the external moulding was obstructing the low point of the open perpends in the brickwork which have been provided as weep holes to drain the brick cavity at the level of the base brickwork. He also noted that some of the mouldings were damaged.

96. Mr Horley suggested that vertical cuts could be made in the moulding which could be sleeved at an angle out from the brick face so as to not drip any more or less than would a traditional weep hole. He said that not a great deal of water would drain from the holes.

97. I accept the need for the weep holes to be open, which was not disputed, and I accept Mr Ryan's evidence that making vertical cuts in the moulding is not an acceptable solution. This moulding is an Architectural feature of the House and as such, its appearance should not be compromised. I accept that Mr Ryan's scope of works will be necessary. The cost is included in the costing of the next item.

Rendering and mouldings - $16,331.00

98. Mr Ryan said that the East side stair void window has no visible weep holes under the rendered sill moulding and that there are a number of windowsills where either weep holes have not been installed or, if they have been, they are covered by the mouldings. The existence of this defect does not appear to be disputed. I accept Mr Ryan's costing of this item, which is $16,331.00. The main component is a scaffolding allowance because of the height at which much of the work is to be done.

Driveway entry gate pillars and garage - $1,501.50

99. A number of bricks in the left-hand side brick pillar at the driveway entrance have been chipped. Mr Ryan suggested that it looked as though they had been vandalised by someone with a hammer. Mr Horley pointed out, correctly, that the perpetrator of the damage is unknown and that the damage has not affected the structural integrity of the pier. Similar damage was sustained by the brickwork next to the garage.

100. Although it is not suggested that the damage was caused by the Builder, the site was at the risk of the Builder at the time it was sustained and the presence of the damage affects the value of the work and materials that it supplied.

101. Mr Ryan costed the rectification of the damage at $2,359.00. Mr Horley simply allowed $632.00 for the cost of an engineer's inspection. It appeared to be accepted that an engineer's inspection is not required and I cannot see why it would be, since it is unlikely that the structural integrity of the pillars would have been affected. I accept Mr Ryan's figure, adjusted by deleting the cost of an engineer, which results in a figure of $1,501.50.

Brick lintels - $7,955.60

102. Mr Ryan said that the lintels adjacent to the alfresco area are undersized for the distances they span. Mr Horley agreed but said that the over-span was small and there is no evidence of any deflection in either lintel. He said that it would be excessive to replace the lintels prior to an engineer's investigation. Mr Ryan agreed that the lintels above the upper doors did not require replacement because they only supported a small amount of brickwork. He said that both lintels would require to be certified by an engineer.

103. It was the Builder's contractual obligation to build in accordance with the National Construction Code ("the Code") and the Owner is entitled to have correctly sized lintels supplied and installed. I accept that the scope of works identified by Mr Ryan will have to be done and I accept his costing of $7,955.60.

Brickwork to the front fence - $6,366.00

104. The front fence brickwork retaining wall panel has bowed out excessively and failed. Mr Ryan said that it requires demolition and rebuilding. Mr Horley agreed. They differed as to the cost. Mr Ryan costed it at $6,763.00. Mr Horley costed it at $5,969.00. One is as likely to be right as the other and so I will allow $6,366.00.

Front concrete stairway - $7,464.60

105. There is a large monolithic concrete stairway in front of the House providing access to the front door. Mr Ryan said that the approved structural engineering drawings did not show any stairs in that location and that the concrete stairs constructed by the Builder did not accord with the drawings. He said that the risers were inconsistent and the stairs did not appear to have been constructed with concrete footings or with the approval of the relevant building surveyor.

106. In his initial report, Mr Horley agreed that the stairs were non-compliant and needed to be demolished and replaced. However at the hearing he said that he had since been informed that the stairs had been constructed on founding piers through to a clay substrate and that structural integrity has thereby been achieved.

107. At the on-site inspection I noted that the stairs appeared to have been very roughly cast with uneven risers and little care appeared to have been taken by the concreter to achieve a smooth finish. I also noted that a gap had opened up between the top of the stairs and the House. Mr Horley said that he thought that this was due to settlement.

108. On this issue I prefer Mr Ryan's opinion. There is no evidence of any proper footing having been constructed for the stairs and no evidence of any inspection of the foundation supporting them. I accept that they will have to be demolished.

109. Mr Ryan's costing includes fees for an engineer and an Architect to design appropriate replacement stairs but the drawings were the responsibility of the Owner. He also includes footings and brickwork which were not constructed by the Builder. In determining the value of the work carried out by the Builder for the purposes of s.41 of the Act, I should take into account the cost of demolishing this defective construction and also what is likely to have been included in Mr Wilson's valuation of the overall work with respect to their construction. Doing the best I can using Mr Ryan's figures, I think that an appropriate allowance, including the cost of demolition, is $7,464.60 including margin and GST. That figure is the total of the third, fourth, fifth, sixth and ninth items in his costing schedule. There is also no reason for any contingency.

Damaged block retaining wall - $657.80

110. Some of the blocks on the concrete retaining wall of the driveway have been vandalised with black paint. Although the damage is not widespread, the affected blocks will need to be replaced.

111. Mr Horley correctly pointed out that the person responsible for the damage could not be identified. However the site was at the risk of the Builder at the time the damage was sustained and the presence of the damage affects the value of the work and materials that have been supplied by the Builder.

112. Mr Ryan costed this part of the work at $764.00 whereas Mr Horley costed it at $200.00. Comparing the two costings, I do not see the need for a contingency figure or a rubbish bin allowance separate from what has already been allowed for in the other costings. With that deduction, Mr Ryan's assessment becomes $657.80, and that figure will be allowed.

Articulation joints - $2,686.00

113. This was a matter raised in Mr Wilson's initial report. He said that articulation joints in the brickwork on the south elevation do not extend to the full thickness of the masonry and expansion joints have been introduced more than 10 courses above the concrete strip footings. Mr Ryan said that they needed to be rectified by cutting through the feature moulding. Mr Horley agreed but said that it was incomplete work.

114. I prefer Mr Ryan's evidence that this is defective rather than incomplete work. The articulation joints have been defectively constructed and need to

be rectified. I therefore accept Mr Ryan's scope of works and also his costing of $2,686.00.

Undersized drainage pit - $550.50

115. There is a drainage pit in the lower driveway area. It is agreed that it is undersized and requires replacement. Mr Ryan's costing for removing the existing undersized pit and putting in one of the correct size is $550.50. Mr Horley did not cost this item. That figure will be allowed.

Eastside metal roof - $450.00

116. This claim relates to some damaged and defective sheeting and tray flashing. There are some mortar splashes on the roof to be removed which Mr Ryan acknowledged was incomplete work but most of the issues related to defects. Mr Ryan has costed the rectification at $614.00 and Mr Horley has costed it at $450.00 for a somewhat different scope of works. Considering that a small component is incomplete work, I will allow Mr Horley's figure $450.00.

Timber decking installation - $1,250.00

117. Mr Ryan said that the rear timber deck constructed by the Builder is not shown on the plans and does not appear to have been approved by the building surveyor. He said that the rear brick wall of the House had been constructed with a single skin and an additional sleeper wall had been constructed in order to take the lateral pressure of the soil. He said that an engineer would need to inspect the site and prepare a decking design to be submitted to the building surveyor.

118. In addition, he said that a number of weathered decking boards would need to be removed and replaced because they had been subjected to excessive weathering. He acknowledged that may be possible to clean them but suggested that there were insufficient gaps between the boards. His costing of $5,930.00 includes the cost of an engineer to assess the decking frame and supports and also to replace the decking boards.

119. Mr Horley said that, given the height of the retaining wall and its distance from the wall of the House, it was within the angle of repose required by the Code. He said that the structural design of the decking and the retaining wall were therefore in accordance with the relevant standards, although he agreed that the agricultural drain in front of the sleeper wall would need to be connected to a silt pit.

120. On this item I prefer the evidence of Mr Horley and will allow his figure of $1,250.00 for the lesser scope of works.

Drummy tiles on the porch and balcony pillars

121. The pillars on the front porch and the rear alfresco area are of lightweight construction and have been tiled. The mitred corners, which were acknowledged to have been well executed, have opened up and the grout is cracked. According to Mr Ryan, the tiles appeared to be drummy when

tested. Although over 5000 mm high they had no movement joints and the rear pillars have no metal capping. Mr Ryan acknowledged that the drummy state of the tiles might have been caused or contributed to by water entering through the exposed tops of the pillars.

122. Mr Horley said that there was no evidence that any of the tiles were drummy and that all that was required was finishing the external corners and the capping. He noted that the tops of the pillars had been left exposed since the Owner assumed control of the site.

123. No concern about these tiles was raised in Mr Wilson's reports. It first appeared in Mr Ryan's report following his inspection in September 2016, over a year after the Owner took possession of the site. Since one of the suspected causes of the problem is water penetrating the tops of the pillars, it is uncertain whether the current state of the tiles is due to defective construction by the Builder or simply the failure of the Owner, after termination, to take reasonable steps to protect the pillars from deterioration. I am not satisfied that it has been demonstrated that I should make a deduction from the value of the Builder's work with respect to the present condition of these tiles.

Waterproofing of bathrooms

124. Mr Ryan said that the falls in the shower floor are not as recommended by *Australian Standard AS3958.1-2007 Appendix D3 Falls Ratio*, which he said was between 1:60 and 1:80. Mr Horley did not seem to dispute the measurements of falls made by Mr Ryan but said that the standard contemplates falls flatter than 1:100 and that, in such a case, the effectiveness of the floor drainage should be confirmed to ensure that the performance requirements were met.

125. Some measurement of falls was undertaken by Mr Ryan during the on-site visit and he now acknowledges that the shower recess in the master bedroom has an acceptable fall. The Bedroom 2 shower recess has falls of 45 mm, 10 mm and 7 mm and in the shower recess in the guest bedroom they were marginally below 1:100. The shower bases in question are rectangular and the falls to be achieved were in a number of directions. The bases themselves appeared to my untrained eye to be well constructed and all have falls. The only issue appears to be whether the falls which have been provided are adequate to meet the performance requirements. Some water was poured onto the floor to test the fall and I observed no ponding. I accept Mr Horley's evidence that the shower bases as constructed are sufficient.

Toilet stop valves

126. The Builder has provided stop valves for the toilet cisterns on the bathroom walls at greater heights than is usual. Mr Gurleyen's evidence was that this is the height required for the very expensive type of toilet suite selected by the Owner. The dispute in this regard is whether that particular sort of toilet

suite was to be used in all bathrooms or just in the ensuite for the master bedroom. I am satisfied that the Owner wanted premium fittings throughout and had ordered this particular toilet. Since it did not appear to be disputed that the heights at which these valves have been fitted are suitable for the expensive toilet referred to, I am not satisfied that a defect is demonstrated.

Rattling stairway

127. There was a complaint about rattling of the metal balustrade of the staircase. I do not recall this being pointed out during the on-site inspection. Mr Ryan said that the staircase contractor should attend and glue the loose balusters when necessary and he has allowed a call-out charge of $285.00 for arranging that. I think this is incomplete work.

Ducting

128. Mr Ryan said that the kitchen range hood requires a fire rated ducting and an external weatherproof wall vent that has not been installed. Since some ductwork is present in the ceiling bulkhead, Mr Ryan said that he did not consider this was incomplete works but rather, non-compliant works.

129. In addition, he said that the exhaust fan for the ensuite to the guest bedroom has not been ducted and that this should have been done before the plaster was installed.

130. Mr Horley said that the ducting placed in the kitchen bulkhead was sufficient and simply needed to be connected and that this was incomplete works.

131. Mr Ryan assessed the cost of rectification of $1,140.00. Mr Horley assessed it at $784. It seems to me that this is incomplete, rather than defective, work.

Doors - $515.50

132. There are a number of doors that have a horizontal timber pattern on them. Two of them form a double door into the master bedroom and the horizontal lines, on each side, do not match up.

133. As to the difference in height, the possibility was suggested that when the doors were taken down for painting they were refitted in the wrong places. If that were the case, it could have been easily corrected before hand over but it was not established that that is why the doors are of different heights.

134. Mr Ryan provided a costing of $515.50 for this item for the replacement of one of the doors to ensure correct alignment, and I accept that that will be necessary.

Fitment of internal and robe doors

135. Mr Wilson pointed out that the Builder had not installed the robe doors in accordance with the standard inclusions list. Mr Ryan pointed out that internal doors need adjustment. This would seem to be incomplete work.

Internal stairway - $380.00

136. Mr Ryan said that the bottom riser of the timber stairs is out of parallel. Mr Hagreed. Mr Ryan has suggested a method of rectification costing $380.00 whereas Mr Hhas suggested seeking a dispensation for the height variance. I think the problem should be rectified and I accept Mr Ryan's figure of $380.00.

Architraves

137. There are gaps in some of the architraves exceeding 1 mm which require filling and painting. It is acknowledged that this is incomplete work.

Control joints and floor tiling - $465.00

138. Control joints have not been installed in areas of the floor tiling. It is agreed that the method of rectification is to remove grout and install an appropriately colour flexible filling to create control joints. I accept Mr Ryan's figure of $465.00 for this work.

Conclusion as to defects

139. The total cost of rectifying the defects in the work are therefore assessed at $93,153.00, as follows:

Water proofing of above ground areas	$40,800.50
Brickwork and subfloor ventilation	$ 5,779.00
Weep holes, rendering and mouldings	$16,331.00
Driveway entry gate pillars and garage	$ 1,501.50
Brick lintels	$ 7.955.60
Brickwork to the front fence	$ 6,366.00
Front concrete stairway	$ 7,464.60
Damaged block retaining wall	$ 657.80
Articulation joints	$ 2,686.00
Undersized drainage pit	$ 550.50
Eastside metal roof	$ 450.00
Timber decking installation	$ 1,250.00
Doors	$ 515.50
Internal stairway	$ 380.00
Control joints and floor tiling	$ 465.00
	$93,153.00

Submissions as to Termination

140. Mr Philpott submitted that the Builder had repudiated the Contract by the following conduct:

(a) performing defective work;

(b) demanding payment otherwise than in accordance with the Contract;

(c) failing to comply with the Contract in regard to variations; and

(d) delay.

141. He acknowledged that the Owner's solicitor's letter of 20 August 2015 did not refer to all of these breaches but submitted that this did not preclude the Owner from now relying upon them as repudiatory conduct.

142. Mr Fenwick submitted that any grounds the Owner had to terminate the Contract on the ground of repudiation existed before 2 April 2015 and that instead of terminating the Contract she elected to continue with it by:

(a) the letter from her solicitors dated 29 April referred to above;

(b) an email from her solicitors dated 30 April 2015 demanding a schedule for completion of the project;

(c) a subsequent site meeting on 6 May 2015 between her representative, Mr Wilson, and her solicitor with representatives of the Builder; and

(d) the Builder carrying out additional work after the meeting and before the letter purporting to terminate the Contract, which is detailed in paragraph 46 of Mr Gurleyen's witness statement.

143. In order to amount to an election the party said to have elected must be faced with alternative rights which are mutually exclusive. I was referred to the case of *Sargent v. ASL Developments Ltd* [1974] HCA 40, where Mason J said (at paras.26-28):

> "26. …A person is said to have a right of election when events occur which enable him to exercise alternative and inconsistent rights, i.e. when he has the right to determine an estate or terminate a contract for breach of covenant or contract and the alternative right to insist on the continuation of the estate or the performance of the contract. It matters not whether the right to terminate the contract is conferred by the contract or arises at common law for fundamental breach - in each instance the alternative right to insist on performance creates a right of election.
>
> 27. Essential to the making of an election is communication to the party affected by words or conduct of the choice thereby made and it is accepted that once an election is made it cannot be retracted (*R. v. Paulson* (1921) 1 AC 271, at p 284; *Tropical Traders Ltd. v. Goonan* [1964] HCA 20; (1964) 111 CLR 41, at p 55). No doubt this rule has been adopted in the interests of certainty and because it has been thought to be fair as between the parties that the person affected is entitled to know where he stands and that the person electing should not have the opportunity of changing his election and subjecting his adversary to different obligations.

> 28. A person confronted with a choice between the exercise of alternative and inconsistent rights is not bound to elect at once. He may keep the question open, so long as he does not affirm the contract or continuance of the estate and so long as the delay does not cause prejudice to the other side. An election takes place when the conduct of the party is such that it would be justifiable only if an election had been made one way or the other (*Tropical Traders Ltd. v. Goonan* [1964] HCA 20; (1964) 111 CLR 41). So, words or conduct which do not constitute the exercise of a right conferred by or under a contract and merely involve a recognition of the contract may not amount to an election to affirm the contract."

144. The alternative rights must be inconsistent. The innocent party will affirm the contract by conduct justifiable only on the basis that an election has been made, even if the party does not intend to affirm (see *Cheshire and Fifoot "Law of Contract"* 9th Australian edition para. 21.29 and the cases there cited).

145. The mere reliance in a notice of termination upon a clause in a contract does not in itself amount to an election to affirm that contract. Where the choice is between termination of a contract according to its terms or termination or at common law, each involves a right to terminate with the result that, usually neither is inconsistent with the other and the doctrine of election does not apply (see *Waters Lane & anor v. Sweeney & ors* [2007] NSWCA 200. However termination pursuant to Clause 20 and s.41 of the Act is qualitatively different from termination by acceptance of a repudiation because they have very different consequences.

146. Mr Fenwick referred me to a line of English authority which would suggest that, where a notice of termination makes explicit reference to a particular contractual clause and nothing else, that may, in the circumstances, show that the giver of the notice was not intending to accept a repudiation but was only intending to rely on the contractual clause (see *Shell Egypt West Manzala GmbH v. Dana Oil Egypt Ltd* [2010] EWHC 465 and the cases there cited).

147. In the present case, the letter expressly terminated the Contract under Clause 20 of the Contract and s.41 of the Act. Such a termination has different consequences from the acceptance of a repudiation. There is nothing in the letter to say that, in the alternative, the Owner was accepting a repudiation by the Builder. She has unequivocally stated that she is terminating the Contract in that way and mentions no other. Once that communication was made, the Contract was at an end by operation of Clause 20 and s.41 and I think that it is then not open to her to argue that the letter amounted to an acceptance of a repudiation.

Repudiation by the Builder?

148. In case I am wrong, and in case the letter of 20 August 2015 can stand as an acceptance of an act of repudiation I should consider whether such a remedy is available to the Owner in any event.

149. In paragraph 9 of her Points of Claim the Owner alleged that the Builder evinced an intention no longer to be bound by the Contract. No particulars of the repudiation are pleaded but allegations are made in the Points of Claim that the Builder:

    (a) failed to carry out works in a proper and workmanlike manner and in accordance with the plans and specifications;

    (b) failed to supply materials which were good and suitable for the purpose;

    (c) failed to carry out the works in accordance with all legal requirements;

    (d) failed to carry out the work with reasonable care and skill.

    It is also pleaded that the Builder failed to complete the work within the construction period.

150. Mr Philpott submitted that, by carrying out defective work, the Builder failed to comply with an essential term of the Contract. He suggested that because of the extent of the defective work, the Builder had expressed an intention no longer to be bound by the Contract and had thereby repudiated it.

151. In addition, Mr Philpott pointed to the payments made throughout the project by the Owner to the Builder which he said followed Method B in the Contract (*Tribunal book 900*). By s.40 of the Act, a builder must not demand, recover or retain under a major domestic building contract more than the stated percentage for each stage set out in the section unless the parties to the contract agreed do so in the manner set out in the regulations.

152. The relevant regulation is Regulation 12 of the *Domestic Building Contracts Regulations* 2007, which provides as follows:

    > "For the purposes of section 40(4) of the Act, when parties to a major domestic building Contract agree that sections 40(2) and (3) of the Act do not apply to that Contract, the manner of agreement is to include in the major domestic building Contract—
    >
    > (a) a warning in the form of Form 1 in the Schedule which is signed by the building Owner before the execution of the Contract; and
    >
    > (b) a Clause in the form of Form 2 in the Schedule."

153. Although the Contract contains the required warning, there is no signature of the Owner on the line provided for the purpose. Consequently, s.40 applies and the Builder cannot demand or recover more than the amount set out in the section which, up to the end of fixing stage, amounts to 90% of

the Contract price. It also cannot retain any more than that from the money it has received.

154. In fact, the Owner has paid the instalments set out in the Contract plus additional amounts to take account of variations, totalling $1,040,700.00. Mr Philpott submits that, by receiving and retaining these payments, the Builder has repudiated the Contract.

155. In addition, Mr Philpott said that the Builder repudiated the Contract by not following the procedure with respect to variations required by the Act. Finally, he said that the failure of the Builder to complete the construction of the House within a year after the termination of the construction period also amounted to repudiatory conduct.

156. A party repudiates a Contract if he evinces an intention no longer to be bound by it or to fulfil it only in a manner substantially inconsistent with his contractual obligations (see Cheshire & Fifoot *Law of Contract* 9th Australian Edition para 21.12 and the cases there cited). Repudiation is a serious matter and is not to be lightly found or inferred (*Shevill v. Builder's Licensing Board* [1982] HCA 47 per Wilson J at para.8).

157. The conduct that is said to amount to a repudiation of the contract must be assessed objectively. In *Laurinda Pty Ltd v. Capalaba Park Shopping Centre* [1958] HCA 23, Brennan J. said (at para 14):

> "Repudiation is not ascertained by an inquiry into the subjective state of mind of the party in default; it is to be found in the conduct, whether verbal or other, of the party in default which conveys to the other party the defaulting party's inability to perform the contract or promise or his intention not to perform it or to fulfil it only in a manner substantially inconsistent with his obligations and not in any other way."

158. It does not appear to be necessary for a party who is accepting a repudiation to specify any ground for the termination. Indeed, if an invalid ground is stated, the termination may nonetheless be effective if it is justified on some other ground, even if the terminating party was not aware of that alternative ground (*Shepherd v. Felt Textiles of Australia Ltd* [1931] HCA 21).

159. The correspondence suggests a willingness on the part of Mr Gurleyen to finish the job and the Owner appears to have adopted a very casual attitude in terms of making decisions about what she wanted and how long the work was going to take. Nevertheless, if, viewed objectively, the conduct of the Builder demonstrates an intention on its part to perform the Contract in a manner substantially different from its contractual obligations that will amount to an act of repudiation even though subjectively, Mr Gurleyen might have been anxious to complete the Contract.

160. The performance of defective work does not necessarily amount to an act of repudiation, nor does the failure of the Builder to complete the work within the Contract period. The Contract contemplates that there might be defects in the work that will need to be rectified during the defects liability period.

It also contains provisions that contemplate that the construction period might be exceeded and saying what is to happen in such an event.

161. Although I am satisfied, on the expert evidence, that there are a number of defects in the work as described above, I am not satisfied that it has been established that the Builder thereby evinced an intention no longer to be bound by the Contract.

162. As to the time taken to carry out the work, because of the frequent changes made by the Owner I am unable to find that the Builder is to blame for all or even a substantial part of that.

163. As to the instalments of the Contract price paid by the Owner, because of the failure of the Builder to have the Owner sign the acknowledgment required by Regulation 12, although the receipt by the Builder of these amounts was in accordance with the written terms of the Contract, it was a breach of s.40 of the Act. It has the consequences set out in the section but it is not in itself a breach of the Contract. It remains unlawful for the Builder to retain those instalments and the consequences of that are considered below. The mere receipt and retention of those payments does not evince an intention on the part of the Builder not to be bound by the Contract.

164. The procedure to be followed in regard to variations to the Contract which are set out in s.38 of the Act and Clause 12 of the Contract was not followed but the section itself sets out what is to happen if the procedure is not followed.

165. The onus of proof is on the Owner to establish that the Builder has repudiated the Contract and repudiation is not to be lightly inferred. Even objectively viewing all of the above factors together, I do not find that the Builder has evinced an intention no longer to be bound by the Contract.

Affirmation

166. Mr Fenwick submitted that, even if the conduct of the Builder was repudiatory, the Owner, with knowledge of the conduct, elected to affirm the Contract.

167. In the case of repudiatory conduct if the innocent party, with knowledge of the conduct, continues to perform the Contract or accepts continued performance of the Contract by the party in breach following the conduct, that will generally amount to an affirmation of the Contract and the right to accept the repudiation and determine the Contract will be lost (see *Idameneo (No 123) Pty Ltd v. Ticco Pty Ltd* [2004] NSWCA 329; *Carr v. JA Berryman Pty Ltd* (1953) 89 CLR 327).

168. Up to the time her solicitor sent the letter purporting to determine the Contract, the Owner knew how long the Builder had taken in the construction of the House and it is clear from her evidence that she was well aware that she was entitled to terminate the Contract under Clause 20 of the Contract and s.41 of the Act. She was also aware, through her agent,

Mr Wilson, what needed to be done in order to rectify and complete the work. She nonetheless continued to insist on performance up until 5 August 2015 when Mr Wilson forwarded the proposed deed of variation to the Builder. It was only when the Builder refused to sign that document that the letter of 20 August was forwarded on the following day.

169. Mr Philpott submitted that the Owner's conduct, when viewed objectively, is consistent with that of a party preserving her rights. Although that is not explicitly stated in the solicitor's letter of 29 June, the concluding words said that nothing in the letter was intended to limit or waive the owner's contractual and common law rights to seek damages.

170. Mr Philpott referred to the following passage from the judgment of Fullagar J in *Carr v. JA Berryman Pty Ltd (above)* at p.351:

> "An election to not rescind for failure to deliver the excavated site on the due date could not deprive that failure of all significance. When a second breach occurs, the two combined may have a significance which it might not be legitimate to attach to the first alone".

171. It is unclear from Mr Philpott's submission what the further breaches are said to have been. Obviously, the whole of the conduct of a party said to be in breach must be viewed together to see if it can reasonably be inferred that the party does not intend to take the contract seriously or is prepared to carry it out only when it suits.

172. In those circumstances I think that, if the Builder's conduct had been repudiatory, the Owner elected to affirm the Contract and it was therefore not open to her to accept the repudiation when the letter of 20 August 2015 was sent.

Termination under Clause 21 and s.41 of the Act

173. Clause 21 of the Contract substantially re-states the provisions of s.41 of the act but omits sub-section (6). The relevant parts of the section are as follows:

> "Ending a Contract if completion time or cost blows out for unforeseeable reasons
>
> (1) A building Owner may end a major domestic building Contract if—
>
> (a) either—
>
> (i) the Contract price rises by 15% or more after the Contract was entered into; or
>
> (ii) the Contract has not been completed within 1½ times the period it was to have been completed by; and
>
> (b) the reason for the increased time or cost was something that could not have been reasonably foreseen by the builder on the date the contract was made.

> (2) For the purposes of subsection (1), any increased time or cost that arises as a result of a prime cost item or a provisional sum or that is caused by a variation made under section 38 is to be ignored in calculating any price rise or increase in time.
>
> (3) To end the Contract, the building Owner must give the Builder a signed notice stating that the building Owner is ending the Contract under this section and giving details of why the Contract is being ended.
>
> (5) If a Contract is ended under this section, the Builder is entitled to a reasonable price for the work carried out under the Contract to the date the Contract is ended.
>
> (6) However, a Builder may not recover under subsection (5) more than the Builder would have been entitled to recover under the Contract."

174. Mr Fenwick submitted that, as well as electing not to accept a repudiation by the Builder, the Owner also elected not to exercise her right to terminate the Contract pursuant to Clause 20 of the Contract and s.41 of the Act. I do not accept that submission.

175. There is nothing in the section to say that the right to terminate a Contract under s.41 must be exercised immediately the circumstances that it contemplates arise. Until the Contract is determined the parties are bound by it and there is nothing inconsistent between the Owner continuing to insist upon performance of the Contract while it is on foot and later exercising her right to terminate it pursuant to the section if she should decide to do so.

176. Were it otherwise, the Owner would have had to call a halt to the work the instant the critical date arrived or be deprived of the right that Parliament intended her to have. That is not a sensible interpretation. Quite obviously, if an Owner allows work to continue after the date has passed, the Owner will have to pay a reasonable price for that work pursuant to sub-section (5).

177. The right to determine a contract under s.41 is not dependent on a Builder being in breach. The language is neutral. All an owner has to show in the present context is that the work under the contract has not been completed within one-and-a-half times the period in which it was to have been completed and that the reason for the increased time was something that could not have been reasonably foreseen by the builder on the date the contract was made.

Time

178. The letter purporting to determine the Contract was sent on 20 August 2015, which was 623 days after work commenced.

179. It was common ground that construction extended beyond one-and-a-half times the Contract period by a substantial degree. The construction period

specified in the Contract was 321 days. Work commenced on 6 December 2013. The work should therefore have been completed on 23 October 2014, subject to any right the Builder might have had to extensions of time. There was no formal suspension of work or claim for an extension of time under the provisions of the Contract.

180. Mr Fenwick submitted that I ought to extend time by amending the Contract so that additional days for completion are allowed. He submitted that I have power to do that under s.53 of the Act.

181. Section 53 empowers the tribunal to make any order that it considers fair to resolve a domestic building dispute. Examples are given in the following subsections and, by sub-section (c), I can vary any term of the Contract including the completion date, the contract price, a provisional sum or the amount to be paid for any prime cost item.

182. Despite the apparent width of the powers conferred by this section I do not believe that Parliament intended the Tribunal to apply some abstract notion of fairness (see *Versa-Tile Pty Ltd v 101 Construction Pty Ltd* [2017] VSC 73 and the cases there cited). It can never be fair to make to make an order otherwise than in accordance with the evidence and the law. To extend the completion date I would need to be satisfied that the Builder was lawfully entitled to an extension.

183. Clause 15 of the Contract entitles the Builder to extensions of time for various causes including variations, interference by the Owner or the failure of the Owner to provide instructions. The procedure is for the Builder to inform the Owner of the existence of, and the estimated length of, the delay and if the Owner does not notify the Builder in writing or dispute the notice of delay within 14 days then the Contract is automatically extended for the delay period stated in the Builder's notice. If the Owner disputes the Builder's notice of delay, the Builder is entitled to a reasonable time.

184. In some architect-supervised contracts there is a power conferred upon the architect or supervisor to grant an extension where appropriate and that power can, while the contract remains on foot, be exercised by the tribunal in some circumstances. However there is no such provision in this Contract.

185. Even if I have power to extend the construction period specified in the Contract, I would need to consider each variation, or other alleged ground for an extension of time, and make a finding as to its impact on the critical path of construction. That would require detailed evidence and the evidence that I have is too vague to enable me to make any finding as to what extent any extension should be.

186. However I think it is not open to the Owner in the present case to complain about delay in the construction which was caused by her own indecision and failure to provide instructions and plans to the Builder. This failure continued up to the date of termination.

187. In *Brooking on Buildings Contracts* 4th Edition, the learned author states:

> "It is a fundamental principle that one party may not rely upon the failure of the other party to perform the contract where it is the former who has prevented the performance. Or, as it was would in *Panamena Europea Navigacion (Compania Limitada) v. Frederick Leyland & Co Ltd* [1947] AC 428 at 436:
>
> '…… No person can take advantage of the non-fulfilment of a condition the performance of which has been ended by himself'.

Whether the delay was reasonably foreseeable by the Builder on the date the Contract was made

188. At the time the Contract was signed there were no specifications, no appliances had been chosen and colours and finishes had not been selected. Recital B of the draft Deed of Variation prepared by the Owner's solicitor stated:

> "The Contract did not adequately specify the scope of the works, specifications, prime cost items or provisional sum allowances. Variations were not adequately documented or authorised."

There is no doubt that such was the case.

189. Although the Owner contended that the Builder was responsible for the documentation referred to, that was not established on the evidence nor (sensibly) was it pursued in final submissions. I am satisfied that the Architect was engaged and paid by the Owner and as a consequence, it was he and not the Builder who provided the plans and the Owner who was to produce the landscaping drawings which never eventuated.

190. As stated above, the plans that were supplied underwent numerous changes and what is now built is not what is shown in the Contract drawings. I am satisfied that there were numerous changes of mind by the Owner and that the Builder had great difficulty in obtaining instructions from her.

191. The whole project seems to have proceeded on a very leisurely basis, without any adherence to contractual procedures in regard to documentation of variations, requests for information or formal suspension of work while information was pending. The Builder's explanation for failing to follow the strict contractual procedures was that he had a very good personal relationship with the Owner and the tone of the emails supports that.

192. Considering what the Builder should reasonably have foreseen at the time the Contract was signed, it ought to have anticipated some difficulty from the poor state of the documentation but I think it would have been entitled to assume that the required information would be provided promptly by the Owner or the Architect when it was required.

193. The Builder could not have foreseen the delay relating to the front fence because that was not within the original scope of works.

194. I do not think that the Builder could reasonably have foreseen the numerous and substantial changes made by the Owner to the scope of works or the

time that would be taken for the Owner to provide instructions concerning what she wanted or, in some cases, fail to provide them at all.

Delay caused by variations

195. That raises the question as to whether delays caused by the variations requested by the Owner are to be taken into account in determining whether the construction period was exceeded by the required degree.

196. Sub-section (2) of s.41 provides (inter-alia) that, for the purposes of subsection (1), any increased time that is caused by a variation made "under s.38" is to be ignored in calculating any increase in time. It is not any variation at all that is to be ignored but only a variation that is made under s.38.

197. For a variation to the plans or specifications set out in a Major Domestic Building Contract to be under s.38 I think it would have to be made in accordance with the procedure required by that section, otherwise the reference to s.38 would be redundant.

198. A variation within sub-section (2) of s.38 can be carried out without having to follow the procedure set out in sub-section (3) but only where the variation is not expected to affect the time taken to complete the work. There is no evidence that there were any such variations which, despite a reasonable expectation by the Builder to the contrary, affected the time taken to complete the construction.

199. For all other variations to be in accordance with s.38, the procedures set out in sub-sections (3) and (4) must be followed and in this case they were not.

200. As a consequence, any delay arising as a result of the Builder accommodating the variations made by the Owner are to be counted for the purpose of applying Clause 20 and s.41 because those variations were not made under s.38.

Conclusion as to Termination

201. For the foregoing reasons I find that the Contract was terminated by the letter from the Owner's solicitor dated 20 August 2015, pursuant to Clause 20 of the Contract and s.41 of the Act.

202. As a consequence, the Builder is entitled to a reasonable price for the work it has done under the Contract, up to the date the Contract ended. Neither party is entitled to damages resulting from the termination of the Contract.

The Builder's entitlement

203. By subsection (5), the Builder is entitled to a reasonable price for the work carried out under the Contract up to the date the Contract was ended. Most of the expert evidence was directed to establishing the existence or otherwise of defects, the cost of rectifying them and also the cost of completing the construction of the House.

204. The section does not say how a reasonable price is to be ascertained but I think that it must be taken to be a price that is objectively reasonable for the work that the Builder has done.

205. Subsection (6) provides that the Builder may not recover more than it would have been entitled to recover under the Contract. What that means is unclear because the section assumes that the work is incomplete and so the whole of the contract price will not have been earned by the builder.

206. As a result, the calculation of the maximum recoverable under subsection (6) appears to be a hypothetical exercise. In the present case, because of the subsection, the maximum the Builder would be able to recover under s.41 would be the Contract price of $970,000.00, plus the agreed variations of $175,409.00, making a total of $1,145,409.00, plus any further variations the Builder might be allowed, less the cost of rectifying defects, which I have assessed that $93,153.00, and less the cost of completion because, although there is no claim by the Owner under s.41for incomplete work, the Contract price assumes that the work is complete. Finally, any payments the Builder has received would need to be deducted.

207. However, that is not necessarily what the Builder is entitled to be paid. That is the ceiling on its entitlement. What the Builder is entitled to is a reasonable price for the work it has done up to the date of termination.

208. A building contract will generally not have assigned a separate price to the specific items of work for which a builder is entitled to be paid. It will simply have specified a price of the whole of the work.

209. The Contract in this case provided that payment of the Contract price was to be made in instalments relating to particular stages of construction as those stages were reached. For the reasons already referred to, the Builder's entitlement to claim instalments was limited to the stages set out in s.40 of the Act. This payment regime is intended to regulate how the contract price is to be paid. The instalments set out in the section do not purport to be equivalent to the actual value of the work done at each stage. The relationship between the proportion of the contract price a builder is allowed to claim when a particular stage of construction is reached and the amount of work that is actually done with respect to that stage is approximate only. There are some building contracts where claims for payment are made by a builder for the value of work done since the last claim made, but this is not such a contract.

210. I think that subsection (5) requires me to make an assessment of a reasonable price for all of the work the Builder has done, regardless of what stage a particular item of work falls within. Were it otherwise, an owner could terminate a contract under s.41 immediately before a particular stage of construction was completed and so avoid payment for any of the work done by the builder that formed part of that stage. Such an interpretation would be inconsistent with the apparent intention of subsection (5).

211. Although Mr Ryan acknowledged that the contract works were nearing completion at the time of his inspection, he did not place a value on those works. The only evidence led that was directed to establishing what a reasonable price would be for the work that was carried out by the Builder to the date the Contract was ended is found on page 25 of Mr Wilson's report dated 5 September 2015. On the final page of this report Mr Wilson said that he calculated the estimated value of the works completed at $1,006,073.00. He estimated the cost of rectification of defects at $244,230.00 and the value of the work required to reach completion at $328,270.00.

212. Termination under s.41 gives rise to no claim in damages. However a reasonable price for an item of work that is found to be defective must necessarily take into account the cost of rectifying any defects in it, with the cost of rectification being deducted from the value that it would otherwise have had. The amount to be deducted in regard to any particular defect should be what it would reasonably cost the Owner to rectify it.

213. The cost the Owner will incur to complete the work is not relevant. The section contemplates that the work is incomplete and says that, nonetheless, the Builder is entitled to be paid for the work that it has done.

214. On that basis, the reasonable value of the work would be $917,802.02, being the value assessed by Mr Wilson ($1,006,073.00) less the cost of rectifying the defects that I have found ($93,153.00). Since the Builder has already been paid more than that it has no further entitlement under the section.

Owner's claims

215. The Owner claims the following losses:

(a) Cost of renting alternate accommodation from 21 August 2015 to 10 July 2016. This claim is related to the failure of the Builder to complete the work within the time specified in the Contract. However I have found that the delay in construction was caused by the Owner rather than the Builder.

(b) The Owner has paid $7,182.67 in insurance premiums concerning the House since the date of termination. Since there are no damages arising from the termination this amount is not recoverable.

(c) The Owner has spent $34,808.33 on fees paid to Mr Wilson. Although the Owner was dissatisfied with the Builder's performance and engaged Mr Wilson to assist, it is not established that this cost was due to a breach of the Contract by the Builder. Some part of the amount claimed might be included in a claim for costs if costs are ordered in favour of the Owner.

(d) Damages for defective workmanship. Because of the findings of fact that I have made and the warranties as to workmanship expressed in the Contract or implied into it by s.8 of the Act, the Owner is entitled

to damages for defective workmanship which I have assessed at $93,153.00.

(e) Damages for incomplete work. The work is not incomplete because of any breach by the Builder but rather, because the Contract has been determined under s.41 of the Act. Since such a termination does not arise because of a breach, no damages are recoverable for the cost of completing the work.

216. The Builder has been paid $1,040,700.00, which, when defects are taken into account, is more than the value of the work that it has provided. Neither s.41 nor Clause 21 provides for a refund to the Owner if the Builder has received more than the reasonable value of the work.

Orders to be made

217. There will be an order that the Builder pay to the Owner the sum of $93,153.00. Costs will be reserved for further argument.

SENIOR MEMBER R. WALKER