

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**CIVIL DIVISION**

DOMESTIC BUILDING LIST	vcac reference No. D871/2006
CATCHWORDS	
Identification of contracting parties - 'Builder'- 'Major Domestic Building Contract' – ss3, 18,31,35,135 of the <i>Domestic Building Contracts Act 1995</i> – s29 <i>Fair Trading Act 1999</i> – quantum meruit.	

APPLICANT	Stubbs Enterprises Pty Ltd (ACN 006 120 234)
FIRST RESPONDENT	Martin Lucas Williams
SECOND RESPONDENT	Lucas Alliance Pty Ltd (ACN 091 386 786)
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Hearing
DATE OF HEARING	13 June 2007
DATE OF ORDER	11 September 2007
CITATION	Stubbs Enterprises Pty Ltd v Williams (Domestic Building) [2007] VCAT 1909

Order

1. I direct the principal registrar to amend the record to reflect the correct ACN of the Second Respondent – ACN 091 386 748.
2. The First Respondent shall pay the Applicant the sum of \$8,128.20.
3. Costs reserved – liberty to apply. I direct the principal registrar to list any application for costs for hearing before Deputy President Aird for 2 hours.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:	
For Applicant	Mr J.M. Shaw of Counsel
For Respondents	Mr A. Beck-Godoy of Counsel

Reasons

- 1 In late 2004 the applicant, Stubbs Enterprises Pty Ltd ('Stubbs') purchased a duplex in Prahran as an investment. Stubbs engaged Collins Simms as the managing agent and sought their recommendations for improvements to increase the rental return on the properties. Their recommendations included renovation of the kitchen and bathrooms, painting, new floor coverings and blinds throughout. Collins Simms, as agent for Stubbs, approached Mr Williams of Lucas Interiors to provide quotations for the works and he was subsequently engaged to carry out the agreed works. Proceedings were initially commenced against Mr Williams by application lodged on 12 December 2006 and it was not until 8 March 2007, after an unsuccessful mediation, that Lucas Alliance was joined as a party. Which of the respondents was the contracting party is an issue to be determined.
- 2 Mr Stubbs, a director of Stubbs, gave evidence that he met with Mr Williams, the first respondent, on site to discuss renovation options, but otherwise left the negotiations and arrangements to Collins Simms. He said that when he met with Mr Williams on site he was shown promotional material and photographs of other works carried out by Lucas Interiors and also a sample door. He accepted Mr Williams' recommendation to retain the kitchen cupboard carcass, the kitchen sink and the existing stove and to replace the bench tops and cupboard doors. He said it was always his understanding that the kitchen would look 'as new'.

- 3 A feature of the kitchen was to be an extended bench top with an installed dishwasher and space for a front loading washer/dryer unit. Stubbs maintains that it was agreed the works would be completed by 16 March 2005. This is denied by Mr Williams who says he was never advised of any completion date, although under cross examination he conceded that he became aware, after works commenced, that tenants were to move in on 18 March 2005.
- 4 Various quotations were provided for different works – some of which relate to works to be carried out in each of the units, and others for works to one unit only. Although defective works have been identified in each of the units by Rob Lees, the building consultant engaged by Stubbs, its claim in this proceeding is only concerned with the works carried out in Unit 2.
- 5 Stubbs claims the kitchen works and the tiling were defective, and the kitchen did not look ‘as new’. The kitchen has been replaced and Stubbs claims that the tiling works are so inferior they need to be redone. Stubbs seeks:
- | | | |
|-----|-----------------------------|-------------------|
| i | Replacement kitchen | \$ 7,233.90 |
| ii | Compensation paid to tenant | \$ 2,770.00 |
| iii | Loss of rent | \$ 6,000.00 |
| iv | Re-leasing fee | \$ 686.40 |
| v | Cost of re-tiling | \$ 4,371.00 |
| vi | Expert’s fees | <u>\$1,278.75</u> |
| | | \$22,340.05 |
- 6 Lucas Alliance claims \$7,662.36 by way of counterclaim being what, it says, is the outstanding balance due to it.

Which of the Respondents was contracted to carry out the works?

- 7 Stubbs alleges that its contract was with the first respondent, Mr Williams, whilst the respondents maintain the contract was with the second respondent – Lucas Alliance Pty Ltd formerly Lucas Records Pty Ltd (‘Lucas Alliance’). Whilst it is clear that Lucas Alliance was the proprietor of the business name at the time the quotations were provided, and when the works commenced, the business name ceased to be registered at the end of January 2005. This was only a few days after the works commenced. It is common ground that there were a number of variations to the works after they commenced and that Stubbs has paid \$36,638.60 into Lucas Alliance’s bank account by way of direct debit. The respondents rely on these payments into Lucas Alliance’s bank account as evidence that the contract was with the company. However, it seems that the details provided to Collins Simms by Mr Williams, as recorded by Ms Halperin, were that the bank account was in the name of Lucas Interiors not the company name.
- 8 The identification of the contracting party is complicated by all quotations having the heading ‘Lucas Interiors’ and the following ‘agreement clause’:
- ‘I/We agree to engage LUCAS INTERIORS PTY LTD to provide the goods and services at the price and upon any terms noted above. By signing below I/we also charge all of my/our right title and interest in the property/premises where the goods/services are to be installed and/or provided in favour of LUCAS INTERIORS PTY LTD for so long as monies are owing to that company by myself/us’
- followed by
- Yours sincerely
Martin Williams
- 9 On some, but not all of the quotations the name ‘Lucas Interiors’ and its contact details appears at the foot of the page, and on some: ABN: 63 091 386 74. The quotations and Schedule of Progress Payments dated 17 January 2005 are signed by Mr Williams. The quotations dated 24 January 2005, which I understand identify the original scope of the works to be carried out to both units are not signed.
- 10 Not only is the ‘charging clause’ in contravention of s18 of the *Domestic Building Contracts Act 1995*, Lucas Interiors Pty Ltd does not, and has never existed, and the ABN is incomplete – the last number, an ‘8’ is missing. Further, the advertising leaflet provided to Stubbs by Lucas Interiors only contains the name ‘Lucas Interiors’ and the names ‘Martin Williams’ and ‘Nathan Williams’. No company name or ABN is included. The deficiencies in the documents would appear to be a contravention of

the provisions of s29 of the *Fair Trading Act 1999*.

- 11 Further, in its Points of Counterclaim at paragraph 12, Lucas Alliance alleges that there were 'a number of agreements ...made between on or about January 2004 and September 2005'. Any agreement made after 31 January 2005 could not have been made by Lucas Alliance – the registration of the business name 'Lucas Interiors' having ceased on that date.
- 12 The documents on which the respondents seek to rely are so inconsistent and lacking in clarity that it is impossible to be satisfied that the contracting party was Lucas Alliance. On balance I find the contract was entered into with Mr Williams in his personal capacity.

Is this a 'major domestic building contract'?

- 13 Section 3 of the *Domestic Building Contracts Act 1995* ('*DBC Act*') defines a 'builder' as:

- a person who, or a partnership which –
 - (a) carries out domestic building work; or
 - (b) manages or arranges the carrying out of domestic building works; or
 - (c) intends to carry out, or to manage or arrange the carrying out of, domestic building work.

Mr Williams clearly falls within the definition of builder. A 'major domestic building contract' is defined as:

- a domestic building contract in which the contract price for carrying out of domestic building work is more than \$5,000 (or any higher amount fixed by the regulations).

- 14 Although Mr Williams said separate quotations, most of which are for less than \$5,000.000, were provided because there was no certainty that Lucas Interiors would be engaged for all of the works; he was, and the total contract price, if one accepts Mr Williams' evidence in relation to all of the variations, is approximately \$43,000.00. On 17 January 2005 (the date of the initial quotations) Mr Williams forwarded to Collins Simms a Schedule of Progress Claims (for all of the works to Units 1 and 2) with approximate starting and completion dates of 19 January and 14 February 2005 respectively. All works were invoiced together without reference to the individual quotations. I am satisfied that this was one deal and find the contract was a major domestic building contract as defined by the *DBC Act*.
- 15 Whilst Mr Williams carried out all measurements and designed the kitchen he said that the building works were carried out by contractors engaged by him. However, details of the arrangements with each of the contractors is not before me, nor, surprisingly have they been discovered. This does not absolve Mr Williams of his obligations under the *DBC Act* – to be registered, to enter into a written domestic building contract (s31) and under s135 of the *Building Act 1993*, to arrange builders warranty insurance where the cost of the works is greater than \$12,000.00. The obligation to arrange warranty insurance cannot be avoided simply by issuing a number of quotations each of which is for an amount of less than \$12,000.00.
- 16 Whilst the quotations of 24 January 2005 seem to set out the original scope of works for Units 1 and 2, none of them were signed by Mr Williams (or otherwise on behalf of Lucas Interiors), and none of them were signed by or on behalf of Stubbs.

Expert evidence

- 17 Stubbs has filed an expert report from a building consultant, Rob Lees, who attended the hearing to give evidence. Mr Lees has provided estimates of the cost to carry out the recommended rectification/replacement works. Stubbs also tendered copies of a quotation and tax invoice for the new kitchen it has had installed.
- 18 Mr Williams did not file any expert reports or any evidence in relation to the cost of carrying out any rectification works which may be ordered.

Kitchen

- 19 Although Mr Williams denies representing that upon completion of the works the kitchen would look 'as new' I preferred the evidence of Mr Stubbs, Mr Morrissey and Ms Halperin who all said that they understood from their discussions with Mr Williams the kitchen would look 'as new'

The bench height and depth

- 20 I accept it was clearly explained to Mr Williams that the objective was to carry out works which would increase the rental return on the property. Collins Simms had recommended that a dishwasher and space for a front loading washer/dryer would assist in realising this objective, this was clearly part of Mr Williams' brief. I reject the attempt by Mr Williams to rely on the dimensions on his own sketch plan, as evidence that it was impossible to achieve adequate bench height to allow for a non-modified installation of a dishwasher, or for a front loading washing machine to fit at all. The sketch clearly shows a dishwasher and under bench machine – the only problem is that Mr Williams failed to confirm the required height and depth before he prepared the sketch and the quotations. If he had checked, and found the height and depth were inadequate, alternatives could have been discussed with Stubbs before the works were carried out. However, little or no regard appears to have been taken by Mr Williams to ensure there was adequate height available to enable installation of a dishwasher without significant modification. There was insufficient height for a front loading washing machine at all.
- 21 Further, the quotation dated 17 January 2005 allows for the supply and installation of a Dishlex dishwasher and for a tumble dryer (to be priced). The quotation dated 24 January 2005 includes:
- New extension plus drawer set, cupboard and Dryer and Dishwasher space with laminate bench top
- There can be no doubt Mr Williams always understood there was to be space for a dryer (which I understand to mean a front loading washer/dryer unit and a dishwasher).

The cupboard doors

- 22 Stubbs complains that the cupboard doors had exposed hinges which did not accord with the sample Mr Stubbs was shown when he met with Mr Williams. He gave evidence that he was shown a sample door with concealed hinges. I accept Mr Lees' expert opinion that the method of installation of these hinges was unsatisfactory, resulting in exposed edges of the MDF panel which would have been prone to swelling due to the absorption of moisture. Mr Lees confirms that the existing carcass was not suitable for the installation of doors with concealed hinges (or even with the exposed hinges, as installed). This is something about which Mr Williams had an obligation to inform Stubbs. Cupboard doors with exposed hinges do not result in a kitchen which looks 'as new'.

The existing laminate strip around the kitchen sink

- 23 Following Mr Williams' recommendation to keep the existing sink the laminate strip was not replaced with the new laminate used for the bench top. Mr Williams said this was because it was virtually impossible to replace the strip. I accept this was never discussed with Mr Stubbs or the Collins Simms agents. This was unsightly and evidence of 'shoddy' workmanship. Irrespective of the brief having a strip of the pre-existing, mismatching laminate is clearly an unacceptable finish and evidence of shoddy workmanship. It could not have resulted in a kitchen which looked 'as new'.

Splashback tiling

- 24 I accept that the splashback tiling was less than satisfactory. Any rectification works to the kitchen would have necessitated removal and retiling of the splashback to ensure a satisfactory finish.

Was Mr Williams given a reasonable opportunity to carry out rectification works?

- 25 Mr Williams was unable to provide any plausible or satisfactory explanation for his failure to attempt any rectification works during a period of more than 12 months – between when the works were 'complete' in or about February/March 2005, and when he was advised Stubs would be making alternative arrangements for rectification of the defects in February 2006.
- 26 I reject any suggestion that the works were accepted by Mr Morrissey on behalf of Stubbs. Even if Mr Morrissey had expressed delight with the works, as alleged by Mr Williams, the warranties in s8 of the *DBC Act* still apply. It is clear that these works were not carried out in a proper and workmanlike manner and the deficiencies in the bench height were obvious when the dishwasher was installed by Mr Williams. He gave evidence that it had to be modified to fit and surprisingly seemed to think it acceptable

that a dishwasher be installed minus its top and feet.

- 27 I accept the tenants complained that a front loading washing machine would not fit, early in the tenancy, and that this was brought to Mr Williams' attention. It seems that initially, at least, the major impediment to Mr Williams returning to carry out any remedial works, was his insistence on being paid the amount he claimed was outstanding. Despite repeated requests he failed to provide a clear reconciliation and accounting of the amounts claimed and paid.
- 28 There seem to have been significant delays and difficulties in communication between him and Mr Morrissey. Finally, in a letter dated 1 September 2005 Mr Williams agreed to carry out various works to Units 1 and 2 including raising the height of the benches in both units on the condition the outstanding blind account was finalised first. At this time he was seeking payment of \$2,500.00 for this account. He estimated the cost of the works to be \$2,500.00 which he said would be paid by Lucas Interiors. The outstanding balance for the blind account, which was actually \$638.00, was paid in January 2006. In late January Mr Williams went to the unit at which time, it is alleged, he took some measurements and suggested to the tenants they remove the top of the washing machine so that it would fit under the bench. Mr Williams said he was unable to install the new bench top at that time because although it had been ordered it was not yet available. I found this evidence unconvincing in the absence of any evidence of the bench top having been ordered, or cancellation of the order.

Rectification or replacement?

- 29 Mr Williams contracted to provide a renovated kitchen in accordance with the brief given to him by Stubbs and its agents Collins Simms. He failed to do this in a proper and workmanlike manner, and I am satisfied on balance that the only realistic option was for the kitchen to be replaced. Although it may have been possible to increase the height of the benchtop, increasing the width would have been unsightly and caused difficulties with access to the corner cupboard, and it was impossible to do anything with the exposed hinges on the cupboard doors.
- 30 After noting that the Lucas Interiors quotation for replacing the bench tops and cupboard doors was \$4,697.55, Mr Lees estimated the cost to remove and replace the cupboards and bench tops at \$6,229.60 but *'It is highly likely that this figure could be decreased if standard sized units were used rather than purpose built units as is priced below.'* Stubbs has actually spent \$7,233.90 on a new kitchen, including a new kitchen sink. Unfortunately, I was not provided with photographs or even a drawing of the layout of the new kitchen so am unable to compare the two. Mr Stubbs conceded that there were some additional works carried out, including the installation of a new kitchen sink, and that the cost of these should be deleted.
- 31 I am not persuaded that Stubbs is entitled to the cost of the new kitchen. This would lead to a betterment in circumstances where although Mr Williams' advice was clearly inadequate, the recommended works, even had they been carried out in a proper and workmanlike manner, were unsatisfactory to achieve the objective,. Stubbs did not pay for a new kitchen – it paid for a renovated kitchen. I am satisfied that Stubbs is entitled to be placed back in the position it would have been in had these works not been carried out, and that the appropriate measure of damages is a refund of the amount paid for the works. In calculating this sum I have had regard to the invoiced amounts, which for these works are consistent with the quotation of 24 January 2005:

• new bench top	\$ 420.00
• new extension plus drawer set	\$ 920.00
• replace cupboard doors	\$2020.00
• Hinges	\$ 432.00
• Remove doors and bench top	<u>\$ 70.00</u>
	\$3862.00
Plus GST	<u>\$ 386.20</u>
	\$4248.20

- 32 I have not included the door handles or new tap ware in this calculation as, in my view, they could have been reused when the kitchen was replaced.
- 33 Having regard to Mr Lee's estimate I will allow the sum of \$350.00 for the

removal and installation of new splashback tiling.

The bathroom tiling

- 34 No complaint was raised about the tiling in the bathroom until after Stubbs obtained Mr Lees report which identified a number of issues. It is irrelevant that the defective tiling works were not identified by Stubbs or Collins Simms. Mr Williams had an obligation to carry out the works in a proper and workmanlike manner and has failed to do so.
- 35 The tiling over the bath is incomplete as it does not extend to the shower screen, and it slopes at the bottom where it meets the bath. There are areas where the grout is uneven and the tiles are out of alignment but that alone is not sufficient to order all of the tiling to be replaced. Applying the principles set out in *Bellgrove v Eldridge* (1954) 90 CLR 613, I am not persuaded that it is reasonable or necessary to replace all of the tiling. I am, however, satisfied that further tiling works need to be done around the bath and in the absence of an itemised estimate for those works alone I will allow \$500.00.

Tenancy claims

- 36 Stubbs also seeks payment of a number of costs associated with the tenancy, each of which I will consider in turn:

Compensation paid to tenant \$2,770.00

- 37 This is the amount Stubbs was ordered to pay the tenants by the Residential Tenancies List of this Tribunal. Although it is apparent that Mr Williams was less than responsive when asked to carry out rectification works, concentrating instead on recovering payment of the allegedly outstanding balance under the contract, Stubbs, whether by itself or through its agent, Collins Simms could, and in my opinion should, have been more proactive in attending to its tenants' concerns and complaints.
- 38 I have before me a copy of the tenants' application to the Residential Tenancies List. They were seeking compensation relating to a number of non urgent repairs:
- i renovation/repair of kitchen outstanding since beginning of tenancy - 25/2/05
 - ii repair/replacement of flyscreens – outstanding since beginning of tenancy - 25/2/05
 - iii repair/replacement of rear security door – outstanding since beginning of tenancy - 25/2/05
 - iv maintenance of garden
- 39 Stubbs was ordered to pay the tenants compensation of \$2,770.00 by order dated 19 June 2006. The sum of \$1,080.00 was ordered as *'compensation for the landlord's failure to repair the kitchen between the commencement of the tenancy and 18 April 2006'*. The balance was ordered for *'breach of the landlord's duty of quiet enjoyment during the tenancy and failure to repair the fly screen and back security door within a reasonable time'*.
- 40 Although the tenants were not called to give evidence I was provided with a copy of their Chronology of Events which I understand was prepared for their hearing before the Residential Tenancies List. Having regard to s98 of the *Victorian Civil and Administrative Tribunal Act 1998* I am satisfied it is appropriate for me to consider the matters set out in the Chronology, which indicate that the issues with the kitchen were but one of the tenants' concerns. In such circumstances, I am satisfied that Mr Williams should reimburse Stubbs \$1,080.00 for the compensation it was ordered to pay because of the failure to repair the kitchen but the claim for the balance of the compensation it was ordered to pay to the tenants is dismissed.

Loss of rent \$6,000.00

- 41 This claim is for the loss of rent from when the tenants vacated on 27 July 2006 until the premises were relet, at an increased rental, on 11 November 2006.
- 42 Stubbs' expert, Rob Lees, did not inspect the premises until 27 June 2006 and Stubbs did not obtain a quotation until 21 August 2006 – more than three weeks after the tenants vacated. The tax invoice for the kitchen works is dated 27 September 2007, although there is no evidence as to the period of time the works actually took. From my experience I would expect a kitchen renovation to take no more than two weeks. There is no evidence as

to what steps were taken to relet the premises between when the tenants gave notice of their intention to vacate on 27 July and 11 November 2006. Noting that they were let at an increased rental I cannot be satisfied Stubbs took any steps to mitigate its loss in relation to any loss of rent, for example by decreasing the rent or offering a rent free period. I am prepared to allow five weeks rent at the 'old' rent of \$1,690.00 per calendar month or \$390.00 per week - \$1,950.00 – which I consider to be a fair and reasonable period for the arranging and carrying out of the works and the reletting of the premises.

Re-leasing fee \$686.40

- 43 A releasing fee is one of the ongoing costs incurred by landlords. The tenants did not leave before the expiration of their lease, and in such circumstances I cannot be satisfied this is not a cost Stubbs would not have otherwise incurred as a landlord. This claim is dismissed.

Amount claimed by way of counterclaim

- 44 The second respondent – Lucas Alliance - has claimed payment by way of counterclaim of \$7,661.76 which it alleges is the outstanding balance including variations. Mr Williams has not claimed a set-off or claimed payment by way of counterclaim, in the alternative. Notwithstanding that I have found the contract was entered into with Mr Williams in his personal capacity, and the company therefore has no standing to bring this counterclaim it is appropriate to consider its merits. As has been discussed above, the contract does not comply with the provisions of the *DBC Act* and, as such, is illegal and unenforceable. It is true that where there is an illegal contract a builder may bring a quantum meruit claim - a claim for payment of the reasonable value of the works. The onus is on a builder to prove the nature and extent of the work carried out, that it was performed in a proper and workmanlike manner and the reasonable value of the works performed. As Warren CJ said *Kane Constructions Pty Ltd v Sopov* [2005] VSC 237

In the assessment of a claim brought on by quantum meruit, a court is usually concerned to assess that which is fair and reasonable for the value of the work performed. The assessment of a reasonable sum in the context of a building case would usually be to assess the degree of completion of the work and the value of the work so completed. There is an obligation on the party claiming on a quantum meruit in a building context to establish the work performed and its value and, further, that it was performed with proper skill. ... [867, omitting citations].

- 45 It is impossible on the evidence before me to be certain as to what works were actually carried out and charged for by Mr Williams. He tendered quotations totalling \$30,210.15. I have before me invoices totalling \$44,300.36 (some of which were tendered by Stubbs and the invoice for the blinds which was tendered by Mr Williams). Payments of \$36,638.60 have been paid by Stubbs leaving a balance of \$7,661.76 – the amount claimed by Mr Williams.
- 46 I do not have before me tax invoices reflecting what Mr Williams says is the actual contract price as varied. I note that Stubbs' solicitors have been seeking tax invoices for the outstanding balance, and details of the calculation of any variations since November 2005. A summary of the balance claimed to be outstanding was provided to Collins Simms by Mr Williams on 12 May 2005 and a further copy provided by his solicitors to Stubbs solicitors on 16 December 2005. The balance under the heading 'Summary of outstanding and additional' is \$8,300.60 including GST which is not the same as the amount claimed by way of set-off and counterclaim. It is unclear which items are outstanding and which are additional. It is impossible to reconcile the Summary and the tax invoices, and surprisingly no attempt has been made by Mr Williams to do so.
- 47 I suspect that much of the confusion arises because, rather than issuing tax invoices clearly referable to specific quotations, each item supplied, or work carried out, has been itemised individually and payments applied as lump sum amounts against each of the invoices. In some instances, the invoiced amount for a particular item differs from that quoted. The amount of each payment applied against the invoices is difficult to reconcile with the actual payments which Stubbs says it has made – although both agree payments totalling \$36,638.60 have been made. Mr Williams was unable to identify the particular items on each of the invoices which he says are outstanding.
- 48 Stubbs tendered a schedule of payments for the works to units 1 and 2 as follows:

<u>Payment Date</u>	<u>Amount</u>
28/01/2005	\$ 8,000.00
31/01/2005	\$ 4,000.00
02/02/2005	\$ 4,000.00
16/02/2005	\$ 5,000.00
07/03/2005	\$10,000.00
01/04/2005	\$ 5,000.00
11/01/2006	<u>\$ 638.60</u>
	\$36,638.60

On the invoices I have before me payments have been applied as follows:

<u>Invoice Date</u>	<u>Invoice No:</u>	<u>Payment applied</u>
22/02/2005	101396	\$17,000.00
22/01/2005	101397	\$14,000.00
18/04/2005	101400	<u>\$ 5,000.00</u>
		\$36,000.00
Paid 11/01/2006		<u>\$ 638.60</u>
		\$36,638.60

- 49 As noted above, to succeed on a quantum meruit claim the claimant must prove the reasonable value of the work carried out, and that it has been carried out in a proper and workmanlike manner. It seems that whilst Mr Williams may have been asked to do some additional works, these were performed on an ad hoc basis with no quotations or any indication of the likely cost of the works. In considering the invoices not only is it almost impossible to identify the additional items it is impossible to identify the hourly labour rate, or the number of hours applicable to any of the works. Copies of relevant invoices for the purchase of any supplied items are not before me. I am unable to identify what, if any margin, has been added to the price paid by Mr Williams for any such item, and if a margin has been added, determine whether it is reasonable in all the circumstances. Mr Williams has failed to comply with s38 of the *DBC Act* which essentially requires that unless a variation is in writing, signed by the owner and the builder, the builder is unable to claim payment for it unless the tribunal is satisfied that the builder 'would suffer significant or exceptional hardship' if payment were not ordered.
- 50 I am unable, on the evidence before me, to determine a reasonable value for any additional works which may have been carried out. Neither Mr Williams nor Lucas Alliance have made any attempt to reconcile the accounts and I have been unable to do so. The counterclaim, even if properly brought by Lucas Alliance, is dismissed.

Conclusion

- 51 I will therefore order Mr Williams to pay to Stubbs the sum of \$8,128.20 as follows:

• Refund of amount paid for kitchen	\$4,248.20
• Removal and retiling of splash back	\$ 350.00
• Bathroom tiling	\$ 500.00
• Compensation to the tenants	\$1,080.00
• Loss of rent	<u>\$1,950.00</u>
	\$8,128.20

- 52 I will reserve the question of costs with liberty to apply, being mindful always of the provisions of s109 of the *VCAT Act*.

DEPUTY PRESIDENT C. AIRD
