

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**BUILDING AND PROPERTY LIST**

VCAT REFERENCE NO. BP1631/2015

**CATCHWORDS**

*Domestic Building Contracts Act 1995 – s.53 – architect supervised contract - claim by builder for extension of time costs - how assessed - delay by builder - repudiation of contract - what amounts to - whether conduct of builder evinces an intention not to be bound by the contract - expert evidence - alleged defects not supported by experts reports - whether claim can be entertained – cost of completion - how assessed - non-pecuniary damages - whether allowable*

<b>APPLICANT</b>	Spectre Group Pty Ltd (ACN 133 267 679)
<b>FIRST RESPONDENT</b>	Harvey Webb
<b>SECOND RESPONDENT</b>	Sophie Webb
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member R. Walker
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	17 - 25 July, 31 July and 4 August 2017. Final written submissions received 6 October 2017
<b>DATE OF ORDER</b>	24 November 2017
<b>CITATION</b>	Spectre Group Pty Ltd v Webb (Building and Property) [2017] VCAT 1944

**ORDERS**

1. The claim is dismissed.
2. Order on the counterclaim that the Applicant pay to the Respondents the sum of \$128,462.24.
3. Direct that the retention sum of \$52,272.85 be paid to the Respondents in part satisfaction of the amount awarded.
4. Questions of interest and costs are reserved for further argument.

**SENIOR MEMBER R. WALKER**

**APPEARANCES:**

For Applicant

Mr T. Valentine, Director

For Respondents

Mr M. Bromley of Counsel

## REASONS

### Background

1. The Respondents (“the Owners”) are the owners of a house in Toorak (“the House”) that was partially constructed by the Applicant (“the Builder”) pursuant to a major domestic building contract (“the Contract”) between 2013 and 2016.
2. The Contract was then terminated and the construction of the House was completed by other builders. By this proceeding, the Builder seeks payment of monies that it claims are due to it under the Contract as well as damages for breach of contract. By their counterclaim, the Owners seek damages for defective workmanship and the cost of having the construction completed by the other builders as well as liquidated damages and compensation for other alleged losses.

### Hearing

3. The matter came before me for hearing on 17 July 2017 with 15 days allocated. The Builder was represented by its director, Mr Valentine, and the Owners were represented by Mr Bromley of counsel. The case ran over nine days, concluding on 4 August.
4. Expert building evidence was given in behalf of the Builder by Mr Beck and on behalf of the Owners by Mr Ryan. Further expert evidence was provided by a quantity surveyor, Mr Buchanan, on behalf of the Builder, and by the rectifying Builder Mr Kenneally, on behalf of the Owners, although Mr Kenneally provided no expert’s report. The expert evidence was given concurrently
5. Further evidence was given for the Builder by Mr Valentine and two of the Builder’s employees, Mr Hoare and Mr Voss and on the Owners’ side I heard from the Owners themselves, their architect, Miss McEwen (the Architect”), and the electrician who worked on the project Mr Laferlita, who gave evidence on their behalf.

### Credibility issues

6. I have the following concerns as to both the reliability and usefulness of Mr Valentine’s evidence:
  - (a) When tendering for the job he provided a professional profile which stated that he held the degrees of Bachelor of Construction Management and Bachelor of Design (Architecture) from Deakin University. Under cross-examination he acknowledged that he had no such qualifications;
  - (b) He made progress claims with respect to deposits that the Builder was to pay or claimed to have paid. The Builder received payment but the deposits were not paid to the suppliers. When this was put to him in cross-examination Mr Valentine said that he had used the money to finance the progress of the work. The amount of \$8,000.00 was claimed by the Builder on 17 December 2013 as a deposit for joinery which the Architect approved. Although it was paid to the Builder, the amount was not paid to

the joiner on account of the cabinetry for the House. Similarly, \$10,800.00 was claimed as a deposit for mechanical works which the Builder had also not paid, although Mr Valentine said that it was paid at a later date;

- (c) He claimed in advance for trades before work was done and suggested that the Architect allowed him to claim for works that would be done a few days after he submitted his invoice. The Architect denied any such agreement. Mr Valentine also said that this practice was an industry standard. There was no evidence of the existence of such a standard but in any case, it was inconsistent with the express terms of the Contract;
  - (d) On 7 September 2014, he made a statutory declaration that the Builder had paid a deposit for the fireplace when in fact it had not been paid;
  - (e) His evidence as to the engagement of a joiner was confused and contradictory. He claimed at first to have terminated the engagement of the first cabinetmaker, Elyse Joinery, towards the end of 2014. By this time the Builder had received a 40% deposit from the Owners that was to have been paid to Elyse Joinery but it never was. Yet on 29 September 2014, he made a statutory declaration declaring that he had paid a deposit equivalent to 40% of the cost of the joinery. He defended his action by saying that the money was spent elsewhere on the project. In August 2015 Mr Valentine told Mr Webb that he had transferred \$25,000.00 to Elyse Joinery and showed him a bank statement to verify that. In cross-examination he acknowledged that it had been paid to Elyse Joinery for money that the Builder owed it for other jobs;
  - (f) Mr Valentine said that he had evidence of various things that he would produce, such as payments to suppliers and invoices for work that he said had been done but these were ultimately not produced.
7. Apart from issues of credibility, his evidence both in his witness statements and the witness box was expressed in very general terms and seldom descended to specifics, severely limiting its usefulness. I do not regard him as being a reliable witness.
8. The imprecision of the Builder's evidence was repeated in Mr Valentine's submissions, where he said repeatedly that matters had been "established", "discovered", "proven", were "evident" without pointing out how or why.
9. There is no reason to doubt the credibility of any of the other witnesses.

### **The Contract**

10. The Contract was an ABIC SW – 2008 Simple Works Contract. It is an Architect supervised contract and it was signed by the parties on 11 December 2013. It was to carry out the construction of the House in accordance with the Contract documents for a price of \$1,227,319.50 inclusive of GST. The Builder was required to bring the works to practical completion by 18 July 2014, although there were provisions in the Contract for that date to be adjusted by the Architect in accordance with the Contract terms.

## **The Architect**

11. By Clause A4.1 (d) of the Contract, the Owners were to appoint an architect to supervise the construction and they appointed the Architect, who had prepared the plans. By Clause A6 of the Contract, she was to act as agent of the Owners in giving instructions to the Builder but she was to act independently when acting as assessor, valuer and certifier under the terms of the Contract.

## **Payment of the Contract sum**

12. The mechanism under the Contract for payment of the Contract price was as follows:
  - (a) The Builder was to submit claims for progress payments to the Architect on or after the first day of each month, setting out the Builder's valuation of work completed, the materials delivered to the site and the percentage of the price claimed;
  - (b) The Architect was then to assess the Builder's progress payment claim and issue to the Builder and to the Owners a certificate setting out any payment due to the Builder within 10 business days after receipt of the claim;
  - (c) The Owners were to pay to the Builder the amount of any such certificate within 14 days;
  - (d) The Owners were entitled to withhold an amount of up to 10% of each progress payment by way of retention until such time as the retention equalled 5% of the Contract price. The retention sum was to be held in a separate bank account as trustee for the Builder.
13. The Builder submitted claims, commencing on 14 November 2013, almost on a monthly basis, although no claim was submitted with respect to the months of January, May, October and November 2014. In 2015, only two claims were made. These were during the months of May and September.
14. The claims at first were largely accepted by the Architect on the basis of the information supplied by Mr Valentine. As the job progressed, the Architect became distrustful of what she was told by Mr Valentine and concerned that the percentage of the Contract price already paid substantially exceeded the percentage of the scope of works that the Builder had done.
15. The last amount certified by the Architect as being payable to the Builder was \$39,963.53 on 2 October 2014. The next certificate the Architect issued was on 27 May 2015 when she certified that the Builder was to pay to the Owners \$44,230.57. She issued a further certificate on 24 September 2015 requiring the Builder to pay to the Owners \$25,139.94. A final certificate was issued by her on 24 March 2016 when she certified that the sum of \$168,414.57 was payable by the Builder to the Owners.

### **The date for practical completion**

16. The Builder was entitled under the Contract to make a claim for adjustment of the date for practical completion as a consequence of any delay to the completion of the works caused by:
  - (a) an instruction by the Architect;
  - (b) the Owners' failing to promptly provide to the Builder necessary information properly due to it that the Builder specifically requested in writing;
  - (c) a breach of the Contract by the Owners; or
  - (d) an act of prevention by the Owners.
17. As well as adjusting the date for practical completion, the Builder could include a claim for adjustment of time costs resulting from any such delay. Such a claim was required to be made within 20 working days after the end of the period with respect to which the claim was made. If a claim for adjustment of time costs was made, the Architect was to assess it within 20 working days and the Builder would be entitled to an adjustment to the Contract price equal to the loss, expense or damage incurred.

### **The progress of the work**

18. On 20 October 2014, the Builder advised that the site supervisor would not be returning to the site and that another supervisor would be taking over. The Architect said that work proceeded thereafter on an irregular basis.
19. On 10 December 2014 the replacement supervisor informed the Architect that he would not be returning because he had not been paid by the Builder. On 29 February 2015 Mr Valentine said that he would taking over the role of site supervisor.
20. The Builder applied for extensions of time which the Architect assessed. The Builder was dissatisfied with the assessment and a meeting took place on 10 December 2014 at which it was agreed that the date for practical completion would be extended to 31 October 2014.
21. The Builder provided successive programs to finish the work, the last stating that the works would reach practical completion on 15 January 2016. Practical completion was not reached by that date and, on 28 January 2016, the Owners purported to determine the Contract, alleging that the Builder had repudiated the Contract by not having completed the works 15 months after the adjusted date for practical completion.
22. In the meantime, on 14 December 2015, the Builder commenced this proceeding seeking an order for payment of extension of time costs to which it claimed to be entitled.

### **The extension of time claims**

23. A major part of the Builder's claim in this proceeding is an amount of \$248,719.40 for extension of time costs said to arise from extensions of the construction period to which it claimed to be entitled.
24. The elaborate procedure set out in the Contract for claiming additional time referred to above was never followed by the Builder. Further, although Mr Valentine claimed that the work was delayed due to lack of instructions or a lack of response to various requests for information, the Builder never purported to suspend the work.
25. These various requests for information were expressed in very general terms without saying specifically what was required. Mr Valentine sent lengthy emails to the Architect on an almost daily basis, blaming her for lack of information and not responding to his requests but, apart from these assertions, both in the emails and by Mr Valentine in the witness box, the evidence does not indicate any hold up due to lack of instructions to the Builder.
26. In his submissions, Mr Valentine said that the Architect "had no intention" of assessing the Builder's extension of time claim. That is not the evidence. On 15 October 2014, following receipt of an informal extension of time claim the Architect adjusted the date of completion to 17 October 2014 and told the Builder that no further extensions of time would be allowed that were not in accordance with the provisions of Sections H and L of the Contract.
27. On 20 October 2014 the Builder claimed a further 106 working days lost.
28. There were then further discussions, following which, on 10 December 2014 there was a meeting between the parties at which it was agreed that the date for practical completion would be extended to 31 October 2014 and that the Builder would not be entitled to any extension of time costs up to that date. The Builder's claim for an extension of time was assessed by the Architect in accordance with this agreement and on 12 December 2014 she issued a certificate pursuant to Section H and Section L of the Contract revising the completion date to 31 October 2014. That certificate has not been disputed under the terms of the Contract.
29. The Architect said in her witness statement that she did not adjust the date for practical completion beyond 31 October 2014 because she did not receive an extension of time claim from the Builder and, in any case, she did not think that there was any cause of delay which would have affected the ultimate completion of the project.
30. As to the manner in which the Tribunal should approach the assessment of claims for extension of time costs ("EOT claims"), Mr Bromley referred me to the following passage from the judgment of Chief Justice Warren in *Kane Constructions Pty Ltd v. Sopov* [2005] VSC 237 (at paras. 673 to 675):

“673 *McAlpine* outlines the general approach which should be taken with respect to EOT claims. More specifically, with EOT claims, the burden of proof is on the claimant to establish actual delay. Whilst theoretical calculations, particularly those contained in computer software programs, are useful tools in the building industry, generally further information will be required. Whilst there may be assumptions and calculations, it is necessarily a matter of the claimant proving in the proper way that there has been actual delay such as to substantiate claims for reimbursement.

674 Thus, in this case, it behoved the plaintiff for the purposes of the EOT claims to establish that it had actually been delayed and that damage was actually suffered by reason of that delay. The defendants argued that the plaintiff failed on both counts.

675 As observed, to assist in deciding the point, *McAlpine* casts the necessary approach as one that requires a Builder, in this instance the plaintiff, to present a drawing by drawing, beam by beam, column by column, gutter by gutter factual analysis to show how a particular event had the effect of delaying other identified work.”

31. There was no detailed evidence produced on behalf of the Builder to justify its various claims for an extension of time. What was chiefly relied upon by Mr Valentine was a very large number of lengthy emails expressed in general terms but lacking any particularity. In contrast, the Architect’s contrary evidence was detailed and supported by documentary evidence as well as the evidence of other witnesses.
32. In its points of claim, the Builder now claims an entitlement to extensions of time with respect to five separate alleged delays. They were as follows.

#### **Initial delays**

33. On 23 September 2014 the Builder submitted an extension of time claim to the Architect for delays said to have been caused by inclement weather, delay in the provision of a building permit and variations to the works, including changes to the joinery package. They are described in the Builder’s Points of Claim as “Initial delays”.
34. These delays were included in the claim that was made and settled by agreement between the parties and certified as stated above. Having entered into that agreement I do not think that it is now open to the Builder to go behind it. The same applies to the other claims that are now made that were the subject of that agreement and the consequential assessment.

#### **The “Lutron” system**

35. The electrical work included a system of wiring designed to provide central control for all of the lights and communications in the House. The Builder claimed that the Owners failed until 18 February 2015 to provide instructions as to the final design of the system despite requests for them to do so. The Builder claimed that, as a consequence, it was prevented until about early June 2015 from completing the rough in of the electrical wiring and it claims that this affected the critical path.



36. The Architect said that an engineer had checked over the data security drawings as well as the overall power supply and loadings for the project. She said that the entire scope of electrical works was given to the Builder at the time of tender and that only minor amendments were made in the course of carrying out the work.
37. The Architect's evidence is supported by that of Mr Laferlita, who was the electrical contractor engaged by the Builder to install the Lutron system as well as the security system and all the other electrical work. He said that the information supplied at the start of the job was more than enough for him to know how to wire the House and that he had no issues with the documents or information provided. He said that he stopped work on the site in September 2014 because he had not been paid for work that he had done for the Builder on other projects. He said he did not obtain payment of the money owed to him until the following year after he took legal proceedings against the Builder to recover it.
38. According to the Architect, Mr Laferlita's departure caused some disruption to the project because she and the Owners had spent some time briefing Mr Laferlita about what was required.
39. The minutes for the site meeting on 9 October 2014 refer to a number of electrical matters and do not record Mr Valentine saying that the electrician had ceased work. According to the minutes, Mr Valentine advised that there were then no known supply issues and that the revised date for practical completion was likely to be in November 2014.
40. The replacement electrician, Mr Diamond, said in an email on 20 February 2016 that he commenced work on 11 March 2015. He said that he spent some days assessing just how far the previous electrician had got, indicating that there had been no handover from Mr Laferlita. He also said that some details required clarification due to the spreadsheet not matching the drawings and there were various other problems which took some time to resolve. He said that he ceased work on 7 October 2015 because he was not paid by the Builder.
41. A letter of demand from Mr Diamond's solicitors sent to the Owners alleged that \$34,146.59 worth of work had been done by Mr Diamond on the House of which only \$4,000.00 had been paid.
42. I accept that there was some difficulty experienced by Mr Diamond although Mr Laferlita said that he had had no such difficulty. In addition:
  - (a) Mr Laferlita produced an email that was sent to him by Mr Valentine on 10 December 2014, stating that he, Mr Laferlita, had been provided with all of the information, drawings and documentation for the project. I find that to be the case;
  - (b) in the Builder's extension of time claim made on 23 September 2014 there was no mention of any electrical delays; and
  - (c) the main cause of delay concerning the electrical work would seem to have been the failure of the Builder to pay the electricians.

43. I am not satisfied that it is established that there was any delay caused to the progress of the work by reason of any deficiency in the information provided by the Owners or the Architect with respect to the Lutron system or indeed, any of the other electrical work.

### **The security system**

44. In its points of claim, the Builder also claimed that work was delayed from before 31 October 2014 to 1 July 2015 as a consequence of the Owners' failure to give the Builder final instructions regarding the scope of the rough-in wiring until 4 May 2015 and failure to provide final confirmation that the rough-in wiring for the security system met their requirements until 1 July 2015.
45. Even if that were the case, it is unclear how this could have held up the critical path since the frame was not passed by the building surveyor until 18 August 2015 and so the plastering and following stages could not have been done until then.
46. Clause N17 of the specification (*Tribunal book 4809*) required the Builder to provide and install a complete functioning security system in accordance with the security system drawings, including a number of features. The security sub-contractor was to liaise with the Owners in regard to the final configuration of the system prior to commencing work in order to ascertain their service requirements.
47. The obligation of the Owners was not to provide any design of the security system. Rather, the Builder was to provide a fully functioning system that met certain performance requirements that were set out in the specification. Mr Valentine confirmed in evidence that he had priced the job to do that.
48. It is not established that there was anything in the way of instructions regarding the scope of the rough-in wiring that was required, nor was it necessary for the Owners to inform the Builder that the rough-in wiring met their requirements. It was a performance-based requirement. As with the other electrical work, Mr Laferlita did not say that he required any further information to do the rough-in for the security system.
49. Indeed, the Owners allege that it was the Builder that failed to supply information concerning the system that it propose to provide. Ultimately, when the Builder failed to provide any security system at all, it was taken out of the Contract.
50. Since there was no requirement to provide the Builder with any further information concerning the rough-in, there can be no delay with respect to which further time can be claimed. I note that no formal extension of time claim was made by the Builder at the time.

## **The gas line**

51. In its points of claim the Builder said that, from about 3 August 2015 until 19 September 2015 the works were delayed as a consequence of the delays by Origin Energy in installing the gas lines to the site. It says that work was then further delayed from about 19 September to 14 October 2015 while the Owners arranged for the gas metre installation by Origin Energy.
52. It was said that, due to restricted access to the site, the completion of the gas line and the metre installation were required before the Builder could carry out the front driveway footpath reinstatement.
53. According to the minutes of a site meeting held on 3 September 2014, Mr Valentine told the Architect and the Owners that the crossover works were due to commence in the week commencing 8 September 2014 but they were never done. The crossover permit expired on 17 October 2014 but the Builder did not draw this to the attention of the Owners or the Architect.
54. Origin Energy attended the site to quotation for the gas installation on 14 May 2015 and the Builder obtained a quote for \$2,275.16. The Builder submitted a variation which the Architect accepted.
55. According to the minutes of a site meeting held on 16 September 2015, Mr Valentine advised that works for the gas reconnection were then scheduled for 21 September 2015 and claimed that there had been ongoing access issues that had caused a delay.
56. On 20 September 2015, Mr Valentine requested that the Owners contact the gas provider to negotiate the installation of the metre. In response, the Owners asked the Builder for details of the Builder's plumber and other information required for the metre connection. According to Mrs Webb, the Builder provided her with the necessary information on 30 September 2015 and the metre was installed on 14 October 2015.
57. On 30 October 2015 the Builder submitted a claim for a variation seeking \$6,282.20 for the removal and replacement of the existing footpath and the construction of a new crossover. This was an adjustment to the provisional sum. On the same date, it also sought an extension of time of 19 days with respect to the gas line, claiming site costs of \$30,274.35 plus GST for the delay. It appears that the gas line needed to be put in before the crossover could be constructed. The claim said that the finish date was 14 October 2015 but did not specify a starting date. The cause of delay alleged by the Builder was said to have been waiting for the new gas line and metre to be installed.
58. In an email dated 13 November 2015 the Architect sought further details of the claim for a variation for the crossover but it does not appear that these were supplied.
59. It is not demonstrated that any delay in the works was caused by a failure of the Owners or the Architect to supply necessary information or do what they were requested to do in regard to either the gas line or the crossover.

### **Landscaping delays**

60. This appears to be a new claim because it was not included in the claim for delays made by the Builder on 30 October 2015 (VQ 40) which included only electrical, security and the gas line.
61. The Builder now claims that it was delayed from on or before 5 August 2015 because of the Owners' failure to give final instructions on the design and placement of the retaining wall on the western boundary of the front courtyard of the House and on the level of placement of the stormwater pit to the courtyard.
62. What further information the Builder required is unclear. According to the Architect the landscaping design was included with the tender documents and the scope of works in the front yard was unchanged, although she acknowledged that there were some clarifications and redrawing that she did in order to answer Mr Valentine's questions and his concerns that the retaining wall could not be built as it was designed because it would impact on the footing of the house in the adjoining property. That appears to be acknowledged.
63. The other issue said to be causing delay with the landscaping in the front was the level of the front stormwater pit. There was a great deal of argument about this in evidence but I am satisfied that the Builder installed it initially too high, causing water to enter the House, resulting in damage which the Builder rectified. The relative level (RL) of the House was 10.00. In an email to the Architect dated 23 July 2015, Mr Valentine acknowledged that the RL of the pit as installed by the Builder was 9.9, whereas it should have been 9.88.
64. The Builder claimed a variation in regard to rectification of both issues which the Architect did not approve since she considered the price excessive. On 12 August 2015 she directed the Builder to proceed with the original design but it did not do so. The work was eventually done after termination by the rectifying builder.
65. I am not satisfied that it has been demonstrated that there was any delay to the front landscaping due to any deficiency in the Contract drawings or information supplied by the Architect. Further, these are external works and there was no evidence that landscaping impacted on the critical part or the practical completion date.

### **Tiling delay**

66. Again, this appears to be a new claim since it was not included in VQ 40.
67. The Builder claims that works were delayed from on or about 23 October 2014 because of the failure of the Owners to provide answers to the Builder's requests for information concerning the layouts of the tiling in the master bedroom ensuite and the children's bathroom to account for what are said to have been different size wall tiles selected by the Owners and in regard to the installation of natural stone sheets to the master bedroom ensuite.
68. According to the Architect, the tile set out had been included in the tender documents. She acknowledged there were minor changes made to the cabinetry

but said that the tile set out was not affected. She said that the original tiles selected were lost because the Builder failed to pay a deposit.

69. On 21 January 2015 the supplier of the decorative stone cancelled the order because the Builder had not taken delivery and paid the balance due for the stone, the deposit having been paid directly by the Owners.
70. On 27 July 2015 the Builder notified the Architect that the Builder would be deleting the tile supply from the Contract and crediting the provisional sum of \$8,400.00. Mr Valentine also said that he expected tiles to be procured by the Owners and to be on site within 10 working days, although the Owners were overseas at the time.
71. Tiles were subsequently obtained by the Owners and delivered to the site by the end of August 2015 but those that were originally selected were then no longer available.
72. In the meantime, on 19 August 2015, the Architect notified the Builder of a change in the set out of the floor tiles in the master bathroom, due to the original tiles no longer being available. According to the Architect, the tiles were procured and delivered to the site but they sat there for some time thereafter before a tiler was appointed.
73. The Architect said that, on 23 October 2015, she met Mr Valentine and the Builder's tiler on site at Mr Valentine's request in order to finalise the tile layouts. She said that the tiler was concerned about the quality of the substrate and that this required adjustment before the tiles could be laid.
74. On 18 November 2015 Mr Valentine told the Architect that the substrate for the decorative stone was not in accordance with the Australian Standards and needed to be replaced with a different material. She asked the Builder to provide a variation to do that. There does not appear to have been a response to this request but on 22 November 2015 Mr Valentine wrote directly to the Owners complaining, amongst other things that he was still waiting for the stone installation date and that this was holding up the tiling. Quite obviously, the stone could not be installed until the substrate was replaced with the correct material. In addition, there was an argument between the Architect and Mr Valentine about coordinating the tiler and the stonemason on site.
75. On 26 November 2015 Mr Valentine sent an email alleging that the Builder had not received all of the revised tile set out. The Architect said that this was not true because the tile set out had been discussed on site with the tiler and indeed, during October 2015 the tiles set-out drawings were taped onto the walls of each room that was to be tiled.
76. Some tiling was done by the Builder but what could be done was limited by the fact that the cabinetry had not been delivered and the decorative stone could not be installed. Consequently, the bulk of the tiling was done much later by the replacement builder.

77. I am not satisfied that there was any delay to the critical path due to any failure on the part of the Owners or the Architect to provide any necessary information to the Builder concerning tiling.

### **Extension of time claims**

78. The Builder has claimed extension of time costs totalling \$248,719.40 with respect to the foregoing alleged delays. There was no daily rate specified in the Contract for extension of time claims by the Builder. The claim is based on a claimed daily rate of \$698.65, the principal component of which was \$600 a day for "Site/project management". No accounting evidence has been produced to justify these figures.
79. It does not appear from the evidence that there has ever been a full-time supervisor on site and according to the Architect there were long periods on site when nothing was done. The Architect said that she asked Mr Valentine for a breakdown of the daily costs together with evidence such as timesheets but no details were ever provided.
80. Even if I were to find that any of the foregoing extensions of time should be granted, I have no evidence as to what costs were incurred by the Builder on account of any delay beyond Mr Valentine's bald claim of what he considers is appropriate.
81. The claim for extension of time costs fails because I do not find that Builder should have been granted any extensions of time beyond that certified by the Architect. Further, the expenses, losses or damages said to have been suffered by reason of any delay have not been proven.

### **The scope of works**

82. Construction was to be in accordance with detailed Architectural and engineering drawings by provided by the Architect and the Owners' engineer as well as detailed specifications. There was also a highly detailed spread-sheet prepared by Mr Webb in regard to the "Lutron" system which provided a great deal of detail. Mr Valentine complained that it was not "industry standard" but Mr Laferlita said that he understood what was required.
83. The Contract documents included a demolition plan for an old house and outbuildings that were already on the site at the time the Contract was signed. Demolition was done by the Builder in November and December 2013 and payment was sought in the claims that were made and certified relating to those two months.

### **Variations**

84. By the terms of the Contract:
- (a) the Architect was entitled to give to the Builder a written instruction for a variation;

- (b) the Builder was to review the variation and notify the Architect in writing as to the effect of the variation on the price and on the date for practical completion;
  - (c) within five working days of receiving this notification the Architect was required to instruct the Builder whether or not to proceed with the variation or give further instructions to the Builder in regard to it;
  - (d) if the Architect issued a written instruction to proceed with the variation she was required to adjust the price and the date for practical completion if applicable.
85. During the course of construction, a number of items were removed from the scope of works and the Contract price was adjusted accordingly by the Architect. The extras approved by the Architect amounted, with GST, to \$156,823.08. In addition, the Builder claims that there is a credit due to the Owners for the deletion of security equipment of \$3,768.99 and a variation to which it is entitled for construction of a driveway and crossover, amounting to \$6,283.20. Both figures include GST and both are denied by the Owners.
86. I prefer the evidence of the Architect and accept her assessment of \$156,823.08.

#### **Misleading and deceptive conduct**

87. The Builder alleged that the Owners and the Architect engaged in misleading and deceptive conduct by representing that the Architect was:
- (a) a registered Architect;
  - (b) independent of the Owners and capable of exercising her functions as Architect of the Contract independently and in the interests of both parties.
88. The Builder alleged that:
- (a) it entered into the Contract on the faith of each of the representations; and
  - (b) the representations were false and misleading in that the Architect was unregistered until approximately June 2015 and that she was in a “relationship” with a close personal friend of Mr Webb. It was said that because of this alleged relationship she was not capable of exercising her functions under the Contract independently and in the interests of both parties.
89. As a consequence, it is said that:
- (a) the Owners and the Architect engaged in misleading and deceptive conduct in contravention of s.18 of the Australian Consumer Law;
  - (b) insofar as the conduct was by the Architect, the Owners were involved in the contravention within the meaning of s.236(1)(b) of the Australian Consumer Law; and
  - (c) by entering into the Contract the Builder suffered loss and damage because of the contravention, amounting to \$922,250.17.

90. Although Mr Valentine said in evidence that he was disappointed when he discovered that the Architect was not a registered architect, he did not say that he had relied upon the representation that she was registered in deciding whether or not to enter into the Contract.
91. It appears that, although not registered, the Architect was a qualified architect of many years' experience and the reason she was not registered was that, being employed by a firm of architects, she was not required to be individually registered. She said that she became registered on 12 June 2015 and that at all times she held appropriate insurance for the work that she undertook.
92. There is no evidence that the Architect lacked the necessary experience or expertise to carry out the functions required of her under the terms of the Contract. Indeed, considering her formal qualifications and her many years of experience, I find that she had the necessary expertise. The relationship that she allegedly had with a friend of Mr Webb's was not explored and so it is impossible to assess how this might have affected her objectivity.
93. There is always a tension between the dual roles that an Architect has under a contract of this nature. On the one hand, she is paid by the Owners to act on their behalf in their dealings with the Builder and on the other, she is to act independently when assessing claims and issuing certificates.
94. There is no evidence that, if Mr Valentine had been aware of the connection between the Architect and the friend of Mr Webb, the Builder would not have entered into the Contract. There is also no evidence sufficient to make a finding that the Architect was unable to carry out her duties as architect of the Contract, whether for the reasons alleged or for any other reason.
95. For these reasons the claim for misleading and deceptive conduct is not established.

### **Repudiation**

96. The Owners purported to terminate the Contract on the ground that it had been repudiated by the Builder.
97. Mr Bromley referred me to the following passage from the decision of the High Court of Australia in the case of *Koompahtoo Local Aboriginal Land Council V Sanpine Pty Limited*. [2007] HCA 61 (at para 44):

*“The term repudiation is used in different senses. First, it may refer to conduct which evinces an unwillingness or an inability to render substantial performance of the Contract. This is sometimes described as conduct of a party which evinces an intention no longer to be bound by the Contract or to fulfil it only in a manner substantially inconsistent with the party's obligations. It may be termed renunciation. The test is whether the conduct of one party is such as to convey to a reasonable person, in the situation of the other party, renunciation either of the Contract as a whole or of a fundamental obligation under it. (In this case, we are not concerned with the issues that arise where the alleged repudiation takes the form of asserting an erroneous interpretation of the Contract. Nor are we*



*concerned with questions of inability as distinct from unwillingness.) Secondly, it may refer to any breach of Contract which justifies termination by the other party. It will be necessary to return to the matter of classifying such breaches. Campbell J said this was the sense in which he would use the word "repudiation" in his reasons. There may be cases where a failure to perform, even if not a breach of an essential term (as to which more will be said), manifests unwillingness or inability to perform in such circumstances that the other party is entitled to conclude that the Contract will not be performed substantially according to its requirements. This overlapping between renunciation and failure of performance may appear conceptually untidy, but unwillingness or inability to perform a Contract often is manifested most clearly by the conduct of a party when the time for performance arrives. In Contractual renunciation, actions may speak louder than words."*

98. He also referred to my own decision in the case of *Shao v. A G Advanced Construction Pty Ltd* [2017] VCAT 903, where I said (at para 157-8):

“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.”

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).”

99. The principles are well established. The repudiation relied upon might be a breach of an essential term or it might be other conduct that “...manifests unwillingness or inability to perform in such circumstances that the other party is entitled to conclude that the Contract will not be performed substantially according to its requirements.”.

### **The repudiatory conduct alleged**

100. The following conduct on the part of the Builder is relied upon by the Owners as manifesting an unwillingness or inability of the Builder to perform the Contract or to perform it substantially according to its requirements:
- (a) Failure to bring the work to practical completion in time;
  - (b) Claiming monies to which it was not entitled;
  - (c) Failing to take out adequate domestic building insurance;
  - (d) Incomplete and defective work.

## **Failure to bring the work to practical completion in time**

101. Throughout the period of construction, numerous completion dates were given by the Builder to the Owners. In June 2014, the completion date proposed was 5 September 2014. In August 2014 it was the end of October 2014. In September 2014 it was 10 November 2014, at the end of October 2014 it was at first “before Christmas” and then various dates in December 2014. Throughout 2015 the proposed finishing date progressively extended from the end of March 2015 until 19 November 2015.
102. On that date, 19 November 2015, the Owners’ solicitors sent a lengthy letter to Builder setting out these matters and alleging numerous breaches of the Contract. The letter concludes:

“Should Spectre fail to provide Ms McEwen with an updated construction program providing for the remediation of any defects and completion of the works within a reasonable period of time, within seven days from the date of this letter, our clients will treat such as a repudiation or rejection of your willingness to perform the contract and accordingly the contract will be terminated.”
103. In apparent response to this letter, on 22 November 2015, the Builder sent a revised construction program to the Owners providing for an anticipated completion date of 15 January 2016. By a letter of 30 November 2015, the Owners’ solicitors informed the Builder that any failure to comply with the program would result in the Owners accepting the Builder’s repudiation of the Contract for the reasons previously given.
104. The Owners allege that thereafter, the Builder carried out little or no work on the site. When asked during his evidence about the work done by the Builder during this period, Mr Valentine said that there were “tiling activities”, painting, carpentry works, floor levelling and the installation of the “Devex” mats for the bathrooms. It is unclear what the tiling activities were because he also claimed that he was waiting on a tile layout. When he was shown photographs of the state of the works in November and January he appeared to acknowledge that it did not appear that any tiling had been done in the meantime.
105. Mr Valentine said that the Builder broke for Christmas at the end of the third week of December but returned in early January when, he said, there was a roofer there and they did a site clean. He said that the roofer was doing minor rectification work which involved turning down roof sheets. He said that he was waiting on further information from the Architect in regard to tile layout and the landscaping of the front area.
106. There was no qualification in the Builder’s email of 22 November to the effect that the attached program was dependent upon receipt of any further information from the Architect. No emails from the Builder have been produced thereafter seeking further information.
107. A site meeting was held on 15 December, following which the Owners’ solicitors sent a two-page email to Mr Valentine purporting to set out the matters discussed. There was no response to this email challenging its accuracy. The

document records a disagreement between the Architect and Mr Valentine about the Architect's tiling set out instructions for the children's bathroom but it does not suggest that there was a failure by the Architect to provide instructions.

108. Mr Webb said that he and his wife attended the site on Thursday, 14 January and found no one there.
109. Despite the vague evidence of Mr Valentine, I am satisfied by the Owners' evidence and the photographs tendered that very little work was done in December and January. I am also not satisfied that there was any valid reason why the work had still not reached practical completion 15 months after the adjusted date for practical completion that had been certified by the Architect.

#### **Claiming monies to which it was not entitled**

110. As stated above, the Builder sought and obtained payment for deposits that it had not paid and did not subsequently pay. It also sought payment for work not yet done. I am satisfied on the Architect's evidence that the amounts claimed by the Builder for work were well in excess of the value of the work done. Accordingly, I am satisfied that the Builder claimed substantial sums to which it was not entitled under the terms of the Contract.

#### **Failing to take out adequate domestic building insurance**

111. The Contract price was \$1,227,390.50. However the domestic building insurance policy taken out by the Builder was for a contract price of only \$742,000.00. Mr Valentine's explanation appears to be that he deducted from the Contract price what he considered to be an allowance for the swimming pool and for the demolition as well as the provisional sums for various items.
112. Although he acknowledged that those were all within the scope of works of the Contract, he suggested that they were done by other persons and that the Builder simply project managed them. He said that he discussed this with the Architect, the insurer and the relevant building surveyor. Ms McEwen denied that and neither the insurer nor the relevant building surveyor were called.
113. There is no dispute as to what the Contract price was. Mr Valentine said that, due to the state of the paperwork he had to take out staged permits. He also suggested that he had paperwork to show that he had discussed the matter with the insurer but although he was invited to produce this paperwork he never did.
114. Domestic building insurance is essential to provide protection to the building owner and an accurate assessment of the value of the work is required in order to assess the appropriate premium. Obtaining insurance was a requirement of the Contract.

#### **Incomplete and defective work**

115. Another factor relied upon by the Owners as indicating an intention on the part of the Builder not to be bound by the Contract is the extent of incomplete and defective work. As appears below, this was substantial.

## Conclusion has to repudiation

116. Although mere breach of a Contract does not necessarily indicate repudiation on the part of the offending party, in the present case I am satisfied that the breaches by the Builder, when viewed objectively, were so extensive as to convey to the Owners and indeed to the mind of any reasonable person, that the Builder was unwilling or unable to perform the Contract or at least, that it did not intend to perform it or would fulfil it only in a manner substantially inconsistent with its obligations and not in any other way.
117. Consequently, I am satisfied that, on 28 January 2016, the Builder had repudiated the Contract and, by the letter from their solicitors referred to, the Owners accepted the repudiation. The Contract was thereupon terminated and the Owners are entitled to damages for breach of Contract.

## Measure of damages

118. As the innocent parties, the Owners are entitled to be put in the position they would have been in if the breach by the Builder of the Contract had not occurred (see *Tabcorp Holdings Ltd v. Bowen Investments Pty Ltd* [2009] HCA 8 and the cases there cited).
119. Damages are claimed under a number of heads, starting with damages for incomplete and defective work. The main evidence in this regard was given by Mr Ryan on behalf of the Owners and Mr Beck on behalf of the Builder. Both have general building expertise. Evidence as to the costing of the completion of the work was given by a quantity surveyor, Mr Buchanan on behalf of the Builder. Finally, evidence as to the work done to complete the project and the charges made to the Owners was given by Mr Kenneally, the rectifying builder.
120. Their evidence was given concurrently, using Scott Schedules. Most of the items of incomplete and defective work complained of were raised in Mr Ryan's initial report which was prepared in order to inform a rectifying builder what had to be done. In it he identified 80 items of external incomplete works, and a further 70 items of incomplete internal works. In terms of defects, he identified 38 external items and 21 internal items. In his subsequent report he provided costings.
121. Mr Beck responded to Mr Ryan's initial report with his own report of 9 September 2016 which he supplemented with a further report on 5 December 2016. These reports were based upon inspections he carried out on 15 March and 26 August 2016. The latter inspection, and that of Mr Buchanan on 23 June 2016, were after Mr Kenneally had already commenced rectification work. To the extent that works had been progressed in the meantime after the Builder left the site, Mr Beck and Mr Buchanan were dependent upon Mr Valentine's instructions.
122. Mr Ryan costed rectification with a variable contingency figure of 5% or 10% and a builder's margin of 35%. Mr Beck allow in his costings for a builder's margin of 20% for overhead and 10% profit. The margin actually charged to the Owners by Mr Kenneally was 12.5%. In some instances, the amounts the Owners have paid are less than Mr Ryan's assessment and in some cases they

are more. In all instances, Mr Beck's assessments are considerably less, based upon his instructions and his understanding of the state of the works when the Builder left.

123. Being on the scene shortly after the Builder left and before any rectification or completion work was done, Mr Ryan's initial report, which is liberally illustrated with photographs, is the best source of information concerning how the site was left by the Builder. There were also numerous photographs taken by the Owners during the course of construction which were shown during the hearing.
124. There was substantial agreement between Mr Ryan and Mr Beck as to the state of the works in regard to most of these items although considerable disagreement as to whether particular items were defective or incomplete. Since it was the obligation of the Builder under the Contract to complete the works free from defects I do not believe that it makes any difference in the present case, given that the Owners are entitled to the cost of having the works rectified and completed by another builder.
125. I will deal with the alleged defects first and, for the purpose of assessment, some of the items can be grouped together.

#### **Damages for defective work**

126. The items of alleged defective works are set out in a Scott Schedule. I find the following defects to be established. As stated, Mr Ryan's costings used a builder's margin of 35%. Since the Owners have only paid a margin of 12.5% to Mr Kenneally, I will re-work his calculations accordingly.

- (a) Missing flashing on windows \$11,534.10

Head and sill flashings are missing on many windows. Mr Beck said that he was told by the Builder that the Owners did not want aluminium flashing and in some instances the Builder was waiting for a design detail. I accept Mr Ryan's evidence that the Code requires flashings to be installed and that some of the windows have leaked. In pages 5 and 6 of his second report, Mr Ryan provided a scope of works involving scaffolding, removal of some cladding and installation of the required flashings and caulking which he costed at \$9,320.50 before margin. Mr Kenneally's actual charge to the Owners for rectifying the flashings and sealing of windows was \$7,920.00. This does not take into account the replacement of the front aluminium window on the ground floor which is too short in height. The non-compliance with the plans is acknowledged. I will allow Mr Ryan's assessment which I have re-calculated at \$11,534.10 including margin and GST.

- (b) Roof plumbing \$5,271.75

Defects in the roof plumbing identified by Mr Ryan are that the rain heads were installed with non-compliant overflow cut-outs, flashings and roofing material were not turned up or turned down as appropriate, the north end downpipe on the upper roof discharged onto roof flashings, joints were not

sealed, the west lower roof downpipe discharged on the flashing and over insulated pipes from the air-conditioning unit, the air-conditioning pipes were installed in the roof tray, the air-conditioning pipes had not been adequately sealed where they penetrated the wall sheeting, metal cappings had not been properly installed and some did not fall into the gutter, the west side condensate pipe was discharging onto the lower roof, the upper roof box gutter did not have a sump installed, the upper west side eaves gutter was discharging directly onto a lower level flashing and water was entering the building at the internal corner above the glazed entry door because it had not been sealed and the appropriate corner flashing had not been installed.

Mr Beck described most of these matters as being incomplete works, pointing out that a compliance certificate had not been issued by the roof plumber. Despite the absence of a compliance certificate, the roof plumber appears to have finished work some considerable time before the Builder left the site.

Mr Beck costed the rectification of the rain heads of \$1,981.00. He said that, in some instances, Mr Valentine told him that spreaders had been removed by others or that he was waiting for a design detail from the Architect. There is no photographic or other evidence to substantiate that this was the case and it is not apparent why a rectifying Builder would remove spreaders from positions where they were required. I am satisfied that the defects are established.

To rectify all of these defects, Mr Ryan has provided a scope of works on pages 6 and 7 of his second report which he has costed at \$8,918.00. Mr Kenneally charged \$5,271.75 for the necessary work to the roof plumbing, including margin and GST. I think that I should allow the actual cost incurred.

(c) Rear timber screen \$373.73

Mr Ryan said that the rear external timber screen had twisted structural timber posts and boards and required rectification. The Contract documents required the timber to have been treated with a material called "Cutek". Mr Ryan said that the deterioration in the timber was due to the failure of the Builder to adequately protect the timber. He pointed out that the Contract documents required the external timber to be treated every 12 months in accordance with the manufacturer's instructions. He assessed a base cost of \$302.00 for a carpenter to straighten the twisted posts and fix the loose trims. With margin and GST that becomes \$373.73.

Mr Beck said that he was instructed by Mr Valentine that all external timber was properly treated with Cutek at the time of installation although he agreed that the timber required further protection which he assessed at \$186.00. Mr Kenneally included his cost of rectification with other matters which I am allowing.

- (d) Damage to pool area - stained pavers \$1,658.25

The marble pavers under the pool fence are stained. Although Mr Ryan initially thought that this was due to careless application of stain he now appears to acknowledge that it was caused by tannins leaching from the timber. Nevertheless, he said that the Builder should have taken care to protect the pavers from staining. He has assessed the base cost of rectification of this and the next item at \$3,827.00. Mr Kenneally has replaced the pavers for this and the previous item at a base cost of \$1,340.00. Mr Beck costed the same scope of works at \$1,366.00. I will allow Mr Kenneally's figure which, with margin and GST becomes \$1,658.25.

- (e) Damage to pool area - cracked pavers \$2,895.75

Pavers next to the pool have cracked where they were laid over a void in the concrete. Mr Ryan said that this was defective work and Mr Kenneally agreed. I accept that evidence. The photographs support that they were inadequately laid. The existence of the cracking was acknowledged but Mr Beck said that Mr Valentine had told him that the Architect had instructed him to lay the tiles over a void that he had left for a strip drain. I accept Mr Kenneally's evidence that there was no such void. Mr Kenneally has charged \$2,340.00 to replace the damaged pavers which, with margin GST, becomes \$2,895.75.

- (f) Lack of linear drainage \$4,071.37

There is a shed and adjacent shower next to the pool and a full-length linear drain was to be installed to take surface water from the area. It has not been installed. In addition, Mr Ryan said that the junction between the pool paving and the timber cladding lacked appropriate flashing. He assessed the rectification cost at \$921.50.

Mr Beck said that he was told by Mr Valentine that he had already installed a void under the concrete slab to accommodate the strip drain. Mr Kenneally said that there was no such void. I am satisfied that this is defective work and that a drain should have been constructed and the required flashing should have been installed.

Mr Kenneally has charged \$3,290.00 to rectify the defect which, with margin and GST becomes \$4,071.37. Since the work required appears to have been more than was anticipated in Mr Ryan's costing, I will allow Mr Kenneally's actual charge.

- (g) External toilet door \$2,722.50

The sill of the external toilet door is below the pavers that form the floor of the toilet. Mr Beck said that he was informed by Mr Valentine that this was because the door was installed in accordance with the plans, which show a concrete floor, and the Builder was then instructed to install pavers on the floor, thereby raising the height and burying the door sill.

Mr Ryan also said that he was unable to locate an appropriate flashing at the junction between the concrete paving on the steps of the timber shed and that water was entering the lower floor of the shed due to lack of flashing. He also said the door was binding.

Mr Beck said that he did not observe any water entry into the shed and that the binding of the door was a simple matter of adjustment. He agreed that the sill needed to be flashed.

Mr Kenneally's charge for rectifying the defect was \$2,200.00 to adjust the door and raise and flash the sill. Mr Ryan assessed the work at \$921.50. I accepted this is the defect and will allow Mr Kenneally's charge which, with margin GST becomes \$2,722.50.

(h) External decking boards

Mr Ryan said that the east and north side decking boards have not had sufficient penetrating oil or sealer to protect them and that as a consequence they have become warped and twisted due to weathering. They require repairing. Mr Beck pointed out that since the timber came from Queensland and is a natural product, it is to be expected that it will crack to some extent.

Mr Valentine said that they had been sealed and that the Owners had requested a change of colour. Mr Ryan said that he did not dispute that they had been sealed.

Mr Ryan said that to remove the existing decking boards to the east and north sides of the House and to supply and install ironbark decking would cost \$8,263.00. Mr Kenneally agreed with that assessment and suggested that in order to use the "Woodform" product which had been specified would increase the cost by \$2,400.00.

It appears that what has been installed is ironbark, that this has been accepted as an appropriate material and it does not appear that it has been replaced. I am not satisfied about this item.

(i) Water leak kitchen north wall \$2,314.13

Water is leaking in the north wall of the kitchen where there is a steel post on the east side glazed roof. Mr Ryan attributed this to a lack of proper flashing. Mr Beck said that he was instructed that a temporary flashing had been installed while awaiting a finished detailed from the Architect.

Mr Ryan pointed out that since the internal area had been plastered, flashing could not be regarded as being temporary and the work was in fact defective. I accept his opinion and accept that the leak will have to be repaired.

Mr Kenneally has charged \$1,870.00 to rectify the defect. Mr Ryan has not separately assessed the cost and it appears to be included in his assessment for the rectification of the flashing of the windows. I will allow Kenneally's charge which, with margin GST becomes \$2,314.13.



(j) Cavity sliding door \$857.60

The wall into which the large recessed cavity sliding door was to be installed was completed without first installing the door track. Mr Kenneally said that, as a consequence, they had to remove part of the wall in order to install the track for the door. For that he has charged the Owners \$1,740.00.

Mr Ryan assessed the base cost of the work at \$693.00. Mr Beck said that he was informed that the Builder had in fact made allowance for the installation of the track by way of access panels.

I am satisfied that this is defective work and I will allow Mr Ryan's assessment which, with GST and margin accounts \$857.60.

(k) Unstable wall in stairwell

There is an unsupported stud wall at the top of the stairwell which was said to have excessive lateral movement. Mr Beck said that it was constructed in accordance with the drawings and Mr Valentine said that, although he raised concerns with the Architect, he was instructed to construct it as drawn. I think this is a problem with design and that any work done in order to support the wall and give it greater stability would have been a variation. There was also mention in the evidence of a warped post but it seemed to be acknowledged by the experts that, since the timber was a natural material, warping can occur when it dries in an internal environment. I am not satisfied as to this item.

(l) Front guest bedroom

The front door and frame margins were inconsistent. This was acknowledged and an adjustment is required. The figure of \$195.00 to do that was given in evidence for two men to remove and refit the door but, as Mr Valentine pointed out, the door had to come off in any case in order for it to be painted off-site and so I do not think that it is appropriate to make any allowance. There was a dispute that the floor had elevated moisture levels but on balance but I am not satisfied as to that.

(m) Level of front drainage pit \$5,209.88

The external ground at the front of the House was not sufficiently excavated to ensure that surface water would fall away from the concrete floor slab. As a consequence, there was a leak into the front guest bedroom during construction causing damage to the internal finishes which the Builder rectified. There was a great deal of evidence about this and it is clear that the Builder installed the front pit too high and that substantial rectification work was needed. Mr Kenneally charged the Owners \$4,210.00 to rectify the problem.

Mr Beck pointed out the landscaping at the front of the House was incomplete which is true, but since the pit was in place and installed

incorrectly I think this is defective rather than incomplete work. I will allow Mr Kenneally's charge which, with margin GST becomes \$5,209.88.

There were submissions made concerning Item "L" in the Scott Schedule but this was abandoned during the hearing.

(n) Waterproofing in the bathrooms \$13,860.00

Waterproofing to the bathrooms was installed before bath hobs and plastering had been completed and the cabinetry had been installed. Mr Ryan said that this was out of sequence work and that as a consequence, the waterproofing had to be done again. This complaint was first raised in regard to the ensuite which has no bath hob.

Mr Beck said that the membrane might need to be completed in the areas where the cabinetry was to go but that he did not consider that this was out of sequence work. I prefer the opinion of Mr Ryan.

There was also an issue raised concerning the fall on shower recesses in the ensuite. There was a dispute as to the measurement of the fall, although there was no evidence that the shower recesses were not draining adequately. Mr Kenneally said that when the floors were pulled up the shower recesses were found not to have been screeded. Mr Ballantyne suggested that the falls had been achieved by casting them into the concrete slab. Mr Kenneally said that they had been done by using the thickness of the glue. I am satisfied that the waterproofing of the bathrooms was inadequate and that it had to be redone.

Mr Kenneally charged a total of \$11,200.00 to re-do the waterproofing on all four bathrooms. Mr Ryan assessed a cost of \$5,432.50 for the first floor bathrooms. I accept Mr Kenneally's evidence that the waterproofing in all bathrooms had to be redone and accepted his base figure of \$11,200.00 which, with margin GST becomes \$13,860.00. I note that this takes account of all bathrooms and not just the ensuite.

(o) Master bedroom and upper floor ceiling \$2,388.37

The Builder was required to install R4.5 insulation bats in the master bedroom and upper floor ceiling that has not been done. Mr Valentine claimed that it could not be provided because the ceiling space was fully occupied with cables and ductwork and that, in any case, an R1.5 roof blanket insulation was supplied. I accept Mr Ryan's evidence that the insulation was required to the extent that it could be provided and that, since the ceiling had been plastered without any insulation at all, that needs to be rectified. Mr Ryan assessed the rectification cost at \$1,046.00. Mr Kenneally quoted a base cost of \$1,930.00.

Neither Mr Ryan or Mr Beck saw what was in the ceiling space. Mr Kenneally said that they had to pull a lot of boards off the ceiling in order to gain access and when they did so they saw that there was no insulation at all provided. Since the only description that I have of the actual scope of

works that was given by Mr Kenneally and since no issue was taken with his assessment, I will allow his figure which, with margin and GST is \$2,388.37.

(p) Ceiling exhaust fans \$2,957.62

No cut-outs were made in the ceilings and external walls for exhaust fans and no ducts for the fans had been provided. Mr Ryan said that to provide them after plastering would require removing the plaster which he costed at \$965.00, excluding the cost of supplying the fans. Neither Mr Ryan nor Mr Beck removed plaster to investigate the difficulty of the remedial work that was carried out. Mr Kenneally's figure was \$2,390.00 for alterations to joinery, design, and pulling ducting through, which he said was very difficult.

Mr Beck said that he thought that it was incomplete work and that the ducts could be provided through the bulkheads. That was what was done, but the added cost arose from the difficulty of doing so and the scope of works that was necessary after the internal linings and ductwork had been constructed. I accept Mr Ryan's opinion that the ducting ought to have been installed before the ceiling was plastered. Again, I think it is appropriate to allow the actual cost rather than an assessment of a hypothetical lesser scope of works. With margin and GST, Mr Kenneally's figure becomes \$2,957.62.

(q) Air-conditioning access panels \$2,970.00

Mr Ryan said that the Builder made no provision for installation of access panels for maintenance of the air-conditioning units and cleaning of the filters. He said that he had costed to provide eight such panels although in the end, only two were installed by Mr Kenneally.

Mr Beck said that he had been informed by Mr Valentine that he told the Architect about the size of the void for the unit and was instructed to proceed. Mr Ryan said that there was no issue about space. Mr Valentine also said that most of the servicing could be done through the grilles and that he had discussed with the Architect that, if any major service were required, they would have to cut out a section of plasterwork and that she was "...happy to go with that".

I accept that this is a defect. Mr Ryan's base costing to provide panels was \$2,915.00 and Mr Kenneally's base charge was \$2,400.00. I will allow Mr Kenneally's figure which, with margin GST becomes \$2,970.00.

(r) Damaged living room door \$3,372.19

The external aluminium door to the living room had a damaged bottom rail and also a scratched panel of glass. Mr Ryan assessed an amount of \$2,297.00 to replace the door. Mr Kenneally had to pay the supplier \$2,725.00 to replace it. With margin and GST that becomes \$3,372.19.

Mr Valentine said that the supplier of the door acknowledged responsibility and was willing to replace it at its own cost. Mr Kenneally said that he discussed the matter with the window supplier and was told they would not replace the door because they had not been paid by the Builder. Mr Beck suggested that it could be replaced at a cost of \$358.00.

Although the Builder admits responsibility, it has not replaced the rail or the scratched glass and the Owners have been required to bear the cost of rectifying the problem themselves. I will therefore award the amount they paid to Mr Kenneally.

(s) Waterproofing under the First floor decking \$707.23

Mr Ryan said there was inadequate waterproofing of the ceiling under the the rear first floor deck. His opinion was supported by photographs taken of the space between the deck and the soffit underneath. Mr Beck said that his inspection revealed no evidence of a failed waterproof membrane.

On balance, I prefer Mr Ryan's opinion and accept his base cost assessment of \$571.50 which, with margin and GST becomes \$707.23. I note that Mr Kenneally's base price for this item was \$4,200.00 although I do not think this is justified.

There were was a drain hole provided that was intended to be fitted with a spigot but that was not done. Mr Kenneally quoted \$80 to provide the outlet. There is also an electrical wire passing through the waterproof soffit but Mr Ryan acknowledged that he could not say that this was a defect.

Having listened to the evidence I am not satisfied that anything other than Mr Ryan's scope of work is justified and so I will allow his figure.

(t) Living room timber floor \$5,547.09

Mr Ryan said that the Builder had not adequately protected the sealed ground floor timber floor in the living area resulting in visible shading in the finish of the floor sealant. Mr Kenneally said that this was due to coverings on the floor being in place for a considerable time in places where there was substantial sunlight coming through the large aluminium doors in the living room. The floors were also scratched. He said that if the floors had not been laid and sealed out of sequence this would not have occurred.

Mr Ryan has assessed the cost of sanding and resealing the floor at \$3,764.00. Mr Kenneally's base price for the work was \$4,482.50 which, with margin and GST becomes \$5,547.09. Mr Beck said that he could see no shading or damage to the timber floors in the living room.

I was unable to see the shading of the floors in the photographs that were provided. Mr Kenneally said that apart from the shading, the floors were also scratched and it was necessary for them to sand and then recoat the floor, which is what Mr Ryan said was required. Mr Kenneally said that the problem was that the floors were sanded and polished too early in the job. I

accept that evidence and allow the actual charge made to the Owners of \$5,547.09.

(u) Ceiling cut-outs for speakers

Mr Ryan said that there were several cut-outs in the ceiling when there were timber rafters or battens above, necessitating the relocation of the speaker outlets. Mr Beck said that the speakers were very thin and were able to be fitted. Mr Ryan assessed a cost of \$467.00 to cut new holes and repair the old ones. Mr Valentine said that he went through the locations of the speakers with the Architect. I am not satisfied that a defect has been established.

### **Remaining matters**

127. The remaining items below were not raised or dealt with in the expert reports but were raised in Mr Kenneally's witness statement which was filed and served in June 2017. Mr Beck informed me that he had not been instructed in regard to them and neither he nor Mr Ryan could offer me any assistance in dealing with them.
128. There were directions given for the filing and service of experts' reports and these matters ought to have been dealt with in the reports filed and served in accordance with the Practice Note. By s.98 the *Victorian Civil and Administrative Tribunal Act 1998* the tribunal is not bound by the rules of evidence or any practices or procedure applicable to courts of record and may inform itself of any matter as it sees fit. However it is bound by the rules of natural justice and it is a fundamental principle that a party must have notice of the case that it has to meet and a fair opportunity to assemble its evidence and answer the allegations that are brought against it.
129. What concerned me in the present case was that neither Mr Ryan nor Mr Beck had investigated any of these matters. I have the evidence given by Mr Kenneally in his witness statements and during the hearing and also the Contract documents and the comments that the experts were able to make during the hearing but I do not have the benefit of a consideration of the matters by the two experts. Mr Bromley submitted that notice of the claims had been given by the witness statement of Mr Kenneally. Mr Valentine pointed out, correctly, that Mr Kenneally's witness statement was not an expert report.
130. During the course of discussion the claims with respect to items entitled B, G, I, L, M, N, O, R, S, T, U, V, W, Y, CC, DD, and EE in the Scott Schedule were withdrawn.
131. Following submissions, I informed the parties that I would hear evidence in regard to the remaining matters in order to see whether the failure of the Owners to comply with the direction as to experts' reports had so prejudiced the Builder that there could not be a fair hearing in regard to these further issues. In regard to any matters that I thought could be fairly dealt with in the circumstances I would then proceed to see whether the allegation made by the Owners was made out.

(a) The bath tub hob

The bath tub hob in the master bathroom was said to be too small to fit the tub that the Owners had purchased. It was also said that the wall was out of line and that the tap was in the wrong place. Mr Kenneally quoted \$3,400.00 to replace the hob. This was not a defect picked up by Mr Ryan but at the time of his inspection it does not appear that the bath was on-site.

It is possible that the bath purchased by the Owners and the space constructed by the Builder were simply incompatible. The question is, whose fault it was?

Mr Valentine said that the framing for the bath was built exactly to the dimensions shown in the drawings. Neither expert has had the opportunity to check the accuracy of that statement by visiting the site and taking measurements.

Mr Ryan said that it appeared to him to be too tight but it was difficult and he could only go from what he could see in the photographs.

Evidence was given by Mr Kenneally concerning how the arrangement for the hob was set up when he arrived on the site and neither expert has had the opportunity to inspect what he saw or comment on his evidence.

Questions will sometimes arise during a hearing that an expert is called upon to answer in the running but it is most unsatisfactory that experts should be called upon to express opinions in the witness box based only upon photographs shown to them during the hearing concerning an alleged defect of which they have had no prior notice. The matter should have been drawn to Mr Ryan's attention and dealt with in an expert's report so that Mr Beck would have had an opportunity to deal adequately with it. I am conscious that the issue was raised in very general terms in Mr Kenneally's witness statement but there was no detail given. Moreover, the Builder is represented by its director who is not a lawyer. I am not satisfied that the Builder has had a fair opportunity to answer this allegation so I do not propose to allow it to be raised.

(b) Bathroom window

Mr Kenneally said that the window in the bathroom for the master bedroom has been installed upside down. He quoted \$3,800.00 to rectify it although the work has not been done. After some discussion it appeared that the Contract documents were ambiguous, with the drawings suggesting one thing and the specification another. I do not think that I should allow this item to be raised but in any case, I am not satisfied that it has been established on the merits.

(c) Bath plug waste

Mr Kenneally said that the drain for the bath plug in the bathroom for the master bedroom was defective and had to be repaired. He charged the Owners, by way of a variation an amount of \$2,957.63 to repair it.

The complaint was not of defective workmanship but rather, a defect in the bath plug/bath waste drain. Mr Kenneally suggested that the bath would have been out of warranty by the time he installed it. Mr Valentine pointed out that the Builder did not install the bath. I do not see how the Builder can be held responsible for the consequences of the replacement Builder installing a defective bath drain.

(d) Trench heater grate

This grate was to do with the hydraulic heating system in the living room on the ground floor. Mr Kenneally said that the Builder did not allow the full length of the floor to install the grate and part of the slab had to be jack-hammered up and battens laid in order to fit it. He charged \$1,780.00 for this work.

Mr Valentine said that there was extensive discussion with the nominated subcontractor, Camberwell Electrics concerning this issue and that the work that the Builder did was correct. There was a substantial disagreement between Mr Kenneally and Mr Valentine and in the absence of some assistance from the experts on this issue I do not know which of them is right so this item is not established.

(e) The stair handrail \$2,648.25

The stair handrail was constructed too short and had to be lengthened. Mr Kenneally quoted a base price of \$2,140.00 which, with margin and GST becomes \$2,648.25.

Mr Valentine disputed that it was too short but the photographs indicate that it finished short of the bottom of the staircase which is not what was shown on the plans. I think this issue is clearly shown by comparing the photograph with the Contract drawings and I do not find that the Builder has been prejudiced by the failure of the Owners to raise this in Mr Ryan's expert's report. Mr Kenneally's witness statement stated that the rail had to be replaced because it was too short and it is demonstrably too short.

(f) Staircase Wall

It was said that joins between the plaster sheets could be seen in a wall in the staircase area. The joins are visible in glancing light. Mr Kenneally said that, because of the location, the plaster work required a Class 5 finish. I accept the evidence of Mr Beck that the normal finish is Class 4 which was achieved and that a Class 5 finish is not a standard finish but a higher standard that needs to be specified. It was not specified in the present case and so I find no defect.

(g) Master bedroom door

Mr Kenneally said that the metal framed door to the master bedroom could not be installed because the Builder had “nailed through the wall”. He said that he rectified the defect by obtaining a thinner metal framed door at a cost of \$2,100.00.

During the hearing he said that the problem appeared to be screws intruding into the cavity. He suggested these were the screws for the plaster but he could not be certain of the precise cause. Mr Beck said that this explanation would not make sense, given the dimensions of the screws that would have been used to fix the plaster. He asked whether there were any photographs of the alleged intrusions into the door space but there were not.

The problem appeared to be that the door was binding and was difficult to adjust and so the difficulty was avoided by using a narrower door that required a metal frame. The issue that needed to be investigated was, what was causing the door to bind and was it the fault of the Builder?

Since neither Mr Ryan nor Mr Beck have had any opportunity to investigate this allegation I am not satisfied that it is something that can be fairly dealt with now.

(h) Stained windows

Mr Kenneally said that the Builder had not stained timber windows in the bedrooms and the study. He quoted \$600.00 to stain them. Mr Valentine said that they were to be clear coated, not stained. This is a contractual issue that can be dealt with without injustice to the Builder.

The finishes schedule appearing on page 4777 of the tribunal book states that the timber windows were to be painted with a clear coat. There is no mention of staining. This item is not established.

(i) Shower grates

It was said the shower grates did not comply with the specifications and had to be replaced at a cost of \$1,830.00. This allegation does not appear in any expert report or in Mr Kenneally’s witness statement.

Mr Valentine referred me to the variation VQ14, that he submitted to change the drains to strip drains. The issue is whether they were provided. The experts were unable to see from the photographs. It was accepted that one of the grates appeared to be a “Stormtech” drain, which is what was required, although Mr Kenneally said that it was not long enough. Mr Webb asserted that the other grate the Builder supplied was “off the shelf”. Mr Ryan said that he could not tell whether it was off-the-shelf from the photograph. He said he would only be guessing

Mr Kenneally said that the grates ought to have extended for the full width of the shower recess whereas they finished short. There was a debate between Mr Kenneally and Mr Valentine as to whether this was a defect.



Neither Mr Ryan nor Mr Beck offered an opinion. Mr Kenneally said that the grates supplied by the Builder would not have worked and he had to have them specially made.

Since this claim is not raised in the experts' reports, Mr Ryan and Mr Beck have not had an opportunity to investigate it and so are unable to assist me. I do not think that I can determine it now with justice to the parties.

(j) Additional plumbing

Mr Kenneally said that additional plumbing was required during the rectification works costing \$1,220.00. He described it as "bits and pieces" the plumber had to do. These included taps said to be in the wrong place, the upstairs toilet waste pipe in the wrong place, a change of height of the bath mixer, an additional tap in the garden and other changes which might have been variations. Mr Valentine denied that the mistakes were made and said that the plumber he used was the same as the plumber Mr Kenneally used. The plumber was not called to give evidence.

The evidence about this was very unsatisfactory and I queried how the Builder could possibly be expected to answer these allegations. The claim was then withdrawn.

(k) Air-conditioning of studies \$6,896.25

The Builder did not supply air-conditioning units to the ground floor and upper floor study areas. The requirement for it to do so is on page 89 of the specifications. This is a simple contractual dispute and I see no difficulty in dealing with it, despite it not having been raised in the experts' reports.

The Owners obtained a quotation from Camberwell Electrics to install the air-conditioning units in both studies at a cost of \$5,572.73. With margin and GST that becomes \$6,896.25.

(l) Electrical wiring \$7,796.25

Mr Laferlita said that when he was called back to the site after the termination of the Contract with the Builder, he found that the replacement electrician had used a mixture of different cabling for the Lutron system and that it had to be rectified at a cost of \$3,900.00 plus GST. He said that there was also poor termination of cables, that he had not allowed for in his quotation to finish the works, and for which he charged the Owners \$2,400.00 plus GST. There is no contrary evidence and so I find these defects proven and allow the amounts paid which, with margin and GST becomes \$7,796.25.

(m) The solar panels

Mr Kenneally said that the solar panels were not wired to specification and that it will cost \$10,554.00 to de-commission them and re-install them. The source of this figure is a quotation from Camberwell Electrics addressed to the Builder, dated 14 June 2014, to supply the system that the Owners say ought to have been fitted. Mr Valentine said in cross-examination that the

panels referred to in that quotation were no longer available and that those supplied had greater efficiency than the old ones.

The system was installed by Campbell Electrics, which was a nominated subcontractor and no expert evidence was given to demonstrate the inadequacy of what was supplied or the reasonableness of now replacing it with what is alleged by the Builder to have been an out of date system. I do not think that this claim can be fairly dealt with in the absence of proper expert evidence but in any case, I am not satisfied on the limited evidence that I have that the claim is established

132. The total cost of rectification of the defects described above is therefore \$86,052.31.

### **Damages for completion**

133. The Owners claim the sum of \$136,861.67, being the additional amount that they say it cost them to finish the construction over and above what they would have had to have paid to the Builder.

134. The amount claimed is calculated as follows:

Cost of completion (excluding rectification)		\$440,246.99
Contract price, including variations	\$1,348,831.09	
Total paid to the Builder	<u>\$1,045,445.77</u>	<u>\$303,385.32</u>
Additional cost		<u>\$136,861.67</u>

135. In addition to the above, the Owners claim to have spent \$108,287.65 to rectify defects and paid a further \$14,908.41 for other works not included in the original scope of works in the Contract. Rectification of defects is claimed separately and no claim is made for additional work Mr Kenneally did for the Owners.

136. The above calculation is based on what the Owners actually spent. This did not coincide with the expert evidence as to what the reasonable cost completion should have been which I think is all that I can allow.

137. The incomplete items are claimed to be follows. The breakdown is according to building elements.

### **Carpentry** \$8,912.48

138. Mr Ryan said that the base cost of completing the carpentry would be \$7,202.00. Mr Buchanan costed the remaining items of carpentry at \$3,182.85. If one adds in to Mr Ryan's figure some additional items that Mr Buchanan has allowed for Mr Ryan's figure then becomes \$9,220.57. Because it is unclear precisely what is included in Mr Ryan's figures, I do not think that I can merge the figures in this way. I accept Mr Ryan's costing on the basis that he saw the House immediately after the Builder departed. With margin and GST, the cost to complete the carpentry becomes \$8,912.48.

**Plumbing** \$4,636.90

139. Mr Ryan has assessed the cost of completing the plumbing at \$3,747.00. Mr Buchanan assessed a higher figure but again, he saw the property after rectification was underway. With margin and GST Mr Ryan's figure becomes \$4,636.90.

**Fly screens** \$4,950.00

140. No fly screens were provided and the provisional sum was \$4,000.00. This should be credited back to the Owners and since the screens had to be provided by Mr Kenneally, margin and GST should be added, which brings the figure to \$4,950.00.

**Brickwork** \$230.42

141. There was no masonry capping on the front fence. Mr Ryan has costed \$535.00 to provide it. Mr Beck said that capping was not detailed in the Contract documents. I am not satisfied as to that part of the claim. The remaining allowance costed by Mr Ryan is the core filling of the front fence. His base cost for that is \$265.00 compared to a base cost of \$186.20 by Mr Buchanan. Since there is no dispute as to the scope of the work, in the absence of some reason to prefer Mr Ryan's costings over those of Mr Buchanan and considering that Mr Buchanan is a quantity surveyor, I will adopt his figure which, with margin and GST becomes \$230.42.

**Mechanical** \$9,906.19

142. Mr Ryan has assessed a base cost of \$8,005.00 to complete, and commission the various mechanical services including the air-conditioning, heating, hydraulic panels, appliances and solar power system. Mr Buchanan has assessed a base cost of \$2,433.00.

143. Mr Ryan saw the House immediately after the Builder left and has a more accurate idea of the degree of completion of the various items. I accept his base cost which, with margin GST becomes \$9,906.19.

**Electrical** \$17,151.75

144. Mr Ryan assessed the base cost of completing the electrical work at \$15,580.00 Mr Buchanan assessed it at \$2,180.00. Again, because Mr Ryan saw the House immediately after the Builder left the site I prefer his assessment which, with margin and GST becomes \$17,151.75.

**Balustrading** \$4,629.49

145. Mr Ryan has provided a base cost in his report of \$15,237 to complete the internal balustrading and the pool balustrading. These were not calculations that he made but rather, quotations that he was given by others. During discussion it was suggested that the prices in these quotations were excessive.

146. Mr Buchanan pointed out that there was a provisional sum of \$8,000.00 for the balustrading. He assessed a base cost of \$3,471.00. I cannot allow any more than the provisional sum but, in any case, in the absence of some justification of the

quotations that Mr Ryan was given, I must accept Mr Buchanan's figure. With margin and GST that becomes \$4,629.49.

**Flooring/tiling**

\$4,694.48

147. Mr Ryan assessed an amount of \$75 to grout floor tiles in the pantry but, as Mr Beck pointed out, the pantry floor is timber and so the reference must be to another room. Mr Buchanan assessed a base cost of \$3,785.44, the main items being wall tiling and installation of the carpet. This item was not explored during the conclave and all I have are the reports. I have a detailed breakdown of Mr Buchanan's costings but not those of Mr Ryan. I will allow Mr Buchanan's figure which, with margin and GST becomes \$4,694.48.

**The swimming pool.**

\$18,690.00

148. Mr Ryan assessed a figure of \$14,536 to complete the swimming pool. Mr Buchanan assessed it at \$1,700.00, excluding the Builder's margin. The original cost of the pool was \$62,877.27

149. Mr Ryan said that his figure was what the Owners had paid to the pool company to complete the pool. He said that the lining had to be completed and the pool equipment commissioned. Mr Kenneally said that the solar heating not been finished and was undersized and had to be replaced by the pool company.

150. Mr Buchanan said that on his inspection, the pool appeared to be complete, subject to one or two days on completion items and commissioning, but he said that he was not aware how the interior of the pool was to be finished. He was also not aware that the solar heating had not been installed, which cost the Owners \$5,300.00.

151. According to the evidence of Mrs Webb, following the termination of the Contract, the Owners paid \$18,190.00 to the Builder's subcontractor for the completion of the installation of the pool. That is an error in addition, the correct amount being \$18,690. Of that, \$2,000.00 was for upgrading the pump to suit the gas supply that the Builder had installed. Mr Ryan said that the assessment of the size of the pipe required was the job of the Builder. Mr Valentine said that he had properly assessed what was required.

152. Since it does not appear that there has been any additional work beyond what the Builder ought to have done, apart from the upgrade of the heat pump which I find was the Builder's responsibility, I think that the amount that the Owners have had to pay to the Builder's subcontractor to finish the pool is the best measure of the reasonable cost of completion. Had the Builder completed the job it would have been for the Builder to pay its subcontractor to complete the pool.

**Electrical**

\$19,280.25

153. Mr Ryan assessed a base cost of \$15,580.00 to complete the electrical work. With margin and GST that becomes \$19,280.25. Mr Buchanan assessed the base cost as being \$2,180.00. Mr Kenneally said that the actual cost was \$20,000.00 but the quotation that he referred to was never produced. In any case, that is close to Mr Ryan's assessment.

154. Mrs Webb gave evidence of amounts totalling \$8,133.00 paid to Mr Laferlita who did the work but that would not take account of any amounts they paid to Mr Kenneally.

155. It appears that by the time Mr Buchanan had visited the site much of electrical work had been done by Mr Laferlita.

156. On this state of the evidence I will allow the amount assessed by Mr Ryan.

**Painting** \$14,230.00

157. Mr Ryan assessed a base cost of \$24,950.00 to complete the painting. Mr Buchanan's assessment was \$3,621.00. Mr Buchanan saw the site after some work had been done. He said that when he walked through the House, the painting appeared to be largely complete. Mr Kenneally said that the whole outside of the House had to be done and the price that he charged to complete the painting was \$14,230.00. I think that is the figure that I should allow.

**Plaster** \$2,524.50

158. Mr Ryan allowed \$2,040.00 for finishing the internal plaster, being three days labour at \$85 per hour. Mr Buchanan allowed plastering of 22 m<sup>2</sup> at \$38 per metre, producing a base cost of \$836.00. The assessments are on a different basis so it is impossible to compare them directly and this issue was not dealt with in the conclave. Since it will be necessary to bring a plasterer onto the site and there will not be a great deal of work to do, it might be expected that there would be a premium. I prefer Mr Ryan's approach and allow his figure which, with margin and GST becomes \$2,524.50.

**Civil** \$3,161.18

159. There was a linear storm drain to be installed on the front of the House to a pumping system at the rear. Mr Ryan has assessed a figure of \$2,555.00 but provides no breakdown. Mr Buchanan has not costed this item. I will allow Mr Ryan's figure which, with margin and GST becomes \$3,161.18.

**Render** \$309.38

160. There was a dispute as to the requirements for rendering and the evidence was vague. The wall of the adjoining house had to be finished in some way and the price of \$250 was suggested to paint it. With margin of GST that becomes \$309.38.

**Roof plumbing and external flashing** \$4,636.90

161. Mr Ryan assessed a base cost of \$3,747 to finish off the external flashing. This covered the incomplete flashing to the roof as well as the gap between the House and the property next door. Mr Buchanan assessed an amount of \$88.20 for the corner flashing of the north-west wall. Most of the allowance by Mr Ryan related to the installation of the leaf guard, which he costed at \$2,680.00. Adding the margin at the rate charged by the rectifying builder and GST, the amount becomes \$4,636.90.

**Windows**

\$5,432.62

162. Mr Ryan said that flyscreens were not installed, external door seals were missing and the trims to the windows in bedroom one were not installed. He assessed \$4,000.00 for the fly screens, which was the prime cost figure, \$90 for the door seals and \$300 for the window trims, making a total \$4,390.00. Mr Buchanan assessed a cost of \$1,325.48 for the provision of fly screens but did not assess the other items.
163. Mr Kenneally said that he paid \$10,500.00 for screens and other items but was unable to give precise figures of what was actually paid for the items in question. I will allow Mr Ryan's figure which, with margin GST becomes \$5,432.62.

**Landscaping**

\$8,205.13

164. Mr Ryan allowed an amount of \$29,063.00 as a provisional sum for landscaping to the rectifying builder in his second report. He said in evidence that that was from figures that he had been given and so it has not been arrived at by a process of calculation.
165. Mr Kenneally said that when he arrived on site there was no landscaping done apart from the front fence. He said that he worked to a scope of works that he was given but he gave no evidence about what was within the scope of the original Contract.
166. Mr Buchanan said that in making his assessment he worked off the Contract documents but that it was not very clear what the scope of works was. He said that he did a measurement of what he could find and then deducted all the items that he expected to have been done, and arrived at a figure of \$1,535.00. His method of calculation seems appropriate. In effect, his figure is all that he said was left of the provisional sum after deducting what been done but that would not include variations for which the Builder was paid but which were not done.
167. The Architect approved Variation 18 in the sum of \$6,670.13, including GST and margin, which correspondingly increased the amount the Builder was to be paid for landscaping, effectively increasing the provisional sum. Adding this in brings Mr Buchanan's figure up to \$8,205.13.
168. There were numerous other items of work referred to in the evidence that were said to form part of the landscaping but anything over and above the provisional sum and approved variations would have been claimable by the Builder as additional work over and above the provisional sum allowance.

**Fencing**

\$2,311.03

169. Mr Buchanan has allowed a base cost of \$1,867.50 for fencing at the east rear boundary. No allowance has been made by Mr Ryan and it may be that this was something that he included in his landscaping assessment. I will allow Mr Buchanan's figure which, with margin and GST becomes \$2,311.03.

**Joinery**

\$89,915.51

170. Joinery had not been installed by the Builder and the deposits that it claimed were not paid to the joinery supplier. Mr Ryan has allowed the provisional sum for joinery of \$40,000.00, plus the base cost of Variation 16, which Mr Ryan said together amount to \$72,659.00 for joinery. Mr Buchanan allowed \$29,157 as a base cost for this item on the basis of payments that he was told the Builder had made to the joiner. Since I am satisfied there were no such payments I will allow the provisional sum which, with margin GST becomes \$89,915.51.

**Glazing**

\$4,233.74

171. Mr Ryan has allowed a base cost of \$3,421.20 for shower screens and wall mirrors as against a base cost allowed by Mr Buchanan of \$3,500.00. I will allow Mr Ryan's assessment which with margin GST becomes \$4,233.74.

**Preliminaries**

\$12,028.50

172. Mr Buchanan allowed an amount of \$9,720.00 for preliminaries, calculated as a pro rata allowance on the value of the works to complete construction. Mr Ryan made no allowance for preliminaries but the margin of 35% that he used in his calculations might well have been intended by him to include an allowance for preliminaries. Since I am only allowing the margin charged by Mr Kenneally of 12.5% and since no allowance has been made for preliminaries in regard to the rectification work and taking into account the overall scope of the work required to rectify the defect to complete the construction, I accept Mr Buchanan's evidence that it is appropriate to make an allowance for preliminaries of \$9,720.00. With margin and GST are added becomes \$12,028.50.

**House clean**

\$2,178.00

173. Mr Ryan allowed two amounts of \$1,760.00 for a house clean on completion. I do not see why it is appropriate to allow the amount twice since it is unnecessary to do a full house clean until all of the work is done. With margin and GST, the allowance should be \$2,178.00.

**Total completion cost**

174. The cost of completion is therefore \$242,248.45.

**Liquidated damages**

175. By the terms of the Contract the Owners were entitled to claim liquidated damages at the rate of \$140.00 per calendar day if the work should not be completed by the date of practical completion.

176. By an email dated 12 December 2014, the Owners notified the Architect that they intended to claim liquidated damages from the revised date of practical completion, being 31 October 2014. By an email sent the following day, 13 December 2014, the Architect notified the Builder that liquidated damages would be payable.

177. Mr Valentine submitted that no liquidated damages applied because "...the project was under delay". That is not a term of the Contract. If the Builder was

delayed by the Owners or the Architect it could have suspended works in which case time would have ceased to run. It did not do so. It is not demonstrated by the evidence that prevention by the Owners that would justify the granting of an extension of time now. The grounds relied upon by the Builder in this regard were not made out for the reasons given above.

178. Liquidated damages from 1 November 2014 until the date of termination, which was 28 January 2016 (454 days) at the rate of \$40.00 day amount to \$63,560.00.

#### **Further damages for late completion**

179. The House was finally completed and an occupancy certificate was obtained in November 2016. In the meantime, the Owners claim to have suffered further loss in renting alternative accommodation and storing their belongings at a rate of \$3,476.00 plus rental \$486.68 for storage. This is claimed only until 30 June 2016. For five months, that amounts to \$19,813.40. I think that is a reasonable claim and it will be allowed.

#### **Additional claims**

180. The following further claims are made:

(a) Additional Architect's fees \$7,475.00

The Architect charged the Owners an additional \$14,950.00 for administering the construction and the tendering for a new Builder. Although it was acknowledged that some of these fees would have been incurred in any event had the Builder completed the work, it is likely that, in that event, only one half of that expense would have been incurred.

I do not believe that that is speculative. It is quite clear from the evidence that this project has taken much longer than it ought to have taken and a great deal of the work carried out by the Architect before termination seems to me to have been largely driven by the Builder's failure to progress the work, by the Architect having to deal with an extraordinary number of emails and vexatious requests for information that was not required.

Following termination it would not have been necessary to tender for a new builder and then supervise the completion of the construction by the replacement builder if the Builder had performed the Contract. I think that it is reasonable to attribute at least half of the fees charged by the Architect to the Owners following termination to the Builder's breach. In their final submissions the Owners sought to increase this amount but due to the impossibility of making a precise calculation I should adopt a conservative approach and allow only what I think the excess must be at the very least. In that regard, I think that half is appropriate.

(b) Termination costs \$5,080.74

A claim is made for the costs incurred by the Owners in terminating the Contract. The costs were changing the locks (\$263), copying keys (\$45), construction insurance (\$3,458.40), rental of the security fence (\$550), purchase of a security system for the site (\$640) and change the lock on the



gate and the electrical box (\$124.34). I think that it is appropriate to allow these sums since they would not have been incurred if the Builder had completed the Contract.

(c) Building permit costs \$4,074.85

The Owners claim costs of obtaining a driveway permit (\$260), the cost of extending the building permit (\$880), the cost of managing the building permit to allow a change in Builder (\$550) and further building surveys inspections (\$605 and \$1,779.85). I accept that none of these expenses would have been incurred by the Owners if the Builder had performed the Contract. They total \$4,074.85 and that sum will be allowed.

(d) Unpaid utilities \$3,542.81

The Builder did not pay utilities bills incurred before termination, amounting to \$3,542.81. This amount was included in the Architect final certificate which was not disputed by the builder. That sum will be allowed.

(e) Expert's report

A claim is made for the cost of a report by Mr Ryan dated 16 February 2016 on the basis that it was commissioned by the Architect to enable new Builders to price the cost to complete the construction and rectification work. I do not think that is a loss arising directly from the Builder's breach. The Architect was quite capable of advising the Owners what was required and architect's fees are already allowed in the damages to be awarded.

(f) Moving costs

The Owners claim they have had to have an additional move in November 2015 at a cost of \$1,672.00. All losses due to delay up to the date of termination are included in the liquidated damages that are to be awarded.

(g) Inconvenience and stress

The Owners claim damages for the stress and inconvenience that they have suffered as a result of the failure of the Builder to perform its Contractual obligations. The general rule is that only financial losses are compensable in an action for breach of Contract (*Sunley v. Cunard White Star* [1939] 2 KB 791 at 799 per Hallet J.). There are exceptions to that rule, one of which is that physical inconvenience and discomfort can be compensated if it arises from the breach and if it is substantial. There have been previous decisions in this tribunal where damages have been awarded to compensate for a loss of amenity (see: *Henley Arch Pty Ltd v Hannagan* [1999] VCAT 29 at para 10; *Anderson & Anor v Wilkie* [2012] VCAT 432 at para 29; *Kounelis v Ross Horton Homes Pty Ltd* [2014] VCAT 319) but in each of those cases the loss of amenity has been severe. Nonpecuniary damages are not awarded as a matter of course. Anyone having a defective house will be upset and anyone involved in litigation will find the process stressful. What

is compensated under this head of damage is not anxiety and stress arising from the subject of the litigation or the litigation itself but rather, a loss of amenity caused by the breaches that are established. I do not think that this is an appropriate case in which to award non-pecuniary damages.

### Summary

181. Damages due to the Owners are assessed as follows:

Contract price (inclusive of GST)		\$1,227,319.50
Variations		<u>\$ 156,823.08</u>
		\$1,384,142.50
less removed items		<u>\$ 35,311.49</u>
Adjusted contract price		\$1,348,831.09
Paid to Builder	\$993,172.92	
Paid to retention	<u>\$ 52,272.85</u>	<u>\$1,045,445.77</u>
Unpaid balance		\$ 303,385.32
Damages for defective work	\$ 86,052.31	
Damages for incomplete work	\$242,248.45	
Liquidated damages	\$ 63,560.00	
Cost of alternative accommodation	\$ 19,813.40	
Additional Architect's fees	\$ 7,475.00	
Termination costs	\$ 5,080.74	
Building permit costs	\$ 4,074.85	
Unpaid utilities	<u>\$ 3,542.81</u>	<u>\$ 431,847.56</u>
Balance due to the Owners:		<u>(\$ 128,462.24)</u>

### Orders to be made

182. The application will be dismissed. On the counterclaim there will be an order that the Applicant pay to the Respondents the sum of \$128,462.24. Direct that the retention sum of \$52,272.85 be paid to the Respondents in part satisfaction of the amount awarded. Questions of interest and costs will be reserved for further argument.

**SENIOR MEMBER R. WALKER**