VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO.D356/2014

CATCHWORDS

DOMESTIC BUILDING: finding previously made that the owners and the builder had abandoned the contract; assessment of owners claim for damages for defective and incomplete work; assessment of builders counterclaim for unpaid variations and damages.

FIRST APPLICANT	Mr Michael Strong
SECOND APPLICANT	Mrs Michelle Strong
FIRST RESPONDENT	Eco Smart Builder Pty Ltd (ACN 149 584 770) Dismissed from proceeding by Order made 15 March 2016
SECOND RESPONDENT	Anthony Milanovic
WHERE HELD	Melbourne
BEFORE	Member C Edquist
HEARING TYPE	Hearing
DATES OF HEARING	25 June, 26 June, 22 October, 23 October, 6 November, 7 December 2015 and 11 April 2016
DATE FOR FILING OF RESPONSE SUBMISSIONS BY SECOND RESPONDENT	21 April 2016
DATE OF ORDER	28 July 2016
DATE OF REASONS	28 July 2016
CITATION	Strong v Milanovic (Building and Property) [2016] VCAT 1225

ORDERS

1 The Second Respondent must pay to the Applicants the sum of $55,435.

2 Pursuant to s124 of the *Victorian Civil and Administrative Tribunal Act* 1998 I declare that the deck at the Applicants' house constructed in or around October 2014 was not constructed by the Second Respondent, and he is not responsible for any defects in the deck.

3 Liberty to apply in respect of costs.

MEMBER C EDQUIST

APPEARANCES:

For the Applicants:	On the first two days of the hearing, Mr Strong. On the third, fourth, fifth, sixth and seventh days of the hearing, Mr LM Stanistreet of Counsel.
For the Respondent:	On the first, second, third, fifth and sixth days of the hearing, Mr A Milanovic. No appearance on the fourth day, nor on the seventh day.

REASONS

INTRODUCTION

1 Mr Michael Strong and Mrs Michelle Strong are the owners ('the owners') of a house in Doncaster East.

2 On 10 August 2013, the owners entered into a domestic building contract with a builder for the purpose of renovating and extending their home.

3 In April 2014, the owners initiated this proceeding against Eco Smart Builder Pty Ltd (ACN 149 584 770). At this point the contract was on foot.

4 The owners later joined Anthony Milanovic, a director of Eco Smart Builder Pty Ltd, as Second Respondent. The identity of the builder became an issue in the proceeding.

5 The contract came to an end. The owners said the builder repudiated the contract. The builder said the owners repudiated the contract. Neither party contended that the contract had merely been abandoned. How the contract came to an end was another major issue in the proceeding.

6 The proceeding came on for hearing on 25 June 2015, and the hearing continued on 26 June, 22 October, 23 October, 6 November and 7 December 2015.

7 On 15 March 2016, I published a decision, with reasons (the March decision). The March decision resolved a number of issues, as follows:

(a) The Second Respondent, Mr Anthony Milanovic, was declared to be the builder.
(b) The owners' claim against Eco Smart Builder Pty Ltd was dismissed.
(c) The counterclaim brought by Eco Smart Builder Pty Ltd was also dismissed.
(d) The contract was declared to have been abandoned.

8 Because neither party had, during the course of the hearing, made submissions regarding the measure of damages in the event that the contract was found to have been abandoned, the proceeding was listed for further hearing on 11 April 2016.

9 At the hearing on 11 April 2016, counsel for the owners handed up submissions as to damages ('owners submissions') and spoke to them.

10 Following the hearing, I issued an order that the principal registrar send to the builder a copy of the owners' submissions, and gave the builder an opportunity to send response submissions by 4.00p.m. on 21 April 2016. I warned the builder that in the event he failed to send response submissions by that deadline, the Tribunal might proceed to make its decision as to damages in any event. The builder did not avail himself of the opportunity to send response submissions, and I now proceed to give my decision as to damages without the benefit of those submissions.

THE RESPECTIVE CLAIMS OF THE PARTIES

11 At the outset of the hearing on 25 June 2015, the owners were seeking damages from the builder in the sum of $88,989.40, and the builder was counterclaiming for $112,952.76.

THE OWNERS' CLAIMS

12 The owners are claiming damages for incomplete contract works, defective contract work, consulting fees and other costs, and prime cost and provisional sum adjustments.

13 At the start of the hearing, the owners said that the builder was liable to them because the builder repudiated the contract, and they accepted the repudiation. The owners asserted a large amount of work remained to be completed when the contract came to an end, and that they had to engage trades to rectify incomplete work which should have been performed by the builder. They acknowledged that only the final payment of $11,500 remained to be paid. The owners sought damages, calculated after deducting the amount due on completion of the contract, of $88,989.40. Each of the owners' claims is discussed below.

14 Notwithstanding the finding that the contract has been abandoned, the owners contend that they are entitled to recover damages in respect of defective work, and also in respect of incomplete work. No mention was made in the owners' submissions of the other claims made for consultant fees and damages for 'malicious actions'.

15 By way of counterclaim, the builder initially said that he terminated the contract in accordance with its terms, or the owners repudiated the contract and he accepted the repudiation. In any event, the builder initially claimed to have suffered loss and damage estimated at $37,852.76.

16 In an email dated 16 October 2015, the builder advised the owners and the Tribunal that the defence in relation to alleged defective or incomplete work was that the owners continually breached the contract and, in effect, repudiated the contract, 'which then inevitably ended in the contract coming to an end'. The builder also asserted that the works, when the contract was terminated, were incomplete, but not defective.

17 In this email, the builder added claims totalling $75,100 to his original counterclaim. The builder's original, and additional, claims are discussed below.

The owners' submissions

18 The owners began their submissions by contending that they have paid the entire contract sum of $221,607 save for 11,500, and yet the evidence established:

(a) some of the building works were defective; and

(b) the builder did not carry out all the works that the owners have paid for.

The owners then pressed alternative submissions.

The owners' first submission

19 The owners' first submission was that the Tribunal's finding as to the abandonment had no bearing on the owners' claim for damages in respect of defective work, or in relation to the claim for incomplete work. This was because it was not the parties' objective intention that the builder be absolved from liability for defects, nor in respect of incomplete work. This argument seemed to proceed on the basis that the parties must be taken to have reached an agreement about their obligations under the contract following their abandonment of it.

20 The owners say the applicable law is to be found in *FCT v Sara Lee Household & Body Care (Australia) Pty Ltd*,[1] in which Gleeson CJ, Gaudron, McHugh and Hayne JJ referred [at 534] to a following passage from an earlier High Court decision, *Tallermann & Co Pty Ltd v Nathan's Merchandise (Vic) Pty Ltd*:[2]

> It is firmly established by a long line of cases… that the parties to an agreement may vary some of its terms by a subsequent agreement. They may, of course, rescind the earlier agreement altogether, and this may be done either expressly or by implication, but the determining factor must always be the intention of the parties.

21 The owners' first submission went on:

> Accordingly, for the Owners' defects claim to fail, this Tribunal would have to find the parties' intention was that, the Builder would not be liable for any breaches of the express warranties in clause 10.1 of the contract.[3]…

22 Similarly, for the owners' incomplete works claim to fail, the Tribunal would have to find that the parties' intention [was] that the owners were content to simply walk away from the contract, having paid practically the entire contract sum for a manifestly incomplete major renovation, and in so doing, elected to waive any rights to sue the Builder.[4]

The owners' second submission

23 The alternative submission was that the Tribunal should order that the builder pay to the owners, by way of restitution, the amount that the Tribunal deems fair in all the circumstances.

24 The basis of this argument was that as the owners had paid practically the entire contract sum, but had received works which were manifestly

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1 (2000) 201 CLR 520.
2 (1957) 98 CLR 93 at 144.
3 Owners' submissions paragraph 8.
4 Owners' submissions paragraph 11.

incomplete, they were entitled to an order for restitution of the amount they had overpaid. They referred to the 'seminal' High Court decision of *Pavey & Matthews Pty Ltd v Paul*.[5]

25 The owners say the measure of restitution should be assessed having regard to:

(a) the amount the owners paid to the builder; and
(b) the evidence adduced at trial in respect of the quantum of incomplete works.[6]

Discussion

26 It is the owners' primary contention that, for their defects claim to fail, the Tribunal will have to find that the parties' intention was that the builder will not be liable for any breaches of the express warranties contained in clause 10.1 of the contract. Similarly, it was contended that for their incomplete works claim to fail, the Tribunal would have to find that the parties' intention was that the owners were content to simply walk away from the contract.

27 I think these twin contentions are wrong, insofar as they insist that there must have been a meeting of minds regarding what was to happen to the owners' entitlements regarding defects and incomplete works once the contract was abandoned. As I said in the primary decision, all that was required for abandonment of the contract to be established was that the conduct of the parties, when objectively viewed, manifested an intention to that effect.

28 The key passages in the March decision regarding abandonment began as follows:

> 180 Applying the test set out in *CGM Investments Pty Ltd*,[7] what does the conduct of the parties, objectively viewed, tell us about their intention about the continuance of the contract.

29 After reviewing the evidence, I concluded:

> 185 The situation therefore was that neither party had effectively terminated the contract under the show cause procedure available to them in the contract. Furthermore, neither party had rescinded the contract on the basis of the other's repudiation. In these circumstances, the owners took a step which arguably was inconsistent with the continuation of the contract, at the latest on 9 July 2014. The builder, on the other hand, proceeded on the basis that at the expiration of 14 days from 30 June 2014 the contract was at an end, and did not return to site.

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5 (1986) 162 CLR 221, 256.
6 Owners' submissions, paragraph 3 (c); and paragraph 18.
7 *CGM Investments Pty Ltd & Ors v Chelliah & Ors* [2003] FCA 79; 116 ALR 548 at [17-18].

186 I consider that the conduct of the parties, when objectively viewed, manifests an intention to abandon the contract, and I accordingly find that the contract was abandoned.

187 The situation, accordingly, was not unlike that in the High Court decision in *DTR Nominees v Mona Homes Pty Ltd* which was referred to by Finkelstein J in *CGM Investments Pty Ltd*. There, the majority (comprising Stephen, Mason and Jacobs JJ), having begun their judgment with the observation this was a case in which the parties to a contract, having placed conflicting interpretations upon it, have claimed to rescind it on the ground that the other party has repudiated and renounced it, went on to say:

> Thus the contract in the present case was still on foot on and after 25th July 1974. Neither party had effectively rescinded. But there can be no doubt that by 5th December 1974, when these proceedings were commenced, neither party, whatever may have been their reasons, regarded the contract as being still on foot. Neither party intended that the contract should be further performed. In these circumstances the parties must be regarded as having so conducted themselves as to abandon or abrogate the contract.[8]

30 Although there has to be an intention, objectively viewed, that the contract is to be abandoned, the consequences of the abandonment do not, in my view, have to be the subject of any agreement. In the absence of any express agreement, the parties can turn to established legal principles for guidance.

The owners' claim for restitution

31 The owners' alternative claim is based on restitutionary principles. The owners say:

> Put another way, the Builder has received a monetary benefit, to the loss of the Owners, in circumstances where it would be unjust for the Builder to retain all of that benefit. Given the finding that there is no longer any contract in existence, there is no bar to this form of restitutionary relief.[9]

32 In support of their contention that they are entitled to restitution, the owners refer to passages from the judgment of Deane J in *Pavey & Matthews Pty Ltd v Paul* including the following:

> Indeed, if there was a valid and enforceable agreement governing the claimant's right to compensation, there would be neither occasion nor legal justification for the law to superimpose or impute an obligation or promise to pay a reasonable remuneration.[10]

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8 Tribunal's decision dated 15 March 2015, paragraphs 180-187.
9 Owners' submissions, paragraph 17.
10 (1986) 162 CLR 221, at 256.

33 In my view, the owners' claim for restitution is misconceived as it is based on there being no contract in existence. The weakness of the owners' claim for restitution is highlighted by the following further passage taken from Deane J's judgment in *Pavey & Matthews Pty Ltd*:

> The quasi-contractual obligation to pay fair and just compensation for a benefit which has been accepted will only arise in a case where there is no applicable genuine agreement or where such an agreement is frustrated, avoided or unenforceable. In such a case, it is the very fact that there is no genuine agreement or that the genuine agreement is frustrated, avoided or unenforceable that provides the occasion for (and part of the circumstances giving rise to) the imposition by the law of the obligation to make restitution.[11]

34 In this proceeding, there *was* a valid and enforceable contract. I consider that it is to this document, and to their respective actions pursuant to it, that the parties must refer in order to identify their respective rights and obligations. After the contract ceased to exist, the parties had no relationship. Specifically, the builder carried out no further work for the owners, and the owners paid no further monies to the builder. It is hard to see how a right of restitution might accrue to the owners in such a situation.

LEGAL PRINCIPLES RELATING TO ASSESSMENT OF DAMAGES FOLLOWING ABANDONMENT OF CONTRACT

35 The Tribunal has in recent years considered these principles in at least three cases, namely *Arapoglou v Shkolyar* (Domestic Building) [2011] VCAT 2213 (29 November 2011), *Torua Pty Ltd v Sariklis* (Domestic Building) [2012] VCAT 144 (8 February 2012) and *Yan v Brown Bros Cabinet Works Pty Ltd* (Domestic Building) [2013] VCAT 1623 (16 September 2013). Each of these cases was decided by Senior Member Riegler.

36 In each of *Arapoglou v Shkolyar* and *Torua Pty Ltd v Sariklis,* Senior Member Riegler referred to *Westralian Farmers Limited v Commonwealth Agricultural Service Engineers Ltd,*[12] a leading Australian authority on the effect of termination of contract on the ongoing responsibilities of the parties. That case involved termination, but the comments of Dixon and Evatt JJ offer some guidance as to what is involved in the sudden termination of an agreement that has not yet been fully performed under which liabilities are still accruing from day to day. Dixon and Evatt JJ said:

> 81. In general the termination of an executory agreement out of the performance of which pecuniary demands may arise imports that, just as on the one side no further acts of performance can be required, so, on the other side, no liability can be brought into existence if it depends upon a further act of performance. If the title to rights consists of vestitive facts which would result from the further execution of the contract but which have not been brought about before the agreement terminates, the rights cannot

[11] (1986) 162 CLR 221, at 256.
[12] (1936) 54 CLR 361.

> arise. But if all the facts have occurred which entitle one party to such a right as a debt, a distinct chose in action which for many purposes is conceived as possessing proprietary characteristics, the fact that the right to payment is future or is contingent upon some event, not involving further performance of the contract, does not prevent it maturing into an immediately enforceable obligation.

37 In *Arapoglou v Shkolyar*, Senior Member Riegler, after concluding that certain contracts were mutually determined as of 1 November 2009, said at [81]:

> However, I do not regard the contracts as being rescinded *ab initio*. Whatever rights accrued prior to 1 November 2009 survive termination of the contracts. That proposition is entirely consistent with the majority judgement in *Westralian Farmers Limited v Commonwealth Agricultural Service Engineers Ltd.*

38 Having quoted the passage referred to above taken from the judgment of Dixon and Evatt JJ in *Westralian Farmers Limited*, Senior Member Riegler went on to say at [82]:

> Accordingly, it is therefore necessary to examine both the Builder's claim and the Owner's counterclaim to ascertain what, if any, accrued rights crystallised prior to the determination of the contracts.

39 In *Torua Pty Ltd v Sariklis*, Senior Member Riegler, having found that the contract was abandoned, and having referred to the majority judgment in *Westralian Farmers Limited v Commonwealth Agricultural Service Engineers Ltd*, said at [60]:

> it is open for the Owner to claim damages in respect of rights that crystallised prior to March 2010. However, the Owner is unable to claim for loss associated with the costs of completing the Works because such damage would depend on the Builder having an obligation to further perform after the Contract has come to an end, which obligation ceased upon the Contract coming to an end in or around the middle of March 2010.

40 In *Yan v Brown Bros Cabinet Works Pty Ltd*, Senior Member Riegler found that the contract between the parties had been mutually abandoned. He then went on to discuss the consequences of mutual abandonment as follows:

> 50 Having regard to my finding that the contract between the parties has been mutually abandoned, each party is discharged from further performance. However, Ms Yan has paid a deposit of $14,659 to the respondent, yet no joinery has been supplied to her. Originally, that amount formed part of Ms Yan's claim. However, as I have already indicated, the parties partially settled the dispute during the course of this proceeding, which resulted in the respondent returning the whole of that deposit to Ms Yan.
>
> 51 What remains, in terms of Ms Yan's claim, relates solely to her damages claim associated with delay and cost overrun.

However, having regard to my finding that the contract was mutually abandoned by the parties, I am of the view that it is not open for Ms Yan to claim damages for delay and cost overrun.

52 In particular, I have already found that as at April 2013, the two townhouses were in an unfinished state and it was not reasonable for the respondent to have conducted a check measure at that time. Therefore, the obligation to commence production of the joinery had not yet crystallised prior to the contract coming to an end. Consequently, the respondent was not late in performing its obligations prior to the contract being determined. That being the case, there cannot be a claim for damages associated with any delay in completing the two townhouses…

54 Moreover, as future performance of the contract ceased at the time of determination, no claim lies for any cost overrun associated with the additional cost of having another contractor complete the Joinery Works.

General Principles

41 From these decisions, I extract the following principles to be applied to the present situation:

(a) the contract is not to be regarded as being rescinded *ab initio,* ie, as from the start;
(b) any right of a party which had crystallised prior to the abandonment can be enforced; and
(c) a party can claim damages in respect of a breach of any crystallised right;
(d) each party is excused from further performance of the contract.

Claim by owners for damages in respect of defective work

42 In my view, one of the practical implications of these general principles is that the owners' claim for damages in respect of defective work can be maintained. This is because clause 10.1 of the contract sets out the warranties which the builder gives pursuant to s8 of the *Domestic Building Contracts Act* 1995. The builder, under clause 10.1 of the contract, and by virtue of s8 of the Act, gives the owners express warranties regarding the performance of the works.

43 In *Arapoglou v Shkolyar*,[13] Senior Member Riegler said at [113]:

> The Owner was contractually entitled to have the works completed by the Builder in a professional and workmanlike manner. That right existed as an express term of the contracts and also existed as a warranty under s8 of the Act. In my view, the mere fact that the contracts were prematurely ended does not destroy that right. It

[13] [2011] VCAT 2213 at [113].

> accrued prior to the contracts coming to an end and for the reasons stated above, survives termination of the contracts.

44 I respectfully agree with that analysis, and adopt it. I find that the owners have a valid claim for damages for the rectification of defects in the works which existed at the point the contract was abandoned. The qualification of this category of claims will be discussed below.

Claim by owners to recover monies paid for works which were not performed

45 Another practical ramification of the general principles identified is that if the owners were induced by a payment claim submitted by the builder to make a payment in respect of work which had not been performed, the owners can make a claim for restitution of that money on the basis that the claim crystallised before the abandonment of the contract.

46 I have reached this conclusion because there was an express obligation on the owners to pay the builder the contract price in accordance with the contract.[14] The builder was entitled to be paid the contract sum progressively under clause 11.8 of the contract, which provided:

> The Owner will make Progress Payments to the Builder in accordance with the agreed and completed Progress Payments Table as set out in Item 23 of the Appendix.

47 Emphasis should be placed, in my view, on 'completed'. I consider that when the builder issued a progress claim under the contract, he made a representation to the owners that the stage of the works to which it related had been completed, unless some special arrangement had been negotiated.

48 It follows, in my view, that if the builder issued a progress claim in respect of works which were not completed, he breached the contract. At this moment a cause of action crystallised in relation to the breach, because an action for breach of contract accrues at the date of breach, not at the date of loss.

49 This breach of contract would subsist until either the uncompleted works were performed, or a credit note or other adjustment of the relevant payment claim was issued. If neither of these curative steps was taken by the time the progress claim was paid, then the owners, at the time of payment, would suffer loss.

50 I also consider that in issuing a progress claim in respect of works which had not been completed, the builder would have been engaging in misleading and deceptive conduct in breach of s18 of the *Australian Consumer Law*, and accordingly potentially rendered himself liable to an action for damages.

51 The owners' entitlement to bring the action was perfected at the moment the false progress claim was paid by the owners, because this was the point

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[14] Contract, clause 11.5.

at which they suffered loss. This is because, in contradistinction to an action for breach of contract, the action accrues only at the time loss is incurred.[15] In this way also, a crystallised right to sue for damages in respect of works falsely claimed as having been completed, and then paid for, would have been established prior to the abandonment of the contract.

52 On these alternative bases, I find that the owners have an entitlement to recover damages in respect of works invoiced, but not completed, which accrued at the latest when payment was made. The quantification of claims in this category will be discussed below.

Builder's claim for unpaid portion of the contract sum

53 The principle that each party is excused from further performance of the contract means the owners do not have to pay any part of the contract sum which is unpaid, and in respect of which an obligation to pay, either under the contract or under principles of restitution, had not arisen by the date of abandonment of the contract. The corollary is that the builder cannot claim for payment of any unrendered progress claim relating to work yet to be performed at the time of the abandonment of the contract.

Builder not obliged to complete contract works

54 On the same principle, the builder is not obliged to complete any contract work which has not been performed at all, as distinct from having been performed defectively. The owners cannot claim loss associated with the cost of completing any contract work which had not been performed, because such loss would depend on the builder having an obligation to continue performing the work.

55 I now turn to assess the respective claims of the parties in the light of these principles. As a starting point, it is necessary to fix the date of abandonment of the contract.

THE DATE OF THE ABANDONMENT OF CONTRACT

56 In the March decision, I did not make a finding as to the precise date when the contract was abandoned. Having regard to the conclusion I expressed in that decision, that the builder proceeded on the basis that at the expiration of 14 days from 30 June 2014 the contract was at an end, and did not return to the site,[16] I now formally find that 14 July 2014 was the date of the abandonment of the contract.

THE OWNERS' CLAIMS

57 The owners claimed $100,489.40 comprising:

(a) damages in respect of the costs incurred in completing the contracted works of $71,961.40;

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15 *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 525-526, 527.

16 March decision, paragraph 185, quoted at paragraph 29 above.

(b) damages in respect of consulting fees and other expenses incurred in pursuing the matter in the sum of $14,028; and
(c) damages for the 'malicious actions' of the builder in the sum of $14,500.

58 The owners' net claim, after allowing for the amount due on contract completion of $11,500, was $88,989.40.

Owners' claims for consulting fees and other expenses incurred in pursuing the claim, and in respect of the builder's 'malicious damage'

59 It is convenient to deal with these claims first. As noted, in their written submissions handed up at the hearing on 11 April 2016, the owners did not mention the respective consulting fees and other expenses, nor the claim for damages for the 'malicious actions' of the builder. It would appear accordingly that those claims have been abandoned. However, lest the owners did not intend to abandon the claims, I will deal with them, albeit briefly.

Owners' claim for consulting fees and other expenses

60 I address first the claim for consulting fees and other expenses incurred in pursuing the matter totalling $14,028. The first point which may be made is that the claim is not particularised. Accordingly, it is not clear whether the claim relates to the fees of Mr Forrest, or other consultants such as Archicentre or Hansen Design.

61 Irrespective of the consultant concerned, any claim for consulting fees as damages for breach of contract must fail. This category of claims is not particularised. In order to be successful on a claim for any individual consultant's fees, the owners will have to demonstrate that those fees were incurred as a direct result of an established breach of contract by the builder, and an entitlement to damages had crystallised in respect of that breach prior to the point that the contract was abandoned. The claim must be dismissed because, in the absence of any particularisation of the claim, it is impossible to assess whether any specific consultant was engaged as a direct result of a breach of contract by the builder, nor whether the engagement was before, or after, the abandonment of the contract.

Owners' claim for damages arising from malicious actions of the builder

62 Turning to the claim for damages of $14,500 arising from the 'malicious actions' of the builder, similar points can be made. There is no particularisation of the actions in question, and accordingly there is no basis to assess liability. Furthermore, no crystallised entitlement to damages had been established by the date the contract was abandoned. Accordingly, I find that this claim also must be dismissed.

Owners' claim for damages of $71,961.40 in respect of the costs incurred in completing the contracted works

63 Analysis of Mr Forrest's report indicates that the owners are claiming damages in respect of a number of categories of work. The categories are:

(a) works performed defectively;
(b) works paid for, but not actually performed;
(c) works which were in the scope of the contract but which had not been completed at the time of abandonment, and for which payment had not been made, ie, works covered by the final progress claim;
(d) Prime Cost items paid for by the owners.

Overview

64 The owners paid every progress claim up to and including progress claim No.10. They were entitled to expect that the builder had performed, in accordance with the contract, all the work covered by each of those progress claims. As previously indicated, if work was performed by the builder, and invoiced in a progress claim and paid for, but was in some way defective, the builder is to be held to account for the damages required to compensate the owners for the cost of rectification of the defect. Furthermore, as discussed above, where the builder has charged the owners and been paid for work that has not been performed at all, the owners are entitled to a refund in respect of the monies paid for the unperformed work. Where works had not been completed at the time of abandonment of the contract, the builder was relieved by the abandonment of the obligation to complete the works, and the owner has no claim in relation to the uncompleted works. Finally, any crystallised issue in relation to Prime Cost items must be dealt with in accordance with the provisions of the contract.

Owners' claim for damages in respect of rectification of defectively performed works

65 As noted, the owners are entitled to damages in respect of the cost of rectifying defects in the works, if the builder has breached any of the warranties given under clause 10.1 of the contract and implied into the contract by s8 of the *Domestic Building Contracts Act* 1995. The relevant warranties are as follows:

(a) the builder warrants that the work will be carried out in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract;
(b) the builder warrants that all materials to be supplied by the builder for use in the work will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new;
(c) the builder warrants that the work will be carried out in accordance with, and will comply with, all laws and legal requirements including,

without limiting the generality of this warranty, the ***Building Act* 1993** and the regulations made under that Act;

(d) the builder warrants that the work will be carried out with reasonable care and skill and will be completed by the date (or within the period) specified by the contract;

(e) the builder warrants that if the work consists of the erection or construction of a home, or is work intended to renovate, alter, extend, improve or repair a home to a stage suitable for occupation, the home will be suitable for occupation at the time the work is completed;

(f) if the contract states the particular purpose for which the work is required, or the result which the building owner wishes the work to achieve, so as to show that the building owner relies on the builder's skill and judgment, the builder warrants that the work and any material used in carrying out the work will be reasonably fit for that purpose or will be of such a nature and quality that they might reasonably be expected to achieve that result.

66 As I have found the date of abandonment was 14 July 2014, it follows that damages in respect of any defective contract works completed prior to that date are recoverable.

Quantification of the claim for damages in respect of rectification of works

67 In making the following allowances, I rely on the following passage from the recent decision of Senior Member Walker in *Imerva Corporation Pty Ltd v Kuna* (Building and Property) [2015] VCAT 2058:

> The breach of contract in failing to follow the specifications having been established, the onus of proving that rectification is unreasonable is on the Builder (see *Clarendon Homes v Zalega* [2010] VCAT 1202 and the cases there cited).

68 The following items of allegedly defective work are referred to in Mr Forrest's report.

Expansion joints (Mr Forrest's item 12)

69 Mr Forrest provided a costing of $480 in respect of 'incomplete' contract work described as 'caulk all external expansion joints.' Reference to the photographs following this costing, however, reveals that the expansion joints have been partially filled with render. This would make the expansion joints non-functional, and accordingly defective.

70 On the basis of the photographs, I consider the builder is liable. The costing was accepted by Mr Milanovic at the hearing. I accordingly allow **$480** to the owners in respect of this item.

Incomplete render works (Mr Forrest's item 21)

71 In Mr Forrest's report, a costing of $1,800 is given in connection with the rectification of inadequate render to a new bedroom wall. The complaint

made is that the existing render has inadequate coverage over the base render and it is asserted that a full application is required to the whole wall.

72 The photograph enclosed with the report indicates one section of the wall that has not been rendered at all.

73 At the hearing, Mr Milanovic accepted the proposed costing of $1,800. In my view, such a costing is consistent with rendering the entire wall, not a section of the wall. Accordingly, I find against the builder in terms of both liability and quantification, and award the owners **$1,800** in respect of this item.

Roof battens

74 The first complaint made about the roof battens was that they had been laid flat in a manner allegedly contrary to the Australian Standard for residential timber framed construction AS 1684. There was a related complaint that the roof battens had been laid on the wrong edge. It was contended the owners would have to rectify these defects.

75 Mr Forrest did not provide or even refer to any part of AS 1684 for the Tribunal's review in his report. Nor did the owners' counsel at the hearing. More importantly, Mr Forrest did not set out any costing of the proposed rectification works in his report. For the latter reason, I find against the owners in respect of these alleged defects, and make **no allowance** in respect of them.

Timber beam in garage not held down (Mr Forrest's item 28)

76 The allegation here is that the timber beam in the garage has been installed without a holding down system in breach of AS 1684.

77 The quantification of the required rectification by Mr Forrest is $320. This was not disputed by Mr Milanovic at the hearing. I find for the owners in respect of this item, and allow **$320** in respect of it.

Incomplete roof framing (Mr Forrest's item 30)

78 In Mr Forrest's report, it is asserted that the mechanical fixings attached to the battens and rafters are non-compliant with building practice, and require to be completed at a cost of $270.

79 At the hearing, Mr Milanovic accepted this costing. I award **$270** to the owners in respect of this item.

Kitchen joinery (Mr Forrest's report, page 23 of 56)

80 The owners' complaint is that the wine rack in the kitchen was laminated rather than being constructed using 2pak paint. A cost of $1,750 was proposed, based on an oral quotation from Gram Services for the removal and replacement of this joinery.

81 Mr Milanovic disputed liability on the basis that during the course of the job a variation from 2pak paint to laminate had been agreed. He tendered two letters from the joiner Dean Burton of CabNetWorks (Australia) Pty Ltd to support his view. The first letter, addressed 'To whom it may concern' was dated 5 June 2014.[17] This letter indicated that numerous changes had been made to the original architectural design both in the kitchen and the ensuite vanity. These had been noted and incorporated into the cabinetmaker's own detailed plans which the owners sighted and the builder approved. The second letter, also addressed 'To whom it may concern' was not dated. It indicated that the wine rack had been changed. It was noted on a plan that the cabinetmaker could not make a wine rack using 2pak paint 'due to scratching'. The cabinetmaker said:

> this was accepted by the strong's and recorded on the working plan (sic)

82 At the hearing Mr Milanovic conceded that the contract specification had not been formally amended. It follows that the contract variation procedure set out in the contract, alternatively called up in the *Domestic Building Contracts Act* 1995, was not followed.

83 However, this is not a situation in which the builder is seeking more money for a variation. On the contrary, Mr Milanovic's evidence was that the cabinetmaker agreed to make a number of changes, including the change from 2pak paint to laminate, but also including the provision of more drawers. The variations were cost neutral.

84 I accept Mr Milanovic's evidence that the owners agreed to make the change from 2pak paint to laminate direct with the cabinetmaker. I do so partly because this explains why laminate was ultimately used, and partly because of the support provided by the letters from the cabinetmaker himself. I accordingly find against the owners in respect of this issue.

Cabinetry in bathroom (Mr Forrest's report, page 47)

85 There was a related issue relating to the cabinetry in the bathroom, which according to Mr Forrest's report should have been constructed using 2pak rather than laminate. Damages of $600 are claimed.

86 On the basis that the cabinetmaker's letter dated 5 June 2014, to which reference has already been made,[18] specifically refers to changes in the ensuite vanity being made with the owners' consent before being signed off by the builder, I find against the owners in respect of this item also.

Defective Window flashings (Mr Forrest's item 34)

87 Mr Forrest's evidence was that the external glass window units required to be waterproofed by caulking and sealing. This complaint was said to have been demonstrated by water damage on the internal sill. A price of $240

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17 Exhibit R8.
18 Exhibit R8, referred to in paragraph 81.

was given based on the labour of one man, and materials. I find for the owners on liability and accept the costing. I award **$240** for this item.

Bricklaying (Mr Forrest's item 35)

88 Mr Forrest's evidence was that some of the bricklaying was unsatisfactory. He said that approximately 2 m² of a brick wall had to be demolished and rebuilt. Sixteen hours of labour were asserted to be necessary at a cost of $50 per hour, yielding a price for labour of $800. Materials were assessed at $100, and so the total claimed for this item was $900.

89 This costing was accepted by Mr Milanovic at the hearing, but liability was disputed on the basis that he was told by Mr Strong that the house was to be rendered. At the hearing Mr Strong confirmed that the owners might render the house 'in due course'. In my view, this concession indicates that Mr Milanovic was being truthful when he said that he had been told by Mr Strong that the house was to be rendered. Furthermore, in a letter on Eco Smart letterhead to the owners dated 16 October 2015, Mr Milanovic quoted $9,879 to render the existing house. This is documentary evidence that the owners were considering rendering the house.

90 In these circumstances, it is understandable that the brickwork was carried out in the way that it was. As I accept that Mr Strong said the house might be rendered, I find it would be unfair to require the builder to make good the brickwork to the standard which might have been expected had it not been the owners' intention to render the house. I find against the owners in respect of this item.

Roof/wall flashings (Mr Forrest's items 40)

91 The complaints, in general terms, were that installation of the roof/wall flashing had not been carried out in accordance with BCA Requirements (Part 3.5.1.3). The issues were illustrated by photographs contained in Mr Forrest's report as follows:

(a) page 40 (wall flashings to brickwork not in accordance with the BCA);
(b) page 41 (flashing/capping buckling, and loosely fitted, not good practice);
(c) page 42 (unconventional wall flashings and incomplete flashing details);
(d) page 43 (roof flashing fixings not in accordance with acceptable practice; blind rivets to be used);
(e) page 44 (no corrugated flashing);
(f) page 45 (loose parapet wall capping lifting up approximately 30 mm. Insufficient fixings);
(g) page 46 (flashing sheet edge not turned down over roof sheet; extent of sheet flashing not acceptable practice);
(h) page 47 (lack of over flashing, not in accordance with BCA); no rain head; flashing not shaped to corrugated profile);

(i) page 48 (brick flashing silicon fixed to wall; not to BCA minimum fixing requirements);
(j) page 49 (loosely fitted roof capping; not fixed securely);
(k) page 51 (bad roof plumbing practices-silicon roughly cut);
(l) page 52 (no over flashing details);
(m) page 54 (incomplete roof flashings over walk-in-robe).

Wall flashings (Mr Forrest's item 50)

92 The complaint here was illustrated by the photo at page 50 of Mr Forrest's report, which allegedly showed flashing not in accordance with regulations. The flashing upstand was not inserted behind the wall panel in accordance with the proprietary specifications.

93 At the hearing, this complaint was subsumed within the claim for $3,500 made in respect of Item 42 above, and accordingly no separate allowance will be made in respect of it.

Wall flashings (Mr Forrest's item 53)

94 This complaint related to the fact that the roof and parapet flashings are proud of the wall. At the hearing, it was confirmed that this claim was subsumed within the claim for $3,500 made in respect of Item 42 above. Accordingly, no separate allowance will be made in respect of it.

Finding regarding wall flashing issues (Mr Forrest's items 40, 50 and 53)

95 At the hearing, Mr Milanovic, having established that the plumber Begbie had certified the roof, asked how it could be signed off if it still contained defects. Mr Strong's response was that some flashing had been replaced in order to make the house watertight. I accept this explanation, and consider that the sign off by the plumber does not mean there are no defects in the roof flashing.

96 Turning to the cost of rectification, Mr Forrest's report indicated that a verbal quote had been supplied by Begbie Plumbing, who had agreed to complete the works after the settlement of the dispute, in case a site visit occurred. $3,500 was claimed. Mr Milanovic accepted this costing at the hearing.

97 On the basis that the extensive defects in the/roof flashings were illustrated by the photos set out in Mr Forrest's report, I find against the builder on the issue of liability. As quantification has been conceded by Mr Milanovic, I allow **$3,500** for items 42, 50 and 53.

Roof tiles (Mr Forrest's item 55)

98 The roof tiling is said to be defective, having, to quote Mr Forrest, 'been laid by an unskilled person'. The tiles have been patched. Mr Forrest says that it will be necessary to re-lay the whole of the tile roof within 3 metres of the new extension works. $2,400 is claimed, based on a quotation from Carter's Roofing.

99 At the hearing, Mr Milanovic disputed this quantification, and said that $500 was a more appropriate costing. This contest regarding quantification remained unresolved.

100 Mr Milanovic also disputed liability at the hearing. He asked Mr Forrest how he knew that he (Mr Milanovic) had performed work on the roof. Mr Forrest conceded that he did not know. Mr Milanovic then contended that it was not part of his scope of work to tile the roof, but merely to reinstate the tiles.

101 Reference to the contract specification indicates that Mr Milanovic is correct. The scope of work regarding the roof tiles called up at page 11 of the specification as:

> Make good existing tile roof where new works disturb existing and require rebuilding.

102 With respect to the roof tiles themselves, the obligation was 'To match existing'.

103 It was established by reference to an invoice from Carter Roofing dated 7 February 2012,[19] that the owners had had 15 roof tiles replaced and the roof cleaned, repointed and sealed by Carter Roofing long before Mr Milanovic came on the site.

104 Mr Milanovic contended that the tiles had been broken by Mr Strong. In response to this, Mr Strong acknowledged that he did get on the roof to send photos to Mr Milanovic.

105 In the circumstances, I do not think the owners have established, on the balance of probabilities, that Mr Milanovic is responsible for the defects in the roof tiling. I accordingly find against the owners in respect of this item and make no monetary allowance in respect of it.

Sump (Mr Forrest's item 62)

106 Mr Forrest's evidence was that the sump had been installed incorrectly, with the outlet level on the high side. Removal and replacement in the correct position was required, together with reconnection of the boundary stormwater pick-up points. A costing of $2,400, comprising $1,200 derived from an invoice from Begbie Plumbing, together with a further $1,200 based on a price supplied by Gram Services, was accepted by Mr Milanovic at the hearing.

107 I accept Mr Forrest's evidence regarding the defective installation of the sump. As quantification of the rectification cost has been agreed, I find for the owners in respect of this claim, and award **$2,400** in respect of the item.

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19 Included in Mr Forrest's report.

External drainage (Mr Forrest's item 63)

108 The complaint here was that the surface drainage stormwater pipe had not been connected to a compatibly sized pipe. In Mr Forrest's view, replacement was required. A costing of $320, based on an invoice from Begbie Plumbing, was proposed. This assessment was accepted by Mr Milanovic at the hearing.

109 I find for the owners in connection with this item on the basis of Mr Forrest's evidence, and award **$320** for it.

Construction of feathered floor step in hallway (Mr Forrest's item 65)

110 The allegation here is that the new passage floor is approximately 30mm higher than the existing floor. The specification called for the extension floor to be built flush with the existing floor. Mr Forrest, in his report, said that a feathered floor step would be required to compensate for the mis-alignment of floor levels. He explained at the hearing that a feathered step is a piece of timber ground down from its full height of 30mm down to 5mm, with a bull nose. He said that $1,200 was the cost of creating such a step. He also suggested that the change of height in the passageway constituted a major visual defect, with possible financial ramifications for the owners, as well as a safety issue.

111 At the hearing, Mr Milanovic argued that the specification called for the hallway to be carpeted, and that it was Mr Strong who had made an election to polish the floorboards.

112 There was no expert evidence regarding the possible effect of the visual defect on the sale value of the house, and accordingly I approach the matter as a safety issue. In this connection I note that Mr Strong gave evidence that the step was a hazard and that his two year old son had tripped on it.

113 There was a debate at the hearing regarding the cost of creation of a feathered step. Against Mr Forrest's estimate of $1,200, Mr Milanovic gave evidence that the appropriate costing was $500.

114 I adopt the figure conceded by Mr Milanovic, on the basis that I think the sum of $1,200 is excessive for the work proposed. I find that the owners are entitled to an award of **$500** for the creation of a feathered step.

Poor painting in bathroom (Mr Forrest's report, page 45 of 56)

115 The complaint here, according to Mr Forrest, was that the painting in the bathroom was poor, an undercoat was visible, and there was paint splatter on the tiles. By way of rectification of the painting, two top coats were required.

116 I accept Mr Forrest's evidence, and consider that the poor painting constitutes defective, as distinct from incomplete, work. Damages are accordingly recoverable by the owners. A rectification figure of $594 was put forward by Mr Forrest, based on a quotation received from Gram

Services.[20] Mr Milanovic disputed this figure at the hearing, but conceded $250 was appropriate. I adopt Mr Milanovic's figure, and award **$250** to the owners in respect of this item.

Window in spare bedroom wrongly hung (Mr Forrest's report page 46)

117 Mr Forrest, in his report, indicated that the window had been fitted as an awning, rather than being double hung. The cost of rectification claimed, based on a quotation from Gram Services,[21] was $1,235.

118 Mr Milanovic accepted at the hearing that this costing was reasonable, if the window 'had to come out'. Clearly, he was questioning whether it was necessary to replace the window. In circumstances where a window has been installed, and where Mr Forrest's report makes a reference to page B 17 of the specification, but does not say why the specification has been breached, I am not satisfied that there has been a breach of the specification. Furthermore, there was no evidence nor any legal submission from the owners as to why the window had to be replaced. In the circumstances, I find against the owners in respect of this item, and make no allowance for it.

Power and gas in backyard (Mr Forrest's report, page 48 of 56)

119 The owners' allegation here is that the builder removed the electricity and gas services which had previously been available in the backyard, rather than having been capped.

120 The issue of the builder's liability comes down to a question of characterisation. If the reinstatement of the services is regarded as a matter of rectifying defective workmanship because the services should have been capped during the course of works rather than having been removed, then the cost of reinstatement of the services is a rectification cost. On the other hand, if the reinstatement is characterised as incomplete work, then recovery will not be allowed.

121 It was not demonstrated by or on behalf of the owners at the hearing that reinstatement of the services was part of the contract. This may have been because it was never intended that the services would be removed. It was not contended by Mr Milanovic that if he removed existing services during the course of the works he would not be obliged to reinstate them if they were ultimately required by the owners. I accept Mr Forrest's contention that the services should have been capped rather than removed, and I accordingly treat the item as a defect. On this basis I find the builder is liable to the owners in respect of the cost of reinstatement of the services.

122 Gram Services had quoted to reinstate these services at a cost of $1,500. This quantification was disputed by Mr Milanovic at the hearing. As the

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[20] Gram Services quotation dated 16 October 2014, appended to Mr Forrest report, at item 11.
[21] Gram Services quotation dated 16 October 2014, appended to Mr Forrest's report, at item 1.

reinstatement of the services will require work from both an electrician and a plumber, plus materials, I allow **$1,500** for this item.

Shower rose incorrectly plumbed (Mr Forrest's report, page 49 of 56)

123 The complaint here was that a new shower rose had been purchased by the plumber Begbie for $280, and invoiced to the owners. It is not clear why this item was not dealt with as part of the numerous complaints relating to the failure of the builder to complete the ensuite, which are discussed elsewhere.

124 The Fixtures and Equipment Schedule (FF&E)[22] indicates that it was the owners' responsibility to supply the fittings listed, which included two shower sets. On this basis, the claim fails.

Summary of allowed damages for defective works

125 I have made findings regarding recovery of damages by the owners for defective works in the following paragraphs:

Paragraph	Item	Amount
70	Expansion joints	$480
73	Incomplete render	$1,800
75	Roof battens	$Nil
77	Timber beam in garage	$320
79	Incomplete roof framing	$270
84	Kitchen joinery	$Nil
86	Cabinetry in bathroom	$Nil
87	Window flashings	$240
90	Bricklaying	$Nil
97	Roof/wall flashings	$3,500
105	Roof tiles	$Nil
107	Sump	$2,400
109	External drainage	$320
114	Feathered step	$500
116	Painting in bathroom	$250
118	Window in spare bedroom	$Nil
122	Power and gas in back yard	$1,500
124	Shower rose	$Nil

[22] Contained in the contract specification, page16.

126 The total award to the owners in respect of defective works is $11,580.

127 Issues arise as to whether margin should be allowed on this sum, and if so, at what rate. At the hearing, when damages were being discussed in respect of works that had been paid for but had not been completed by the builder, Mr Forrest gave evidence that margin should be added to the cost of completing the works. He said that 25% was a reasonable rate for overhead and profit, and that this rate is often adopted by the Tribunal. Mr Milanovic was not specific about the rate that he thought was reasonable. I find that margin ought to be added to the cost of completing works or rectifying defective works, as any new builder engaged by the owners to complete or rectify works can be expected to charge a margin. I also find 25% is a reasonable rate for margin, and adopt it for the purposes of assessment of damages.

128 Margin on $11,580 calculated at 25% is $2,895. The total of these figures is $14,475. This is the figure to which GST of 10% is to be added. With GST, the grand total is **$15,922.50**.

The claim for damages in respect of completion of works not performed but for which payment had been made

129 The owners seek to recover damages for money paid for works which were invoiced by the builder in a progress claim, and were then paid for by the owners, but which had not been performed as at the date of abandonment of the contract. As found at paragraph 45, this claim is a sound one.

130 The determination of the builder's liability for this category of claim is complex, because there are items where liability is clear and quantification has been agreed, but there is an item where quantification has been agreed but liability is disputed, and there are further items where liability is clear but quantification is disputed.

131 During the hearing, the parties conferred and developed a list of incomplete and defective works in respect of which quantum, but not liability, had been agreed. From that list the following items of incomplete work have been identified, which have three characteristics. The first is that each item had been invoiced by the builder to the owners in a progress claim, and had been paid for by the owners. The second is that each item had <u>not</u> been performed, and the owners accordingly have a basis to claim damages in respect of the amount paid for the unperformed work. The third characteristic is that, at the hearing, the builder raised no tenable argument about his liability in respect of these items. In respect of each of these items I regard liability as being established. And because quantification has been agreed in respect of the items, I find that the owners are entitled to an award in respect of each of the items in the amount respectively shown against it, plus margin and plus GST.

Table of uncompleted items in respect of which liability has been established and where costings have been agreed

Item No.	Page reference in Forrest Report	Description	Agreed Valuation
9	8	Kitchen Bulkhead - works incomplete (caulking ceiling line) (Stage 9)	$90
10 13	9 12	Timber flooring gaps not filled/caulked (Stage 9) No rain heads (Stage 7)	$150 $2,500
18	14	Exhaust kit not installed (Stage 7)	$200 (reduced from $350)
19	15	Plumbing tap ware not installed (Stage 9)	$120
20	16	Timber fence panels laid on neighbouring property (Stage 10)	$440
26	18	Painting architraves (Stage 10)	$230
-	19	No sub-floor insulation installed as per Energy Requirements and Specification (Stage 3 or 8)	$3,620
134	38	Complete plumbing of fridge	$550
166	56	Fan switches paid for but not provided (Variation No 12 dated 11 February 2014, paid 12 February 2014)	$330

132 The total credit to the owners in respect of these items is $8,230. Allowing for margin of $2,057.50 in the subtotal is $10,287.50. Adding GST to this, the grand total is **$11,316.25**.

Item paid for, where costing was agreed, but liability was challenged

133 Mr Forrest, in his report, noted as an item of incomplete work the need to fit off bathroom fittings (towel rail et cetera) which had been purchased by the owners but were to be fitted by the builder.[23] The costing given was $200. Mr Milanovic challenged his liability on the basis that this had already been included in the cost to complete the ensuite. Mr Strong's response was that this item related to electrician's work, not plumber's work.

134 I accept this distinction, and find the owners are entitled to an allowance of **$200** in respect of this item. Margin of 25% or $50 is to be added. . To the total of $250, GST is also to be added, making the total award in respect of this item **$275.**

Works paid for but not completed, in respect of which loss has not been agreed

135 These items are dealt with below in turn.

[23] Mr Forrest's report, page 34.

Front garage door

136 The project involved the renovation of, and an extension to, an existing house. There was an existing brick garage. The contract specification contained in Contract Annexure B ('Specification') at page 11/15 indicated that the existing tilt door was replaced with a Centurion roller door or approved equal. This door is shown on contract drawing ('Drawing') A.08.

137 The new door was paid for as part of the **stage 6** payment which was for $12,000.

138 The owners' position is that they are entitled to damages equivalent to the cost of supplying and installing the door.

139 The owners contend that the cost of supplying and installing the new door is demonstrated by a quotation from RJ Garage doors dated 31 July 2014, which was in the sum of $2,450, inclusive of GST, but covered two doors. Accordingly, the cost of a single door is asserted to be $1,250.

140 However, replacing the door is not the end of the story because the contract called for the enlargement of the existing door opening so that it its height was to be raised by the removal of 14 courses of brick, and their partial replacement. I accept the unchallenged evidence of Mr Forrest on this point, and accordingly accept that it would be necessary to remove all the brick courses to the top of the wall, insert a lintel, and then rebuild the brickwork.

141 Mr Milanovic's defence to this particular claim was that he and the owners agreed during the course of the works that the brickwork above the door opening would not be removed because the mezzanine floor in the garage was going to be raised.

142 However, when pressed, Mr Milanovic conceded that no negative variation for deletion of this aspect of the works had been negotiated, and yet the full price of stage 6 had been paid. Accordingly, the owners had paid for something they had not received. I find accordingly that it is appropriate that the owners should be compensated by an award of damages in respect of the cost of enlarging the opening for the garage door and installing a new roller door as specified.

143 Mr Forrest's costing of the work of enlarging the opening for the garage door was as follows:

Enlarge opening - two men x one day x $60	$960
Prop internal roof works-temporarily	$300
Deliver and install new steel lintel	$1,280
Supply and install new brickwork over lintel	$800
Remove rubbish	$300
Paint lintel	$150
TOTAL	$3,790

144 I accept the scope of work described by Mr Forrest. However, I note that the owners were able to procure the services of a handyman to carry out

rectification and completion works at a rate of $55 per hour. I propose to adopt that hourly rate, rather than $60.

145 It is not possible to scientifically separate the cost of labour from the cost of materials in some of the items identified by Mr Forrest. Doing the best I can, I assess the cost of the ancillary works identified by Mr Forrest at $3,500. This represents a reduction of Mr Forrest's figure of $290.

146 Margin ought to be added. 25% of $3,500 is $875. The figure for the ancillary works to which GST is to be applied is accordingly $4,375. With GST, the total is $4,812.50.

147 I am prepared to accept the quotation from RJ Garage Doors dated 31 July 2014 for $1,250 inclusive of GST, which was put into evidence, as the cost of a replacement roller door. If margin of 25% ($312.50) is added to this sum, the total is $1,562.50.

148 The upshot is that the total assessment for the enlargement of the opening for the garage door and the replacement of the roller door, with margin and GST added, is $4,812.50 plus $1,562.50, a total of **$6,375**.

Missing manhole door

149 The owners claim that the builder omitted to install a manhole door to allow access under the house as specified. The builder also failed to connect the adjacent downpipe. These works had been paid for when the payment for **stage 7** was made. These omissions were conceded by Mr Milanovic, but the costings contended for were not.

150 Mr Forrest assessed the cost of the work to complete the timber frame opening and then to fit it with a bolt latch at $440, calculated as follows:

Half a day by one man by $60	$240
Materials	$200

151 The owners sought to justify this assessment by reference to an invoice from Gram Services dated 6 January 2015 which related to a number of items. These included removal of the cubby house, the placement of crushed rock to backfill a retaining wall, and the creation and fitting of the manhole door. The costs associated with the manhole door appear to be limited to $110 for labour, plus the hinges and the pad bolt cost of $9.50. Even if $100 is allowed for the cost of timber, the total cost of the manhole door would appear to be limited to $220. If margin of 25% is added, the total becomes $275. When GST of 10% is added, the grand total is $302.50. **$300** is allowed for the missing manhole door.

152 No specific costing was given by Mr Forrest for the attachment of the downpipe, and no separate allowance for this item will be made.

Relocating the cubby house

153 Mr Milanovic agreed that the builder's scope of work to be paid for as part of the **stage 11** progress payment included relocating the cubby house from its existing position to a new position.

154 Reference was made to the invoice from Gram Services dated 6 January 2015 by way of verification of this claim.

155 On the basis that this was a claim for work which was not performed by the builder, but also was not invoiced by the builder prior to the abandonment of the contract, I consider that this claim is misconceived, on the basis of the analysis set out above at paragraph 54. Following the abandonment of the contract, the builder was relieved of any obligation to complete work which had not been performed. At the same time, the builder had no entitlement to render a progress claim for this work, and did not do so. The owners arranged to have the cubby house relocated by Gram Services after the abandonment of the contract. The owners have to bear the cost of this.

Steps

156 The owners contended that the builder is obliged to pay for the construction of steps leading from the laundry. The steps are said to be an item of uncompleted contract works covered by the Stage 7 payment. (Stage 7 related to rough in). $780 was claimed.[24]

157 Mr Milanovic disputed liability on the basis that the steps were not shown on the plans.

158 Mr Forrest's response was that although the steps were not shown on the contract plans, they were required by the regulations and were accordingly impliedly required to be installed by the builder.

159 Mr Milanovic acknowledged that he was aware of the procedure set out in the *Domestic Building Contracts Act* 1995, which was broadly replicated in the contract itself, under which the builder could obtain a variation of the contract sum in certain circumstances. However, he said that he knew that Mr Strong would not sign any paperwork for a variation.

160 In my view, Mr Milanovic was entitled to price the project on the basis of the contract plans and specification, as they had been prepared by the owners' architect. Had the plans and specification shown a set of steps leading from the laundry, their price would have been included in an increased contract sum, and the owners would in this way have had to pay for them. Had the builder installed the steps without a signed variation from the owners, there would have been, in my view, exceptional circumstances, and it would not have been unfair to the owners for the builder to have recovered the cost of the steps. There would, accordingly, have been scope for the application of s37 of the *Domestic Building Contracts Act* 1995. On this basis, I dismiss the owners' claim that the builder must credit them an

[24] Mr Forrest's assessment, at page 4 of his report filed on 31 August 2015.

allowance for the cost of the steps. It is accordingly not necessary for me to assess what that cost ought to have been.

Eaves

161 The owners' contention about the eaves is that they had not been fixed properly, and that the required quad was missing. The fixing of the eaves and quad had to be attended to by Gram Services. Mr Forrest costed the job at $150, comprising two hours labour at $60 per hour and $30 materials. The owners claim damages of $150 on the basis that the builder had been paid for this work when the owners paid progress claim 7.

162 Mr Milanovic disputed Mr Forest's costing, saying that the job would take 15 minutes and materials would cost $5.

163 I assess the value of this work at $85, comprising one hour's labour at $55 per hour, plus materials of $30. Adding margin of $21.25, and GST to the sub-total of $106.25, I assess this item at **$116.88.**

Removal of the brick nibs in the garage

164 Mr Strong said that that the need for this work arose because the garage was to be extended, as shown in the drawings A 02 and A 05.

165 Mr Milanovic said that during the course of the works his labourers had trouble with the nibs because of the quality of the bricks and Mr Strong agreed that they did not have to cut the nibs all the way back. Mr Milanovic contended, accordingly, that the specification had been varied by agreement.

166 Mr Strong contested this, and said that he did not want the builder to stop, that he wanted the work done, and that ultimately he had to do the work himself.

167 The owners' claim for damages arises because this work was invoiced in the stage 6 payment claim which related to the garage extension, which was paid by the owners.

168 I note that the variation of the specification which Mr Milanovic said had occurred was, according to the evidence presented, not documented in any way. Accordingly, I accept Mr Strong's evidence that the contractual requirement that the brick nibs should be cut back completely was not altered.

169 Perhaps surprisingly, Mr Strong did not keep a record of the time he spent cutting back the brick nibs.

170 Mr Forrest estimates the cost of removing the brick nib wall to allow for a full width opening into the new garage extension at $600, comprising one man working for eight hours at $60 per hour, plus $120 materials.

171 Mr Milanovic had no questions of Mr Strong about this item, and in these circumstances I am prepared to accept Mr Forrest's estimate of the time it

would have taken to complete the work. Using a cost per hour for labour of $55, the cost of labour is $440 for an eight hour day. Allowing for materials, I will allow this item at **$560**. The owners' loss included margin, and so with margin, the damages are assessed at $700. With GST, the total allowance is **$770.**

Unfinished ensuite (Mr Forrest's item 8)

172 Mr Strong said that when the builder left the site, the ensuite vanity was incomplete, and in particular its top was missing. He gave evidence he had to engage the plumber, Begbie, to complete the works.

173 Mr Forrest gave evidence that the hole cut for the mixer was oversized, and was accordingly defective. This had to be repaired.

174 Mr Strong drew the Tribunal's attention to the Harvey Norman tax invoice dated 21 November 2013.[25] He explained he had purchased items using Mr Milanovic's account. He noted the invoice evidenced the purchase of a Vivid curved shower arm for $148.01. He said the shower had been roughed in the wrong way. Also, the expensive RAK back to wall toilet suite he had purchased could not be fitted and it was still in the garage. The cost of this toilet suite was $378.24, as evidenced by the Harvey Norman invoice. The owners claimed the cost of the wasted WC and shower, as they had paid for them directly.

175 Mr Strong alleged that he was present when the tiler worked in the ensuite, and the tiling was not completed near the toilet. He also disputed that there were two coats of paint.

176 Mr Forrest assessed the value of this parcel of incomplete works at $7,248.40, comprising:

Installation of shower screen and completion of tile works	$200
Installation of shower and shower screen, supply shower and toilet (plumbing rough-in incorrect for original items), supply shower mixer (original taken by builder & not returned), rectification of defective tiling (hole made too large), rectification for painting, install vanity, tap and basin installation	$715
Supply shower screen	$833.40
Plumbing (Begbie)	$5,500

177 Mr Milanovic disputed the builder's liability for the completion of the ensuite on a number of grounds. He said:

(a) The cost of the plumbing work was 'astronomical'.
(b) If Begbie did something wrong, he should not be paid.

[25] Document No.35 in the Tribunal Book.

(c) The owners had changed the toilet and the cistern had to be changed, and the shower was changed. Neither he nor the plumber were liable for these items.
(d) The room had been tiled and had been painted, and the works complained about were not yet paid for.
(e) The painting was satisfactory as three coats of paint had been applied, and Mr Strong had been able to point to only one defective spot, which is where a patch of waterproofing showed through at the end of the tiling.
(f) As to completion of the work, all that needed to be done was the installation of the shower screen, installation of the rail, and the hooking up of the sink in the toilet.
(g) The builder's obligation to pay for the items fitted as the Fixtures and Equipment Schedule (FF&E) contained in the contract specification at page 16 indicated that it was the owners' responsibility to supply the fittings indicated. These included a wall mounted shower set and a toilet and toilet cistern.

178 In relation to this last point, Mr Strong disputed it was the owner's obligation to provide these items, as they were referred to in the architectural drawings.

179 In response to Mr Milanovic's points about the toilet and the shower, Mr Forrest clarified that he had not allowed in his costings for the items which the owners were to supply, but he had allowed for rectifying the rough-in which was performed for the wrong equipment. He had also allowed for the rough-in of the shower screen as the specification, at page 14, required the builder to supply and install glass apartments for showers.

Findings about the Mr Forrest's costing regarding the ensuite

180 Mr Forrest allowed for the supply and the installation of the shower screen. I find that this is appropriate having regard to the specification referred to. I award $833.40 for this item plus $200 for installation and completing the tile work, as claimed, a total of **$1,033.40**.

181 In respect of the several items costed by Mr Forrest at $715,[26] I comment as follows:

(a) I am not prepared to accept the owners' claim that the builder is responsible for the wasted purchase of the RAK back to wall toilet suite at a cost of $378.24. The reason is that I accept the builder's contention that by operation of the Fixtures and Equipment Schedule (FF&E) contained in the contract specification, it was the owners' responsibility to supply the fittings indicated, which included a wall mounted shower set and a toilet and toilet cistern. In my view, where the owners undertake responsibility for purchasing bathroom fittings which are to be installed by their builder, they have a responsibility to

[26] See paragraph 176 above.

ensure that those fittings are available to the builder's plumber in a timely manner so that the rough-in can be performed once, correctly. I conclude from the evidence that this did not occur in the present case. The consequence is that the owners purchased this expensive toilet from Harvey Norman, but could not have it installed. Instead, the plumber, Begbie, installed a toilet which fitted the rough-in which had been created. The owners will have to bear the cost of the wasted RAK toilet suite, as well as the new toilet the plumber acquired.

(b) For a similar reason, I find against the owners on their claim that the builder is responsible for the wasted shower arm, which cost them $148.01. The owners will have to bear this loss also.

(c) Mr Forrest allowed for the supply and installation of a new toilet. He clarified that he thought the builder should pay for the second installation of the toilet, not the toilet itself. I note Mr Forrest had allowed this item as the plumbing rough-in was incorrect for the original items). I find against the owners in respect of this issue. This follows from my comment above that where the owners have undertaken to supply fittings, it is the owners' obligation to ensure fittings are available to the builder and trades in a timely manner. If the toilet had been available when the rough-in was done initially, the rough-in would not have had to be repeated.

(d) Mr Forrest allowed for the supply and installation of a shower. I find that the allowance for the supply of a shower was not appropriate having regard to the obligation of the owners to provide a shower for the ensuite set out at page 16 of the specification. However, it is appropriate for the builder to pay for the installation of the shower. In the absence of any evidence from the parties as to this cost I assess it at $100 and allow **$100** in respect of this item.

(e) Mr Forrest allowed for the replacement of the shower mixer on the basis that the original was taken by the builder and not returned. The builder did not dispute this, and I find that Mr Forrest's allowance for a new mixer is accordingly appropriate. I allow **$100** for this item.

(f) Mr Forrest allowed for the rectification of the overlarge hole in the tiling made for the shower mixer. This defect was not disputed, and I find that this allowance is appropriate. I allow **$50** for this item.

(g) The owners gave further evidence about the ensuite at a later point in the hearing. This further evidence was to the effect that an invoice from the plumber, Begbie, rendered on 3 April 2014, contained an allowance for changing the shower outlet in the ensuite. It was agreed at the hearing between Mr Milanovic and Mr Strong that initially the plumber had inserted a 1200mm shower grate, but the outlet had to be altered to 900mm after Mr Strong had purchased a 900mm grate. On the basis of the principle articulated above, that where the owners have undertaken to supply fittings, it is the owners' obligation to ensure fittings are available to the builder and the trades in a timely manner, I find against the owners in respect of this particular item.

(h) Mr Forrest allowed for a further coat of paint on the basis that the undercoat was showing through. As Mr Milanovic conceded that some waterproofing showed through, I find this allowance is appropriate. I allow **$100** for this item.

(i) In summary, **I allow $350 out of the total $715 claimed, a reduction of $365 from Mr Forrest's figure.**

182 With respect to the plumbing, I note the photo at page 8 of Mr Forrest's report provides evidence to demonstrate the owners' contention that the bench-top had not been fitted and the fittings had not been plumbed off. I find, accordingly, that there was a basis for the owners to recover a reasonable sum for the plumber's work and connecting the basins, and in the absence of any evidence from Mr Milanovic that Mr Forrest's allowance is inappropriate, I accept Mr Forrest's allowance of $5,500.

183 In summary, I am prepared to accept Mr Forrest's costings of the work required to complete the ensuite, including minor rectification work, at $7,248.40 less $365, or $6,883.40. Margin of 25% on this sum is $1,720.85, and brings the total to $8,604.25. GST of 10% of $860.43 will be added, yielding a total of **$9,464.68.**

Fit bathroom fittings - towel rail

184 Liability and quantification of this item were disputed by Mr Milanovic at the hearing. It was contended that there was overlap of this item with Item 8, which related to the incomplete works in the ensuite. Mr Strong contended that the electric towel rail had been fitted by the electrician, thereby raising the inference that there was no overlap.

185 On the basis that Mr Forrest's item 8 related to installation of the shower screen and completion of tile works and the painting, I find for the owners in respect of this item and allow $200 in respect of it. The addition of margin of $50, and GST of 10% on $250, brings a total of up to **$275.**

Extend existing ducted heating to new area, and make good

186 Liability for this work was not disputed, but the quantification was. Mr Milanovic, at the hearing, conceded a figure of $640.65 as the value of this item, rather than the $1,640.55 claimed.

187 I find for the owners in respect to this item but allow only the $640.55 conceded by the builder. The addition of margin $160.16 and GST of 10% on $800.71, brings the total for this item to **$880.78**.

Make good skylight

188 Mr Forrest, in his report, said that the incomplete works included making good the skylight in the hallway which was removed when the attic was installed.[27] In order for this item to be claimable, the owners will have to demonstrate that it was invoiced and paid for. Mr Forrest refers to variation

[27] Mr Forrest's report, page 37 of 56.

No. 6 dated 16 October 2013. Reference of this document indicates that it is a letter from Eco Smart to the owners dated 16 October 2013, which provided costings for variations. It is not an invoice. There is no evidence that the owners paid for the skylight. Accordingly, this claim must fail.

Shelves in kitchen not fitted in accordance with plans (Mr Forrest's report, page 41 of 56)

189 The complaint here was that shelves in the kitchen had not been fitted in accordance with plan A 13 in the contract. At the hearing, Mr Milanovic did did not concede liability, but he did agree with the quantification of $120 put on this item by Mr Forrest. I find for the owners in respect of this item and allow $120 in respect of it. The addition of margin of $30, plus GST of $15, brings this item to **$165.**

Paint Attic door

190 This claim relates to the attic door which was not painted. The owners said that it had been paid for as part of variation No. 6 dated 16 October 2013. As noted, Eco Smart's letter to the owners dated 16 October 2013 was a quotation, not an invoice. I am not satisfied that this work was invoiced and paid for. Accordingly, the claim fails.

Ensuite fittings to be completed (Mr Forrest's item 11)

191 Mr Forrest, in his report, said that the plumbing rough-in initially performed was incorrect for the original items. This meant that the plumber had to supply a new toilet and to install the toilet. $395 for the supply of the toilet was claimed, together with labour of $160, derived from an invoice from the plumber, Begbie.

192 At the hearing, Mr Milanovic contested liability. The owners agreed to withdraw the claim on the basis that it had been dealt with as part of another claim. Accordingly, no allowance will be made in respect of it.

Electrical works (Mr Forrest's item 27)

193 Mr Forrest contended that the owners are entitled to be reimbursed for the cost of the completion of electrical works. Two GST inclusive invoices from S Teal Electrics dated 9 November 2014 for $965.80 and $522.50 were included in his report. The work referred to in the first invoice included 10 hours labour and the provision of fan controllers and plates, a switch in the ensuite, plates for TV cables, a 5m power cable, 5 lengths of 20mm conduit, two J/boards, and earth wire/cable to lights together with the provision of a safety certificate. The second invoice related to provision of a fan connection plate, a power cable for the pump, for the roller door and for the attic, a conduit for the pump and the roller door, four switches to the ensuite, and 5.5 hours labour.

194 These works and equipment, I find, had been invoiced and paid for. Accordingly, liability is established. The quantification of the claim at

$1,488.30 was agreed by Mr Milanovic at the hearing. I allow this sum. The addition of margin of $372.08, plus GST of 10% on $1,860.38, brings this claim to **$2,046.42.**

Builder's clean (Mr Forrest item 15)

195 Mr Forrest, in his report, contended that it was part of the builder's contract works to clean all window frames. This work should have been completed by the time the windows were invoiced. As the windows could have been invoiced either at the frame stage or the lock-up stage, and as both these invoices have been paid, liability is established. Mr Forrest's quantification of $400 was agreed to by Mr Milanovic at the hearing. Accordingly, I find that the owners are entitled to allowance of $400 in respect of this item. The addition of margin of $100 plus GST of 10% on $500 brings this claim to **$550.**

Total allowance for works paid for but not completed, where loss was not agreed

196 The total amount inclusive of margin and GST allowable to the owners in respect of works not completed, for which payment had been made, but in respect of which loss had not been agreed, is **$20,943.76** calculated as follows:

Paragraph	Item	Amount
148	Front garage door	$6,375
151	Missing manhole door	$300
155	Cubby House	$Nil
160	Steps	$Nil
163	Eaves	$116.88
171	Brick Nibs	$770
183	Ensuite	$9,464.68
185	Towel rail	$275
187	Ducted heating	$880.78
188	Skylight	$Nil
189	Kitchen shelves	$165
190	Attic door	$Nil
192	Ensuite fittings	$Nil
194	Electrical works	$2,046.42
195	Builder's clean	$550

Uncompleted works falling under stage 11

197 If the builder had repudiated the contract, the owners would have been entitled to recover damages in respect of the cost of the completion of the contract works. However, after abandonment of the contract, the cost of completion of the contract works became the responsibility of the owners. A number of items of work had not been completed as of the date of abandonment. Some of those items had been paid for by the owners. They have been discussed at paragraphs 135-196 above. It is necessary to identify those items of work which had not been completed as of the date of abandonment, and which had not been paid for by the owner, because they are the items in respect of which the owners cannot recover damages. These items are now discussed in turn.

Backfilling retaining wall (Mr Forrest's report page 33 of 56)

198 Mr Forrest said that the filling of a retaining wall with crushed rock had to be completed by the owner. An invoice for the supply of crushed rock from Col Smith Garden & Building Supply for $255 dated 2 August 2014 was appended to Mr Forrest's report.

199 Mr Forrest did not indicate the stage during which this work should have been completed. Accordingly, the owners have not demonstrated that this item of work was something that the builder had already invoiced, and been paid for. On the contrary, it is clear from the invoice for the supply of crushed rock that the work was carried out after the date of abandonment of the contract. On balance, I am satisfied that these works are in the category of completion works which, had the contract run its course, would have been covered by progress claim number 11. Damages in respect of this item are accordingly not recoverable by the owners.

Rubbish removal (Mr Forrest's report, page 39 of 56)

200 Mr Forrest, in his report, said that the owners had to arrange to have rubbish removed from the site as it had been left in a very messy state. Six invoices from the City of Whitehorse were attached, presumably in order to demonstrate payment of tip fees. There was a further invoice which was illegible. The total amount claimed was $450.

201 Mr Forrest did not suggest that these works had been part of any stage of the works up to and including stage 10, and I find the conclusion inescapable these works were to form part of the stage 11 works. Accordingly, the owners are not entitled to recover damages in respect of rubbish removal.

Fly screens (Mr Forrest's report, page 40 of 56)

202 The owners incurred, according to Mr Forrest's report, an expense of $2,449.70 for fitting fly screens. An email from Jayee Screens dated 15 September 2014 quoting this figure was appended to Mr Forrest's report.

203 The date of the email makes it clear that the fly screens were fitted well after the date of abandonment of the contract. Mr Forrest did not indicate that the fly screens should have been fitted as part of any stage of the works up to and including stage 10. Accordingly, I conclude that the works would, had the contract run its course, have been covered by the stage 11 payment. I disallow this claim.

Steps (Mr Forrest's report page 42 of 56)

204 Mr Forrest said that the concrete steps called up in contract drawing A5 had not been constructed by the builder. $2,980 was claimed in respect of this item based on a quotation from Gram Services dated 16 October 2014. Mr Forrest did not suggest that the steps should have been constructed as part of the work covered by progress claims 1-10 inclusive. There is no evidence that they were invoiced to the owners and paid for. I conclude, accordingly, that the steps were to have been covered by the final progress claim, number 11.On this basis, the claim fails.

Hot Water Service (Mr Forrest's report, pages 43 and 44 of 56)

205 Mr Forrest's report contained two entries regarding the hot water service. The first is related to the supply of the unit. An invoice for $810.90 was appended to the report as evidence of the cost of obtaining a Bosch unit. The second entry related to the fitting of the hot water service. An invoice from Begbie Plumbing for $1,285 was produced in respect of this.

206 At the hearing, Mr Milanovic said that the supply of the hot water service was to be a variation. There is documentary evidence for this in the form of the letter from Eco Builders to the owners dated 16 October 2015 which gives a quotation for the supply of a new hot water service as a variation.

207 On this basis, I accept that the hot water service was to be supplied and installed as a variation. It was not covered by any variation invoice that was produced, and accordingly this is not a situation where the builder has charged, and been paid, for something that he has not supplied. I find for the builder in respect of both aspects of the hot water service claim.

Locksmith (Mr Forrest's report, page 50 of 56)

208 On 2 July 2014, the owners called in a locksmith to change the front door key, the garage door key, and two sliding door locks. The total cost was $310. The basis upon which damages in respect of this item are claimed, according to Mr Forrest's report, is that the builder did not return keys to the owners.

209 I consider the claim must fail, because the owners changed the lock on the day that they saw fit to issue a notice of intention to determine the contract pursuant to clause 20. As I remarked in the March decision, the owners clearly saw the contract as being on foot on that date.[28] There was,

[28] Decision of 15 March 2016, at paragraph 181.

accordingly, no legal justification for them to incur this expense and seek to recover it from the builder. I find against the owners in respect of this item.

Termite protection (Mr Forrest's report, page 55 of 56)

210 Mr Forrest said in his report that these works remained to be completed. An estimate had apparently been provided by Gram Services of $850 for this item, but no details were supplied.

211 Mr Forrest did not suggest that these works ought to have been completed as part of any stage of the work up to and including stage 10. I accordingly conclude that, had the contract run to completion, the work would have been performed as part of the stage 11 works. I accordingly find against the owners in respect of this item.

Prime cost items paid for by the owners

212 Although no claim specifically relating to Prime Cost items (PC items) appears in the owners' pleading, the owners contended at the hearing that they are entitled to damages in respect of PC items for which an allowance had been made in the contract price, but which the owners had purchased and supplied to the builder during the course of the works.

Discussion regarding Prime Cost Items

213 The contract, at Item 21, made provision for prime cost allowances for prime cost items. That Item referred to Annexure A & B.

214 The contract, at Item 22, made provision for prime sum allowances for labour costs. That item was struck out, indicating that there were no provisional sum allowances.

215 Annexures A and B were respectively defined in Section B- Special Conditions. Annexure A was defined as a two-page letter dated 13 July 2013 'Builders Quotation'. It was tendered separately.[29] Annexure B was an 18 page set of Tender Documents from Mark Macinnis, architect.

216 Annexure A was a letter from Eco Smart to the owners dated 13 July 2013, which explained that the builder's quotation enclosed with the letter was to be read on the basis that it included the following allowances:

(a) kitchen appliances $2,200 at builder's cost price;

(b) tap fittings of $160 per outlet at builder's cost price;

(c) sink $300 at builder's cost price;

(d) supply and installation of split systems $3,000;

(e) supply and installation of door hardware $500;

(f) supply and installation of water tank and pump $2,000.

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29 Exhibit A4.

Clause 9.5

217 The owners' first argument regarding prime cost items is that they should receive back a credit for items paid for but not received. They rely on clause 9.5 of the contract, which provides:

> Any amount of a **Prime Cost Item** or **Provisional Sum** which is not expended shall be deducted from the **Contract Price** and deducted from the next payment payable under this **Contract.**

The Air Conditioning Units

218 The owners' evidence was that the air-conditioning system was roughed-in, but not installed by the builder. During the hearing, Mr Milanovic conceded that the air-conditioning units were not installed. The purchase of Mitsubishi split system air-conditioning units for the master bedroom in the main living area for $3,818.18 was established by the owners by the production of an invoice.[30] Pursuant to clause 9.5 of the contract, I find for the owners in connection with the air-conditioning units and allow **$3,000** in relation to this unexpended PC allowance.

The kitchen sink

219 Mr Strong's evidence was that the owners purchased the kitchen sink, not the builder. I accept that, as a kitchen sink is referred to in a Harvey Norman invoice dated 21 November 2013.[31] Its price was $329.56. As this purchase relieved the builder of the burden of supplying the sink, clause 9.5 applies, and I find that the owners are accordingly entitled to a credit in relation to the PC allowance for the kitchen sink of **$300**.

Other kitchen items

220 The owners contend that they are entitled to an allowance in respect of the unexpended PC allowance in respect of kitchen items. The figure claimed in respect of taps, sink, and kitchen appliances in Mr Forrest's report is $2,960.[32] The Harvey Norman invoice dated 21 November 2013 referred to above also proves the purchase of kitchen items including a fan forced oven for $1,185.98, a Bosch cooktop for $1,895.36, a Scheigen rangehood for $1,330.81, and other items including a sink mixer. At the hearing, Mr Strong referred to this invoice and confirmed that the owners paid it.

221 On this basis, I find that the builder was relieved by the owners of expending the PC allowance of $2,200 in connection with kitchen items (other than the sink, which was covered by its own PC allowance), and I allow **$2,200** to the owners in respect of this item.

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30 Tribunal Book 37.
31 TB 35.
32 Mr Forrest's report at p 52.

The shower mixer

222 In respect of another PC item, the shower mixer, the owners seek damages of $51.50. They allege the incorrect mixer was supplied by the builder, and the builder took the mixer to swap it but did not return it, or supply a new mixer. The owners needed to purchase a new mixer. I allow **$51.50** in respect of this item.

The water tank and pump

223 Neither the water tank nor pump were fitted by the builder. The purchase and delivery of a 2000 litre slim low line poly water tank for $780 inclusive of GST, together with the purchase of a Bianco pump with mains switch for $445 inclusive of GST, was proved by the production of invoices.[33] Pursuant to clause 9.5, I allow **$2,000** as compensation for the provisional sum allowance for these items which was not spent by the builder.

Summary of findings in connection with PC items

224 As a result of the findings in connection with PC items contained in paragraphs 218-223 above, I allow $**7,551.50** connection with the PC items, calculated as follows:

Paragraph	Item	Amount
218	Air conditioning units	$3,000
219	Kitchen sink	$300
221	Other kitchen items	$2,200
222	Shower mixer	$51.50
223	Water tank and pump	$2,000

Summary of allowances made in favour of the owners

225 The respective allowances made in favour of the owners in respect of their various heads of claim are as follows:

(a) damages for defective work inclusive of margin and GST: **$15,922.50 (paragraph 128)**;

(b) damages agreed in respect of completion of works paid for but not performed, inclusive of margin and GST: **$11,316.25 (paragraph 132)**;

(c) damages in respect of completion of works paid for but not performed where costing was agreed, but liability was challenged, inclusive of margin and GST: **$275 (paragraph 134)**;

[33] Appended to Mr Forrest's report as documents 36 and 37 respectively.

(d) damages agreed in respect of completion of works paid for but not completed, where loss was not agreed, inclusive of margin and GST: **$20,943.76 (paragraph 196)**;

(e) damages in respect of works covered by progress claim number 11: **$Nil (paragraphs 197-211)**;

(f) damages in respect of Prime Cost items paid for by the owners: $**7,551.50 (paragraph 224)**.

226 The total award to which the owners are entitled in respect of their claim (excluding costs) is accordingly $56,009.01. As this figure has an unreal degree of specificity, I find that the owners are entitled to damages of **$56,000**.

227 The owners will be given liberty to apply in respect of costs.

THE BUILDER'S COUNTERCLAIM

228 The builder initially claimed for the following items:

The sum of $3,352.76 in respect of:

(a) a balance of $2,910 for unpaid variations, which were invoiced on 8 April 2014 and in respect of which only $770 had been paid;
(b) interest of $442.76 in respect of late payment of the invoice of 5 March 2014;
(c) lost opportunity to complete the contract, and entitlement to the final payment of $11,500 subtracting approximately $2,000 in respect of the purchase of kitchen appliances by the owners;
(d) loss of a new contract with a Mr Chris Whitley;
(e) interest pursuant to clause 11.10 of the contract at the rate of 20% compounding weekly;
(f) costs.

229 In an email to the owners dated 16 October 2015, copied to the Tribunal, the builder confirmed that the defence in relation to alleged defective or incomplete work was that the owners continually breached the contract and, in effect, repudiated the contract, 'which then inevitably ended in the contract coming to an end'. The builder also asserted that the works, when the contract was terminated, were incomplete, but not defective.

The additional claims

230 The builder, in his email of 16 October 2015, then added claims totalling $75,100 to the original counterclaim. The additional claims were for:

(a) transcripts and associated costs $600;
(b) legal costs $7,000;
(c) lost time defending the matter $24,000;
(d) medical costs $1,500;
(e) costs associated with loss of work due to medical issues $24,000;

(f) fraudulent use of Mr Milanovic's building licence to continue adding works onto the licence $17,000; and
(g) expert reports $1,000.

THE TRIBUNAL'S DETERMINATION IN RESPECT OF THE BUILDER'S RESPECTIVE CLAIMS

Variations

231 $2,910 is claimed under this heading**.** The background to this claim is that the builder invoiced the owners $3,680 on 8 April 2014 in respect of variations.[34] The variations were as follows:

(a) Glass splashback $2,345;
(b) Move light in hallway $110;
(c) Extra downlight in kitchen $105;
(d) TV point lounge $95;
(e) TV point to garage and power point $175;
(f) Two extra downlights in master bedroom $210;
(g) Extra external light $155;
(h) Two way in kitchen $125;
(i) Ceiling vent to laundry $115;
(j) Two fluoro lights in garage $245.

The owners' response

232 Mr Strong, in an email dated 27 April 2014, challenged the costing in respect of the extra downlights in the kitchen, the TV point and garage powerpoint, the two extra downlights in the bedroom, the external light and the two way in the kitchen.[35] It is to be noted that the total of these items was $770. Ultimately, Mr Strong relented and agreed to pay this sum, leaving $2,910 in dispute. This is the sum now claimed by the builder for variations.

The glass splashback

233 The major item in dispute is obviously the glass splashback. Mr Milanovic, in the hearing, said that the splashback was a variation and that Mr Strong had signed the variation form. He explained that this signed variation had been stolen during a break in April 2014 when his trailer was stolen. This variation, and a number of other variation forms were, he said, stored in the trailer.

234 The fact that Mr Milanovic invoiced the splashback as a variation in April 2014 is consistent with his position.

235 When it was contended by the owners in the hearing that the splashback was in the drawings, Mr Milanovic said he had not included it in his quotation. Drawing A 13 appended to the contract shows the layout of the

34 Exhibit A15.
35 Exhibit A 16.

kitchen and an elevation of the kitchen. This drawing clearly shows a colourback glass splashback above the cooktop. I consider that drawing A 13 is clear, and that the splashback was included in the contract. I accordingly find against the builder in respect of this variation and disallow the claim for $2,345.

Light in the hallway

236 The next unpaid variation was moving a light in the hallway at a cost of $110. Mr Strong did not provide a reason for not paying this variation in his email of 27 April 2014. At the hearing, it was clear that the issue was the price claimed. Mr Milanovic produced no worksheets, but he estimated that to move the light would take an electrician half an hour, and, after that, there would have been an hour's work for a plasterer and then a painter. On the basis that I regard these allowances as reasonable, I accept the price of **$110**, and will allow that sum to the builder in respect of moving a light in the hallway.

TV point in the lounge

237 The next item was the installation of a TV point in the lounge at a cost of $95. Mr Milanovic's evidence was that the TV point had to be moved because of the wall mounting of the television, but Mr Strong refused to pay for the change. I find for the builder in respect of this item, as it is clear that the TV point had to be moved, and allow the claimed **$95.**

Ceiling vent in the laundry

238 The next unpaid variation was the installation of a ceiling vent in the laundry at a cost of $115. The claim was pressed by Mr Milanovic at the hearing, and no defence was raised. I allow **$115** in respect this item.

Two fluoro lights in the garage

239 The remaining disputed variation related to the installation of two fluoro lights in the garage at a price of $245. Again, Mr Milanovic pressed this claim at the hearing, but no defence was raised. I allow **$245** for this item also.

Claim for interest

240 The next issue was the builder's claim for interest of $442.76 in respect of late payment of the invoice of 5 March 2014. This invoice is related to the painting, tiling and carpentry (or PTC) stage. It was not paid by Mr Strong because he considered that the works covered by the invoice had not been completed. He promptly notified his concerns in an email sent on 14 March 2014, in which he set out a non-exhaustive list of items of painting, tiling and carpentry that were not complete. He confirmed his position on 17 March 2014. I find that the owners' position in not paying the PTC invoice was justified, and disallow the claim for interest.

Lost opportunity to complete the contract

241 The next claim of the builder was the lost opportunity to complete the contract, which denied him the entitlement to be paid the final payment of $11,500 subtracting approximately $2,000 in respect of the purchase of kitchen appliances by the owners.

242 It follows from the analysis of the respective entitlements of the parties following abandonment of the contract, set out at paragraphs 35-55 above, and at paragraph 53 in particular, that the builder is not entitled to be paid any part of the contract sum in respect of which a right to be paid had not crystallised prior to the abandonment. I accordingly find against the builder in respect of this claim.

Loss of new contract

243 Next, the builder claimed damages in respect of loss of a new contract with a Mr Chris Whitfield.[36] This claim was based on the proposition that because of the delay in completing his contract with the owners, he missed the opportunity to perform a contract for Mr Whitfield.

244 I consider there are two obstacles facing the builder in respect of this claim. The first is purely factual. There is no doubt that there was a significant overrun in the performance of the owners' contract, having regard to the facts that the anticipated commencement date of the contract works was 1 August 2013, and the construction period allowed by the contract, including delays, was 137 calendar days. In other words the initial construction period was just under 20 weeks. The contract, in clause 15, allowed for extensions of time to be granted to the builder in respect of a stipulated set of causes of delay. There was a process pursuant to which the builder could have claimed extra time to complete the works if one of the stipulated causes of delay had arisen. During the hearing, there was no evidence about any formal claim having been made for an extension of time. In the circumstances, it is, in my view, not possible to make an assessment as to whether it is the builder, or the owners, or both, who are to be blamed for the overrun of the construction period. Accordingly, the claim must fail on a factual basis.

245 The second obstacle to the claim arises from ordinary principles of contract law derived from the leading case of *Hadley v Baxendale.*[37] This case established that damages recoverable for breach of contract fall into two classes. In the first class are damages which flow naturally and directly from the breach of contract. They are the direct losses. In the second class, there are indirect or special damages which are recoverable only if the fact that they might be incurred was a matter about which the breaching party was on notice at the time the contract was made. There was no evidence

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36 The initial claim related to a contract with a Mr Chris Whitley. Mr Milanovic clarified at the hearing that the potential client lost was Mr Whitfield

37 9 Exch 341, 156 Eng Rep 145(1854).

given by Mr Milanovic that Mr and Mrs Strong were aware, at the time the contract was formed that he had a plan to enter into a contract with Mr Whitfield immediately after the completion of their contract.

246 For both these reasons, I disallow this claim on the part of the builder.

Claim for interest pursuant to clause 11.10 of the contract at the rate of 20%

247 The next claim raised in the pleadings by the builder was a claim for interest pursuant to clause 11.10 of the contract at the rate of 20% compounding weekly. When the common law rule against penalties was explained to Mr Milanovic at the hearing, he did not press this claim. Accordingly, I find against him in respect of it. He did not press any alternative claim for interest.

Costs

248 The final claim made by the builder in his initial pleading was a claim for costs. The claim for costs was elaborated upon in the builder's email of 16 October 2015, which added claims totalling $75,100 to the original counterclaim. The additional claims included the following items which are either claims for legal costs or might be regarded as claims for associated disbursements. These claims are:

(a) transcripts and associated costs $600;
(b) legal costs $7,000; and
(c) expert's report $1,000.

249 The builder will be given liberty to apply in respect of costs.

Other claims made by the builder

Lost time defending the matter

250 The first of the builder's remaining claims related to lost time defending the matter, quantified at $24,000. At the hearing, Mr Milanovic gave evidence that he had worked eight hours a day for 30 days in preparing for the hearing, researching matters and attending the hearing. He claimed $100 an hour in respect of his time.

251 While I do not doubt that Mr Milanovic spent many hours researching and preparing for the hearing, and obviously spent many hours at the hearing itself over a number of days, I do not think he can recover damages in respect of his lost time. In the first place, in order to do so, he would have to demonstrate that the owners are legally liable because they breached the contract, which he has not done. Indeed, his case that the owners breached or repudiated the contract failed. Furthermore, these lost hours are really a management expense incurred by Mr Milanovic in running his business. They are an indirect loss, and there was no evidence that a loss of this type was in the contemplation of the parties at the time the contract was made. For these reasons, I disallow this claim.

252 It may be of some consolation to Mr Milanovic that Mr Strong is no doubt in a similar position, and if he had made a similar claim, it would have been disallowed also for the same reasons.

Medical costs

253 The next claim relates to medical costs totalling $1,500. Mr Milanovic said that the claim related to 10 visits to a consultant at a rate of $150 per hour. He gave evidence that the necessity for these visits arose solely from the issues arising from the owners' breach of contract.

254 This claim must fail. Firstly, I consider this particular category of loss is too remote. Secondly, as noted, Mr Milanovic has not demonstrated that the owners are liable to him for breach of contract.

Loss of work due to medical issues

255 The builder then claims costs associated with loss of work due to medical issues quantified at $24,000. Mr Milanovic's argument here is that he has experienced medical issues as a result of the owners' actions.

256 It may well be that Mr Milanovic's mental health has suffered as a result of issues arising out of his contract with the owners, but that is not to say the causation of those issues is necessarily the responsibility of the owners. I consider that the claim must fail because Mr Milanovic gave no evidence regarding his medical issues other than to indicate he had been seeing a psychologist. Accordingly he has not demonstrated any link between his medical issues and the owners' actions. Furthermore, as noted above, Mr Milanovic has not established that the owners breached or repudiated the contract, which he would have to do if he were to hold them liable for damages.

Use of his building licence

257 The final claim made by Mr Milanovic is that the owners fraudulently used his building licence to continue adding works onto the licence, $17,000.

258 This issue was canvassed in detail in the hearing on 6 November 2015. Mr Milanovic tendered a list of site inspections carried out by the building surveyor, Group Four Building Surveyors (Group 4).[38] This demonstrated that the last inspection for which Mr Milanovic was on site was 6 December 2013. The next inspection recorded was on 1 October 2014, long after the date of abandonment of the contract. A site inspection occurred on 6 November 2014 when stump holes for the decking were inspected. On 24 November 2014, the subfloor was inspected. A final inspection was carried out on 19 January 2015.

259 Mr Milanovic also tendered an email he had received from Mr Vin Italiano of Group 4 dated 8 October 2015.[39] From this email it was clear that, after

[38] Exhibit R10.
[39] Exhibit R11.

Group 4 had sent an email to Mr Milanovic following the sub-floor inspection on 24 November 2014, Mr Milanovic had written back notifying that the contract had been terminated.

260 In the email, Group 4 conceded that they had issued an amended permit adding a proposed deck on 25 October 2014, but also said they had no information indicating that any termination had occurred. They said that a building notice would be issued to the owners to show cause why a new building permit was not obtained when the original builder was terminated, and that eventually a new building permit would be required.

261 From this email, it is clear that the owners proceeded to construct a new deck without having obtained a new building permit, and continued to use a permit naming Mr Milanovic as builder, as he alleges.

262 This is potentially a serious matter, but it is not for the Tribunal to determine whether there has been any breach of any law or regulation. In fairness to the owners, it must be acknowledged that Mr Strong tendered a number of documents relating to this issue[40] and it is possible that Group 4 knew, or ought to have known, that Mr Milanovic would not be constructing the deck. It is not necessary or appropriate for the Tribunal to make any determination about this. The Tribunal is concerned only with the question of whether the continued use of a permit naming Mr Milanovic constituted a breach of the contract between him and the owners.

263 Mr Milanovic, at the hearing, said he wanted $20,000 as compensation for the 'fraudulent' use of his building licence.

264 I find that the continued use of Mr Milanovic's licence after the abandonment of the contract in July 2014 did not constitute a breach of the contract, for the simple reason that the contract had come to an end. It follows that Mr Milanovic is not entitled to damages for breach of contract in respect of the continued use of his licence by the owners.

265 However, the Tribunal does have jurisdiction to award damages generally in relation to a *domestic building dispute*. A *domestic building dispute* is defined in the *Domestic Building Contracts Act* 1995 to include a dispute or claim arising between a building owner and a builder in relation to a domestic building contract or the carrying out of domestic building work.[41] Although the contract between the builder and the owners had come to an end by virtue of its abandonment, I consider that the dispute regarding the construction of the deck by the owners relying on the builder's licence following the abandonment of the contract does constitute a *domestic building dispute* under the Act. Accordingly, I consider the Tribunal has jurisdiction to make an award of damages in respect of the matter.

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40 Exhibits A47-62.

41 *Domestic Building Contracts Act 1995*, s 54(1).

266 When Mr Milanovic was asked at the hearing what the sum of $20,000 was for, he said that he did not know, other than it was a 'compensating amount'.

267 In the absence of any evidence from Mr Milanovic that he has suffered any specific loss from continued use of a building permit naming him as the builder, I am not satisfied that I should make any monetary award to him in respect of the matter.

268 However, I consider it is appropriate that I make a declaration that, although the deck was constructed under a permit referencing Mr Milanovic's licence, it was not constructed by him, and he is not responsible for any defects in the deck. The purpose of making this declaration is to save the parties the trouble of traversing the issue again in separate litigation at some point in the future in the event that a problem with the deck emerges.

Summary of findings regarding the builder's counterclaim

269 The builder has succeeded in his claim for variations as follows:

(a) the installation of a light in the hallway at a cost of $110 (paragraph 236);
(b) the installation of a TV point in the lounge at a cost of $95 (paragraph 237);
(c) the installation of a ceiling vent in the laundry at a cost of $115 (paragraph 238);
(d) the installation of 2 fluoro lights in the garage at a price of $245 (paragraph 239).

The total of these variations is $565.

270 I find that the Builder has accordingly been successful in his counterclaim, excluding his claim for costs, to the extent of **$565.** This sum is to be set off against the sum of $56,000 which I have found to be due from the builder to the owners in respect of their claim.

Conclusion

271 As I have found, at paragraph 226, that the owners are entitled to damages of $56,000, and as I have found, at paragraph 270 that the builder is entitled to damages of $565, there will be an order that the builder is to pay the owners the balance of **$55,435.**

Further hearing

272 There will be liberty to both parties to apply in respect of costs.

MEMBER C EDQUIST