VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. D69/2014

CATCHWORDS

Domestic Building Contracts Act 1995 – architect administered contract – role of architect – tender document – not part of contract – repudiation – conduct amounting to – acceptance of repudiation cannot be withdrawn -s.128 – fixture shown in contract and specification included unless excluded – meaning of "shown" – must be shown with sufficient particularity – standard of work required – uncertain term – whether meaning can be ascertained – approach – extension of time by Tribunal – basis of – when granted

APPLICANT	TCM Building Group Pty Ltd (ACN 139 290 618)
RESPONDENT	Kristine Mercuri
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	17 November 2014 to 3 December 2014 Submissions received by 20 March 2015
DATE OF ORDER	1 July 2015
CITATION	TCM Building Group Pty Ltd v Mercuri (Building and Property) [2015] VCAT 983

ORDER

1. Direct that the parties file and serve draft orders that should be made consequent upon the attached reasons for decision and any further submissions related to the amount paid and the total variations allowed.
2. Upon consideration of the said drafts and submissions, final orders will be made..

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Mr G. Hellyer of Counsel
For the Respondent	Mr B. Reid of Counsel

REASONS

Background

1. The Respondent ("the Owner") is and was at all materials the Owner of two adjoining pieces of land in South Yarra. Until the work which is the subject of this proceeding was carried out, there was an old two storey house erected on each of the two pieces of land.
2. The Respondent ("the Builder") is and was at all material times carrying on business as a builder.
3. In February 2010 the Owner's architect, a Mr Orosvary ("the Architect") asked the Builder's director, Mr Maraffa, on behalf of the Owner, to submit a tender to partially demolish the two houses and reconstruct them into a single two storey house ("the House") in accordance with plans that the Architect had prepared.
4. On 13 April 2010 the Builder submitted a tender ("the Tender Document") to carry out the work that was identified in the Tender Document for a price of $1,395,900. Further discussions ensued as a result of which the scope of works was amended and the price was increased to $1,425,370.

The Contract

5. A building contract in the form of ABIC SW-1 2002 Simple Works Contract was signed by the parties on 24 June 2010, which, together with documents incorporated with it, I shall call "the Contract".
6. By the terms of the Contract an employee of the Architect, a Mr Teata Mani ("Mr Mani"), was appointed to supervise the construction and to exercise the powers conferred upon the Architect by the provisions of the Contract.
7. Clause B2 and Schedule 3 of the Contract states that the order of precedence of the contract documents was:
   (i) "the contract", which seems to mean the form of ABIC SW-1 2002 Simple Works Contract the parties had signed;
   (ii) the Drawings;
   (iii) "the specifications dated 18 February 2010 with Section C0900, addenda and modifications following a meeting on 28 May 2010 to be included ie 43 items with additional costs $29,470.00";
   (iv) the Structural Drawings and computations;

(v) Mechanical 0801/Mech.01."

8. All of these documents are part of the Contract and so I think that the words "the contract" in Schedule 3 must be taken to mean the contract document. The reference to the 43 items with additional costs $29,470.00 is the additional work following the tender that brought the Contract price up to $1,425,370.

9. Reference was made on a number of occasions to the Builder's tender for the work. It was sought to demonstrate that, in arriving at the tender price, the Builder had allowed particular quantities for the work and materials expected to be required for the project. The purpose of these referrals was to demonstrate that the Builder had not expended the budgeted quantity on some items and so, it was argued, the Owner was entitled to a credit for the unexpended amount.

10. Although the contract price was the tender price adjusted to take account of other matters, the Tender Document was replaced by the Contract and those documents that form the Contract did not include, or purport to incorporate, the Tender Document so as to give it any contractual force.

11. Mr Reid submitted that I am entitled to look at the Tender Document in order to ascertain what is included in the Contract. I do not accept that submission. If there were any ambiguity in the contract documents it might be permissible to look at the surrounding circumstances in order to resolve that ambiguity, but that would be for the purpose of interpreting the Contract, not ascertaining the rights of the parties. Not being a contractual document, the Tender Document cannot add to, subtract from or vary the documents that do form the Contract.

Practical completion

12. Practical completion of the work was achieved on 30 March 2012 at which time the Owner took possession of the House.

13. The Builder has since made two claims for payment namely, a progress claim called Progress Claim No. 13, and the final claim, neither of which has been paid by the Owner.

14. The Owner alleges that the works are defective and incomplete in numerous respects and also claims to be entitled to various credits. The Owner also claims to be entitled to substantial liquidated damages for late completion.

15. The dispute was not able to be resolved and these proceedings were issued by the Builder to recover the amounts claimed to be due. The Owner has counterclaimed with respect to the claims that she makes.

The hearing

16. The matter came before me for hearing on 17 November 2014 with 12 days allocated. Mr G. Hellyer of Counsel appeared for the Builder and Mr B. Reid of Counsel appeared on behalf of the Owner.

17. On behalf of the Builder, evidence was given by its Director, Mr Maraffa, and the site supervisor, Mr Chamberlain. Expert evidence was given by a Building Expert, Mr Robert Lees.

18. On behalf of the Owner I heard evidence from the Owner herself, her husband, Mr Vince Mercuri, the Architect and his employee, Mr Mani. Expert evidence was given by a Building Expert, Mr Tom Casamento.

19. A witness statement was received from an architect, Mr Quigley, but he was not required for cross-examination and his statement was admitted by consent. It related to the manner in which the prime cost and provisional sum figures were calculated, but Mr Hellyer conceded that the manner in which they had been calculated was wrong and so Mr Quigley was not required to be called.

20. Most of the evidence to substantiate the Builder's case was given by Mr Chamberlain who was the supervisor responsible for the construction. A great deal of that evidence related to calculations of amounts due to the Builder and allowances due to the Owner. He has provided supporting documents for the figures he has calculated and explained how he has arrived at them. I was able to follow his evidence concerning his calculations and it appears that he was very careful in his costing of the work and the variations and appears to have been fair in the allowances he said should be made to the Owner. Although the basis upon which the prime cost and provisional sum figures were formerly calculated was wrong, that is now acknowledged and has been corrected. Otherwise, except in a few minor matters I have accepted his calculations.

21. I was less impressed by the evidence of Mr Mani and the Architect who do not seem to have approached the important role of administering the construction in accordance with the terms of the Contract and with the required independence.

22. Both experts had provided reports and Mr Lees and Mr Casamento gave their evidence concurrently. Mr Casamento's report seems to be based to some degree upon an earlier report by a Mr Tueno ("the Tueno report"). Mr Tueno was not called and his report was not relied upon but there was some reference to it during the hearing.

23. I attended the site with the parties and their experts and spent the whole day examining the defects alleged. During the course of the inspection I climbed onto the roof to view flashings which were alleged to be defective and some other matters.

24. On the following day the concurrent evidence of both experts took the whole day. The hearing then proceeded until 3 December 2014 by which stage the evidence was completed.

25. The proceeding was then adjourned for the hearing of oral submissions on Friday 20 March 2015 and directions for the filing and service of written submissions in the meantime were given.

26. The submissions filed and served were very lengthy and, with answering submissions, rejoinders and annexures, amounted to several hundred pages.

27. Although I am indebted to Counsel for the thoroughness with which these have been prepared it has naturally taken me a great deal of time to properly examine them and consider the points made, to prepare these Reasons and determine the multitude of issues raised and do justice to all of their hard work and to the parties..

28. The hearing was conducted with equal thoroughness. There were a number of issues that were bitterly fought but upon which, ultimately, nothing turns. For example, by Clause C2 of the Contract, the Owner was to hold the 5% retention including interest earned on it in a separate bank account designated as a trust account. Despite numerous complaints by the Builder to the Architect enquiring when amounts withheld with respect to Progress Claims 1 and 2would be paid into the account, she did not do so and no satisfactory explanation was given for this breach. However, no relief appears to be sought with regard to it. Eventually the money was paid in but that should have occurred much earlier.

29. Further, by the terms of the Contract the Builder was entitled to receive one half of the retention monies upon achieving practical completion, which occurred on 30 March 2012. The Owner did not release that one half of the retention monies until almost three months later. She gave as her reason the fact that she wanted the Builder to complete a defects list she had prepared. She was not entitled to delay the release of one half of the retention monies on that account and her conduct again is unsatisfactory.

30. Mr Reid submitted that her conduct should be viewed in the context of there being serious defects in the work at the time but that is not a reason to deny a substantial payment to which the Builder was clearly entitled.

Contractual provisions as to price and variations

31. Payment of the Contract price is governed by Section N of the Contract.

32. The Contract provided for progress claims to be made, and upon certification by the Architect they were to be paid by the Owner, less a 5% retention. The retention was to be paid into a special account and retained there in accordance with the terms of the Contract.

33. Clause N3 provides that the Builder may submit to the Architect one claim for a progress payment each month. Each claim must set out the Builder's evaluation of the work completed and the value of materials and equipment delivered to the site for incorporation in the works. There are various other requirements.

34. By Clause N4, within 10 working days after receiving a claim for a progress payment, the Architect must assess the claim and issue to the Builder and the Owner a certificate setting out any payment due to either. In making the assessment the Architect is to take account of any adjustments to the Contract price made since any previous assessment.

35. By these provisions, the payment is not related to a percentage of the Contract price or a particular portion of the work but rather, it is for the value of the work done and the materials that have been brought to the site for incorporation into the works since the last payment was claimed.

36. By Clause N4.4, if the Architect reasonably needs additional information to assess the claim he must promptly ask the Builder for it or, if that information is needed only to assess part of the claim then he must assess the rest of the claim.

37. By Clause N5, upon receiving a certificate from the Architect, the Builder must prepare a tax invoice equal to the value of the certificate and present both documents to the Owner.

38. By Clause N6.1 and Item 4 of Schedule 1 of the Contract, the amount stated as owing in any certificate must be paid within 7 days.

Variations

39. Variations of the scope of works are dealt with in Section J of the Contract.

40. The Architect may give the Builder a written instruction for a variation any time before the date of practical completion or the Builder may request an instruction from the Architect if it considers that a variation may be required.

41. By Clause J2, if the instruction will not result in an adjustment of the Contract price or require an adjustment to the date of practical completion the Builder must carry out the instruction promptly and it is not required to obtain an instruction to proceed and it is not entitled to any adjustment to the Contract as a result of carrying out the instruction.

42. Otherwise, the Builder is required to notify the Architect within 20 working days of the adjustment to the price or the date of practical completion that will be caused by carrying out the variation and the Architect under Clause J3 must then instruct the Builder whether or not to proceed.

43. If that instruction to proceed includes acceptance of a quotation by the Builder for the additional work then the Contract price will be adjusted in accordance with the quotation.

44. Otherwise, the Builder is entitled to make a claim to adjust the Contract in accordance with Section H. That procedure involves the Builder making a claim to adjust the Contract and the Architect assessing it. Following that assessment the Architect adjusts the Contract price.

45. By Clause H6, if the Builder has not made a claim to adjust the Contract in relation to any change which results from complying with any instruction given under Section J for variation of the works the Architect may adjust the Contract at any time up to the issue of the final certificate.

The Progress Claims made

46. During the course of the works, the Builder submitted 12 progress claims, each of which was assessed by the Architect and paid. These claims incorporated within them numerous variations. Whether the above procedure was followed strictly does not appear from the evidence.

47. There appears to have been no dispute concerning payments until the Builder submitted Progress Claim 13. This claim was never assessed by the Architect or paid, nor were any variations paid after the payment of Progress Claim no. 12. Similarly, the final claim has also not been paid.

48. Since then, Mr Chamberlain has recalculated a number of figures and adjusted the amounts which form the Builder's claim in this proceeding, with allowance for certain credits due to the Owner. The Owner disputes these calculations.

49. I will deal first with the non-payment of Progress Claim 13.

Progress claim 13

50. Progress Claim 13 was dated 30 May 2012 and claimed the sum of $126,871.47. The Builder forwarded it to the Architect by email on 1 June 2012.

51. By this stage, practical completion had been reached and the Owner had taken possession of the House. As a consequence of practical completion having been reached the Builder was entitled to the release of half of the retention sum and this was requested in the 1 June email which forwarded Progress Claim 13. The Builder enclosed a withdrawal form for signature by the Owner to withdraw the money from the retention account.

52. The amount claimed in Progress Claim 13 is set out in detail in the document and was calculated as follows:

"This stage	$108,534.37
Variations	$ 18,337.10
Amount now due and payable	$126,871.47

which includes GST of $11,533.77"

53. At the foot of the progress claim there is the following summary under the heading: "Contract Summary – Prior to this Invoice".

"Original Contract	$1,425,370.00
Approved variations	$80,530.47
PC adjustments	-$75,692.29
Contingency	-$15,000.00
New Contract price	$1,415,208.18
Retention to date	$72,462.06

Claimed variations	$62,193.38
Total claimed	$1,216,074.66
Total received	$1,216,074.66"

54. It will be apparent from this contract summary that:

    (a) of the adjusted contract price, which is said to be $1,415,208.18, only $1,216,074.66 had been claimed; and

    (b) by progress claim 13, only a further $126,871.47 was being claimed.

55. That left a balance of the adjusted Contract price yet to be claimed of $72,262.05, subject of course to any further adjustments to the Contract price that there might be. It was therefore quite apparent that this was not a final claim but was a progress claim. Indeed, the document is headed "Progress Payment Claim – Tax Invoice".

56. Attached to Progress Claim 13 is a spreadsheet of 2½ pages setting out figures intended to support the claims that made up the amount sought.

57. On 3 July 2012 the Builder sent an email to the Architect pointing out that it had been over four weeks since Progress Claim 13 had been submitted. Further figures were sent to the Architect by the Builder on 10 July 2012 although these do not appear to have been requested.

58. On 12 July 2012 Mr Mani sent the following email to the Builder:

> "I have worked on the claim 13 and the retention but unfortunately I have to verify what's credit to the client and what had to be paid to you before I approve the claim. Furthermore can you please advise us if all defects are rectified."

59. On 18 July 2012 Mr Mani suggested a site meeting to discuss alleged defective work. Some further information was provided to the Architect by the Builder but the claim was still not assessed.

60. Progress Claim 13 was re-worked by the Builder on two subsequent occasions.

Progress Claim 13B

61. On 26 September 2012 Mr Chamberlain forwarded to the Architect an amended claim entitled "Progress Claim 13B". It is apparent on its face that this was intended to replace Progress Claim 13. It claimed for that stage $165,275.04 plus variations of $3,952.92, making a total of $169,227.96. At the foot of this amended claim there is the same Contract summary as before and attached to the amended claim is a lengthy spreadsheet of supporting figures.

62. On 7 September 2012, the Architect wrote to Mr Chamberlain referring to a site meeting that had taken place on that day between the Architect, the Owner and Mr Mani "…to verify the Builder's claim in progress certificate (sic.) 13, variations claimed to date, PC amounts in contract and contingency prior

to finalising the Builder's payment." Below the opening paragraph the Architect sets out a list of 18 credits claimed, a figure for PC adjustments that is not detailed and a figure for contingency that is not explained. These are added up to $135,698.70. A number of questions are then put to the Builder.

63. Mr Reid submitted that this letter was an assessment by the Architect of Progress Claim 13 or 13B but I do not accept that submission. There is no mention in this letter of any of the content of the progress claim and not even the suggestion of any assessment of its content. It is just a list of the Owner's own claims followed by some requests.

64. On 28 September 2012 the Architect directed the Builder to attend to a number of alleged defects and told the Builder that he would check the claim and get back to him as soon as possible. He also says that the Owner and her husband will send to him a list of what they consider to be credits due.

65. On 3 October 2012 the Builder provided further information supporting the figures but the Architect still failed to assess the claim.

66. Thereafter the Builder focused on attending to the matters complained about by the Architect and the Owner and in the process, it carried out a considerable amount of further work.

Progress Claim 13C

67. On 14 December 2012, Mr Chamberlain forwarded a further revised Progress Claim 13 to the Architect by email seeking payment in the sum of $163,390.47. This was numbered Progress Claim 13C and again, it is apparent on its face that it is intended to replace the two earlier iterations of Progress Claim 13

68. This amended claim seeks payment of an amount of $159,437.55 plus variations of $3,952.92, making a total of $163,390.47.

69. The Contract summary at the foot of this claim is as before and the amended claim is supported by a spreadsheet of figures.

70. As was the case with the previous two iterations of Progress Claim 13, this claim has never been assessed and remains unassessed by the Architect. The Builder now seeks an order for payment of the amount sought by it. It also seeks interest on the amount due.

71. Mr Reid submitted that the Builder was not entitled to make progress claims 13B and 13C because no further work had been done since the making of the previous claim. However the claims are not cumulative. They are resubmissions of the same claim. Since the earlier claim in each case was not assessed. I see no reason why a claim that was not assessed could not be withdrawn and re-submitted in an amended form. I am satisfied that Progress Claim 13C was a valid claim..

72. Mr Reid argued that Progress Claim 13C superseded the others and that the claim now made, if allowable, is under Claim 13C. I think that is right. Clearly, when 13C was issued, the Builder was not continuing to assert a claim for payment of the amount sought in either of the two earlier iterations of Progress Claim 13. The making of Progress Claim 13C must therefore be interpreted as an abandonment of the two earlier claims.

Assessment of Progress Claim 13

73. By Clause N4.1, the Architect was required to assess a claim for a progress payment within 10 working days of receiving it. The reason advanced by the Architect and Mr Mani for not assessing Progress Claim 13, in any of its three iterations, within the required period or at all was that they thought that it was a final claim. I find it impossible to believe that they really thought that Progress Claim 13 was the final claim. The Architect has had many years experience and Mr Mani, although not an architect, is also experienced in administering building contracts. Any such person reading the document with any care at all would see at once that it was not a final claim. Moreover, from the correspondence it appears that the Architect, Mr Mani and the Owner were all aware that the Builder asserted that this was not its final claim.

74. Mr Reid submitted that, in order to assess Progress Claim 13, the Architect was required to assess the defective works, given that the work had reached Practical Completion.

75. Matters to be considered by the Architect in assessing a progress claim are listed in Clause N4.2 and the cost of rectifying defects is included. However the claim must still be assessed within the 10 day period and the Architect can call for information, make a partial assessment or do the best he can on the material that he has. The assessment is only provisional and any necessary adjustments can be taken up in the assessment of the Final Claim. A ten day period is provided in the form of contract because prompt processing of progress claims in a building project is essential in order to provide the cash flow a builder needs to carry out the work.

76. It is apparent from the correspondence that, after the claim was made, the Architect and Mr Mani were treating it as though it was a final claim and instead of assessing it as a progress claim, they were attempting to reconcile the whole of the respective claims of the parties. That was not the Architect's task when assessing a progress claim.

77. For example, an email sent by Mr Mani to Mr Chamberlain dated 8 October 2012, said:

> "I spoke to Vince this morning and he mentioned that they will not release any fund unless all defects and incomplete works are done. They have a list of items that they will send to me by the end of the week to clarify some of the credits that are due to them and items claimed incorrectly."(sic.)

78. Under the terms of the Contract, it was not for the Architect to accept instructions from the Owner or her husband about whether or not she would "release funds". It was the duty of the Architect to assess progress claims that were made by the Builder in accordance with the Contract and issue a certificate of his assessment. It would then have been the duty of the Owner and the Builder to abide by that certificate. What this email demonstrates is either the ignorance of Mr Mani of the terms of the Architect's own form of contract and the manner in which it operates or an abdication of the Architect's responsibility to assess the claim.

79. By Clause A9.1, the fact that a claim is not assessed does not mean that it is accepted as valid. If a claim is not assessed, the Builder's remedy is, ultimately, to suspend work. (Clause N8.1).

Termination/repudiation

80. Mr Chamberlain said that, in a discussion on site in December 2012, the Architect told him that if the Builder built a new crossover to the garage in accordance with the Architect's design, he would get paid for that as a variation and that he would get his claim paid prior to Christmas. The Builder then built the crossover but was not paid for it, nor was any of the amount sought in Progress Claim 13C paid. I accept that evidence.

81. In the week before Christmas 2012 the Owner and her husband contacted their bank and requested that $75,000.00 of the loan funds available for the construction be released to the Builder. They went away on holiday almost immediately afterwards expecting that the money would be paid but it was not. Apparently a problem arose because their personal banker was also away. When Mr Chamberlain and Mr Maraffa returned in January they found that no payment had been made and the relationship between the parties then became worse. If the non-payment was due to a mistake by the bank it was not rectified by the Owner and her husband when they returned from holidays. It would seem that at that time they no longer wished the payment to be made.

82. By a letter dated 21 January 2013, the Builder purported to suspend work for non-payment. On 1 February 2013, the Builder's solicitors wrote to the Owner, referring to non-payment of Claim 13C and the Builder's suspension of work on 21 January 2013 and alleged that the Owner had repudiated the Contract. The letter purported to accept the alleged repudiation and bring the Contract to an end.

83. The Owner contends that the Builder was not entitled to determine the Contract and that the service of the notice was itself an act of repudiation but her position is that she never accepted the repudiation and that the Contract remains on foot.

Was the Contract repudiated by the Owner?

84. In order for me to find that the Owner repudiated the Contract I would need to be satisfied that she had shown by her conduct an intention to be no

longer bound by it or that she would fulfil it only in a manner substantially inconsistent with her obligations (see Cheshire & Fifoot *Law of Contract* 9th Australian Edition para 21.12 and the cases there cited).

85. In *Shevill v. Builder's Licensing Board* [1982] HCA 47 Wilson J sad (at para.8):

> "Repudiation of a contract is a serious matter and is not to be lightly found or inferred: *Ross T. Smyth & Co., Ltd. v. T.D. Bailey, Son & Co*. (1940) 3 A11 ER 60, at p 71. In considering it, one must look to all the circumstances of the case to see whether the conduct "amounts to a renunciation, to an absolute refusal to perform the contract*": Mersey Steel and Iron Co. v. Naylor, Benzon & Co.* (1884) 9 App Cas 434, at p 439."

86. The conduct alleged to be repudiatory must be looked at objectively. In *Laurinda Pty Ltd v. Capalaba Park Shopping Centre* [1958] HCA 23, Brennan J. said (at para 14):

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

87. The acts of repudiation relied upon are set out in the letter as follows:

> "Your failure to meet your obligation under the building contract including in particular, inter alia, (sic.) a failure to pay the progress claim 13 due to our client and in relation to ensuring the proper administration of the contract by your appointed architect…"

88. The obligation to pay a progress payment does not arise until the claim is assessed, a certificate is issued and it is delivered with a tax invoice to the Owner (Clause N6.1). The failure to pay the progress claim where no assessment had been made and where no certificate had been issued could not therefore amount to repudiatory conduct.

89. The second ground alleged is a failure to ensure the proper administration of the Contract by the Architect. Mr Reid said that the Owner acted upon the advice of the Architect and there is some evidence that that was the case.

90. By Clause A6.3 she was responsible to ensure the independence of the Architect in his role as assessor and, insofar as she or her husband expressed an unwillingness or otherwise to pay that might be construed as an interference with that and so a breach of Clause A6 but the evidence about that is not very clear and falls short of establishing that the Owner prevented the assessment of the claim.

91. The real complaint was that Progress Claim 13, in any of its three iterations, was not assessed.

92. By Clause A6.2, the Architect was to be independent of the Owner in making an assessment and she was not able to direct him to make it. Consequently, a failure of the Owner to direct the making of an assessment and the issue of a certificate cannot be said, objectively, to evince an intention on her part no longer to be bound by the Contract.

93. For these reasons I am not satisfied that the repudiatory conduct alleged in the letter of 1 February 2013 is established and so I find that the letter was not effective to terminate the Contract.

94. Mr Reid submitted that the letter itself amounted to an act of repudiation by the Builder but it does not seem to me to have evinced an intention by the Builder no longer to be bound by the Contract. In any case, it is unnecessary to determine the point because, even if it had been, the Owner by her solicitors elected not to accept it so as to bring the Contract to an end. Once an election to affirm the contract is made, the right to accept a repudiation is lost. In the meantime, an unaccepted repudiation of a contract is said to be "a thing writ in water and of no value to anybody" (*Howard v Pickford Tool Co Ltd* (1951) 1 KB 417 at 421 per Asquith LJ.

95. A “without prejudice” meeting took place on 22 March 2013 between Mr Maraffa, Mr Chamberlain, the Owner and the solicitors at which extracts from the Tueno report were produced and discussed.

96. By letter dated 27 March 2013, the Builder’s solicitors purported to “withdraw” the notice of termination and expressed a willingness to perform all of its obligations under the Contract. Further correspondence then ensued as a result of which further work was done.

97. As I pointed out during the hearing, if the Contract had been terminated by the Builder’s solicitor’s letter of 1 February 2013, it would thereupon have ceased and the purported withdrawal of the acceptance by the Builder of the Owner’s alleged repudiation could not of itself have brought it back into existence.

Quantum meruit

98. There was an alternate claim in quantum meruit that, Mr Hellyer indicated in his opening, was pleaded as a “safety net” . Such a claim could only have been maintained if the Contract had been validly terminated by the Builder’s solicitor’s letter of 1 February 2013 and if the Contract were still no longer in existence. If there is a valid contract in existence, there can be no quantum meruit claim (see *Pavey & Matthews Pty Ltd v Paul* [1987] HCA 5). The claim must be brought under the Contract.

99. In any case, the evidence and the bulk of Mr Hellyer’s submissions were focussed on the claim under the Contract. That is the Builder’s primary claim and presumably the “safety net” of a quantum meruit was to be relied upon only if I should find that the Contract were no longer in force. However, I must find that the Contract is still in force and so the alternate claim in quantum meruit is not maintainable.

Areas of dispute

100. Since the Contract was not terminated, the dispute falls to be determined in accordance with its terms. The four areas of dispute relate to the variations claimed, the credits that the Owner claims are due to her, the adjustment of the provisional sum and prime coast items and the extent of the defective works.

Variation 30

101. This related to a change of the barbecue design requested by email from the Architect on 18 July 2011 with an accompanying plan. The confirmation to proceed with this variation is contained in an email from Mr Mani on 14 September 2011. The calculation of the additional charge is set out in paragraphs 40 and 41 of Mr Chamberlain's witness statement.

102. The Owner contends that the credit for the brickwork should be $2,221.32 instead of the $1,605.00 allowed by the Builder. She also says that because the paling fence was only one sided, the charge for the fence should be halved. The former contention relies upon the Owner's own assessment of brick cost calculated on an assumed cost per square metre, whereas the variation figure was calculated by Mr Chamberlain on the number of bricks and other materials used and the cost of laying them. The Builder's charge is what it actually had to pay its sub-contractor for constructing the fence.

103. Since Mr Chamberlain is qualified to assess the cost of building work and the Owner is not, I think that his figures are more likely to be right I accept his evidence that the charge of $1,471.00 for the variation is fair and reasonable and it will be allowed.

Variation 31 - Additional tiling costs

104. The amount of $6,275.00 claimed by the Builder by this variation was paid by the Owner and so it is no longer part of the Builder's claim.

Variation 36 - Additional of electrical costs

105. An additional $2,159.85 (including margin and GST) is claimed by the Builder with respect to additional electrical work arising from numerous revisions made to the electrical drawings and additional work requested by Mr Mani. The Owner said that these works were not a variation.

106. In his witness statement Mr Chamberlain gave a breakdown of what was claimed by reference to the electrician's quotation, deducting certain items which he said were within the original scope of works. No similar exercise was undertaken on behalf of the Owner.

107. The quotation no. 3615 was given on 24 October 2011 from the Builder's electrician, T.G. Pell Electrical. When one adds onto the proportion claimed, the margin plus GST, the amount becomes $2,159.85 which is the amount claimed. That will be allowed.

Variation 41 - Silver birch stain to floor and sanding and polishing

108. According to Mr Chamberlain, he originally thought that the sanding and polishing of the floors was included in the Contract price but it does not appear in any of the Contract documents. The Owner requested that the floors in the northern building be sanded and coloured with a proprietary product.

109. When the Builder sanded the floors they were found to be affected by borer. It was agreed that the Builder would replace the affected floorboards which it did. It then subcontracted the staining of the floor to the supplier of the product since it had no experience in using it.

110. The amount sought of $4,235 is made up of the sub-Contractor's charge plus the Builder's margin and GST.

111. The Owner said that this should be a credit because the Contract required the floor to be sanded and polished. She refers to the Builder's "tender breakdown" and "cost centre" but these are not contractual documents. No such provision in the Contract has been identified.

112. An Invoice from the Contractor, that the Builder paid, charged for rough sanding 88 square metres. Mr Reid submitted that, when one scales the drawings, the area to be sanded and painted was only 36 square metres.

113. That was not put to Mr Chamberlain and so there has been no opportunity to him to offer an explanation. There is no expert evidence about the area that was rough sanded. I cannot deal with this in final submissions. The state of the evidence is that the Builder employed this contractor to carry out the work and the Invoice relied upon has been known to the parties as a discovered document since well before the hearing.

114. The amount claimed will be allowed.

Variation 43 - Telecommunications from pit to House

115. The Builder claims $605.00 for connecting the telecommunications from the pit to the House. In page 00870 of the specifications, telecommunication services are stated to be separate Contracts and not within the scope of the Contract.

116. The Owner referred to the requirements in Section 16350 of the Specifications but there is nothing there about telecommunications from the pit to the House. The Builder's task under the Contract was confined to the items listed.

117. The cost claimed is $550 and the invoice from the Builder's supplier in that sum is reproduced. With the Builder's margin that amounts to the claim of $605.00 which will be allowed.

Variation 44 - Door Grille

118. Mr Chamberlain said that the Contract documents did not require the provision of a door grille which was provided at a cost of $151.25 pursuant to request by Mr Mani by email of 6 July.

119. The Owner said that a grille was included and referred to Section 16350 of the Specifications. The grilles there referred to are said to be "Custom return air Grilles" and are in the section dealing with refrigerated air conditioning. These are return air grilles for an air conditioning system, not door grilles. The amount of the claim will be allowed.

Variation 45 – Towel rail

120. All bathroom fittings and accessories were to be supplied by the Owner. According to Mr Chamberlain's evidence the Owner asked him to supply a towel rail and he did so. The cost was $320.00 and an invoice in that sum has been produced. With Builder's margin and GST the amount claimed becomes $387.20.

121. The Owner said that this was charged for and paid previously but does not say when nor does she provide any evidence of payment. The Builder's claim will be allowed.

Variation 46 - Render inside garage

122. Mr Mani requested the Builder by email to render the inside of the garage. The cost to the Builder was $1,400.00 and an invoice in this sum has been produced. With the Builder's margin of 10 percent and GST, the claim amounts to $1,694 instead of $1,754.50 previously claimed by the Builder. The lesser sum will be allowed.

Variation 47 - Replacing coping tiles

123. Coping tiles were laid by the Builder around the swimming pool in about December 2011.

124. Mr Chamberlain said that the coping tiles had been laid by the Builder's landscaper early at the request of the pool builder. He said that the spacing of the tiles was between 6mm and 7mm, which is the normal spacing used. He said that no complaint about the laying of these tiles was made by the Architect and that the tiles were only re-laid because the Owner's landscape designer decided that she wanted the grout spacing of the external tiles to be the same width as the grout between the internal tiles. According to Mr Chamberlain's evidence, in about January 2012 the Owner or her landscape designer spoke directly to the tiling contractor and instructed him to remove and replace these coping tiles and the tiler did so. The coping tiles were re-laid to achieve this effect.

125. The Builder was not consulted before the instruction was given to its sub-contractor nor did it consent to him carrying out the work. Nevertheless, it has paid the sub-contractor's bill of $500 which, with GST and margin amounts to $605.00.

126. The Owner said that the tiles were defectively laid in the first place. Although she does not specifically say so, her complaint seems to be that they were laid too far apart. I am not satisfied that they were, because there is no evidence of any instruction to the Builder that the grout spacings were to match those of the internal tiles and Mr Chamberlain's evidence, that 6mm to 7mm grout spacings for such external tiling is usual, was unchallenged.

127. If the Owner really considered that the laying of the tiles was defective, complaint should have been made to the Architect and, if he had agreed with the Owner, a direction could have been given to the Builder to rectify it. Instead the Owner took it upon herself to instruct the tiler to do this work and the Builder has had to pay for it. The variation will be allowed.

Variation 48 - Block off walkway

128. The Builder was instructed by Mr Mani to install a section of blueboard to the garage wall and paint it in order to cover up pipe work which ran from the solar heating on the garage roof to the pool equipment room.

129. The instruction was given by an email dated 17 February 2012 and is also in the minutes of a meeting which took place on that date.

130. The Builder has charged an amount of $279.50 for this work and the break-down is given in paragraph 61 of Mr Chamberlain's witness statement. With Builder's margin and GST the amount becomes $338.20 rather than the sum of $338.80 claimed.

131. The Owner disputes this amount and says that the work should have taken no longer than an hour but she has provided no proper costing of labour and materials. I will allow Mr Chamberlain's lesser sum of $338.20.

Variation 49 - Plaster inside fireplaces

132. Mr Chamberlain said that he was requested by Mr Mani in February 2012 to apply hard plaster to the inside of all fireplaces after first cleaning off soot and other material from the fireplaces.

133. Mr Reid referred to the other claims relating to the fireplace insert but those are dealt with separately in these reasons. He also suggested that there were only three fireplaces plastered. The invoice from the Builder's sub-contractor for the work stated that there were four but whether there were three or four, the invoice was for $1,500.00, and that was what the Builder was charged. With margin and GST that becomes $1,815.00 which is more than the amount claimed of $1,694.00. Since only $1,694.00 is claimed that amount will be allowed.

Variation 50 - Bluestone hearths

134. Mr Chamberlain said that Mr Mani asked the Builder to supply bluestone tiling to the hearths of the existing fireplaces. The Builder did that, using off-cuts, at a cost of $440, being 9 hours labour at $45 per hour plus $35 for materials, plus margin and GST. With margin and GST it becomes $532.40

135. Mr Reid submitted that the invoice was excessive and suggested a lesser cost of $360.00, based upon one day's labour at $31 per hour plus $50 for materials plus margin and GST. No issue was raised in regard to this claim during the hearing and there is no evidence substantiating the reasonableness of Mr Reid's calculations. The Builder's amount will be allowed.

Variation 51 - Concrete landing and steps off garage

136. Mr Chamberlain said that this work w requested by Mr Mani on or about 31 January 2012. He said that the request was confirmed by an email dated the same day..

137. The dispute in regard to this matter is the Owner's claim to be entitled to a credit in regard to some concrete in the front. The email from Mr Mani sent 31 January 2012 said:

> "Garage steps to be priced.
>
> We should have enough credit for concrete to the front courtyard to compensate for any extra concrete for the steps and landing. Please proceed on this bases" (sic.)

138. I am uncertain what to make of this. No evidence of calculations was given justifying this statement. Further, no quantities of concrete were contracted to be supplied and it was not a provisional sum or prime cost item.

139. The gross amount claimed was $735.70 which is detailed in paragraph 65 of Mr Chamberlain's witness statement. Of this, an amount of $245.70 was charged by a concreter and an invoice in that sum was produced. With margin and GST the amount becomes $890.19 and that amount will be allowed.

Variation 53 – Repairs to existing timber floor

140. As stated above, when the existing timber floor was sanded it was found to contain borer damage. Mr Chamberlain said that he notified Mr Mani and then met the Owner on site. He said that she requested the Builder to remove and replace the damaged and affected flooring and the Builder did so.

141. The amount claimed was made up of $1,140 in labour, $822.98 for materials plus a further 4 hours' labour to caulk the floor, totalling altogether $2,102.98. With margin and GST, the final figure is $2,544.61.

142. Although the Owner admitted that she was to be charged for this work, she disputed the scope of the works and the cost. She admitted in cross examination that she agreed to replace "a couple of boards", but not all of the floor. She said that the amount was "way more" than she had anticipated.

143. In his submissions in reply Mr Reid made a very detailed calculation of his own based upon the invoices tendered but whether or not the conclusions

that he draws from those documents are justified I cannot say because these calculations were not put to Mr Chamberlain and no evidence was given about them.

144. Apart from calculations in the submissions and source documents that were not put to the witnesses, there was no contrary evidence about what would be an appropriate figure for what was done and Mr Chamberlain's figure does not appear on its face to be so substantial as to cause me to doubt his evidence about the cost. The amount claimed will be allowed.

Item 8.6– Supply and install metal tank lid

145. This was a lid to cover swimming pool equipment which was supplied at the request of Mr Mani. The labour and materials are detailed in Mr Chamberlain's witness statement and total $290. With margin and GST that became $350.90.

146. The Owner contends that this was part of the Contract works because it was part of the swimming pool. That is by no means clear on the evidence. However, even if it should have been supplied with the swimming pool, and there is no evidence that it should have been, the swimming pool was a provisional sum item and this extra cost would nonetheless have been payable by the Owner as part of the adjustment to that provisional sum.

Item 8.7– Front paving changes

147. The Contract drawings required the front courtyard to be laid with square bluestone pavers. According to Mr Chamberlain, in about January 2012 the Owner's landscape designer, Sharon Harris, gave him a landscaping plan requiring it to be done in "crazy paving". He said that the nominated tiler, who was Alija Karic, charged an additional $40 per square metre for the laying of the crazy paving and his invoice was produced.

148. The Owner said that the amount allowed by Mr Maraffa in his costing of the Tender price should be exhausted before any extra is allowed. How he arrived at the tender price is irrelevant. The scope of work is defined by the Contract documents and the Tender Document is not one of them.

149. I am satisfied that this is extra work and the amount claimed of $1,162.00 will be allowed.

Item 8.8– Front paving changes

150. The rear paving pattern was also changed by landscape plan from that shown in the Contract drawings. According to Mr Chamberlain the tiler had to tile the back steps and also lay some border tiles at a total cost of $700.00 (ex GST). His invoice for the two amounts making this sum was produced and he describes it as extra work. With margin and GST the variation sought is $780.00 rather than the amount claimed of $932.00.

151. Mr Reid again referred to the Tender Document and that amount allowed but that is not a contractual document.

Item 8.9 - Paint rear side fence

152. Mr Chamberlain said that he was asked by Mr Mani in March 2012 to paint the rear side fence with Porter's paint. He said that the subcontractor painted it at a cost of $500.00. With the margin of 10% and GST, the amount claimed is $605.00.

153. The Owner said Section 09910 of the Specification required the Builder to paint all external surfaces but that refers to external surfaces of the House, not the fence. I do not accept Mr Reid's submission that the phrase "all new building surfaces" includes fences. The amount claimed will be allowed.

Item 8.10 - Paint rear lane fence and garage wall

154. Mr Chamberlain said that he was also asked by Mr Mani in March 2012 to paint the rear lane fence and garage wall with Porter's paint. He said that the subcontractor painted it at a cost, again, of $500.00. With the margin of 10% and GST, the amount claimed is $605.00.

155. Mr Reid's submission on this item was the same as the last item and I do not accept it for the same reason.

Item 10.1 – Garage crossover

156. The Builder was required to extend the garage out to the northern boundary. The existing floor was to be maintained but a new floor was to be poured for the extension. The Builder was subsequently directed by the Architect to replace the whole of the floor with a single slab. The Builder demolished the existing floor and poured a new slab (Variation 37).

157. According to Mr Chamberlain it was poured at the same level as the previously existing garage floor. That was disputed by the Architect but since he does not appear to have taken any levels I cannot see any basis for his contrary opinion.

158. When the extended floor slab reached the northern boundary it was higher than the footpath. A bund then had to be constructed by the Builder to connect the level of the footpath with the higher level of the slab. The Owner and her husband subsequently complained about the bund saying that it was too steep.

159. Following discussions which took place between Mr Chamberlain, Mr Mani, the Owner and her husband, the Builder was instructed to construct a new crossover in order to create a more gradual fall from the level of the concrete slab to the footpath.

160. According to Mr Chamberlain, Mr Mani promised that, when the work was done, the Builder would be paid for the crossover as well as for Progress Claim 13C, which was outstanding at the time. The Builder then went ahead and constructed the crossover in accordance with a sketch that had been drawn by the Architect. The calculation of the amount claimed is detailed in Mr Chamberlain's witness statement

161. The Owner contends that the construction of the new crossover was necessitated by a mistake made by the Builder namely, pouring the garage slab too high.

162. Mr Mani suggested in his evidence that the Builder had poured the new slab on top of the old slab. There is no evidence at all that that occurred. It is not only contrary to the evidence of Mr Chamberlain, who has direct knowledge of the matter, it is also most unlikely that this would have happened because it would have resulted in a much higher floor level than what I saw on site. It is quite plainly not the case.

163. The Architect said in evidence that the need for a new crossover was due to a Builder's mistake and that this was admitted. I do not accept that evidence and prefer the contrary evidence of Mr Chamberlain. It seems to me that if the Builder is directed to pour the slab at the same level as before then that is what it must do. Whereas beforehand the difference in level between the garage floor and the footpath could be taken up by a gradual slope over the distance between the garage entrance and the footpath, that benefit was lost when the garage was extended so that the entrance was right on the footpath. The difference in height could then only be graduated if the crossover were also replaced.

164. The photographs showed that the former crossover was old and unsightly and the new crossover is more in keeping with the renovation of the House but that in itself is not a reason why the Owner should pay for it. I accept that this was an agreed variation and that Mr Chamberlain was promised payment for it before it was constructed.

165. As to the amount claimed, Mr Reid provided calculations in his final submissions based upon invoices found in the tendered material. Again, these calculations were not put to Mr Chamberlain and do not include all of the work and materials supplied. Mr Chamberlain has made what appears to have been a careful calculation of the amount due and the Owner and her advisers have known about it since before these proceedings commenced. I am not in a position to say, on the basis of an interpretation of some of the discovered material, that some other amount is due.

166. I am satisfied that the amount claimed of $4,891.87 for this variation ought to be allowed.

Item 10.2 – Aluminium louvres

167. The north and east sides of the southern building are shaded by fixed louvres supported by rectangular hollow section framework attached to the exterior of the building on two levels. These were constructed by the Builder and the Builder claims that they are a variation. The amount claimed is $15,015.55.

168. They were installed by the Builder following an exchange of emails in which the Architect instructed the Builder to place an order for them and

the Builder said that it would so but that it would be claiming it as a variation.

169. The Owner contends that the provision of these louvres was included in the scope of works because they are shown on the plans. Mr Reid relies upon s.28 of the *Domestic Building Contracts Act* 1995, which is as follows:

> "The cost of any fixture or fitting shown in the plans and specifications included in a domestic building contract is to be taken as having been included in the contract price unless—
>
> (a) the contract states that the fixture or fitting is not included in the contract price; and
>
> (b) the building owner places her, his or its signature or seal next to the statement."

170. Because of the reference in this section to "specifications", the word "shown" must include "described" because specifications rarely describe anything pictorially. The section therefore operates to include in the contract price anything that is depicted or described in the plans and specifications unless it has been excluded in the manner described.

171. Louvres are shown in the working drawings to some extent. On WD-05 they are drawn and have the notation "RHS steel fascia with shading devices". Although depicted, they are not dimensioned on the plans. They appear again on WD-06 and are indirectly referred to twice as "Top RHS steel fascia only in shading device continued to parapet" and "RHS steel fascia only in shading device continued to parapet" and "RHS steel fascia with shading device at top and bottom". Again, no dimensions are given.

172. They are again depicted on WD-07 with a notation "Painted RHS steel frames to window head and sill level with shading device as to later detail".

173. On WD-08 there is the notation "RHS steel fascia to engineer's detail with Eclipse aluminium shading devices".

174. On WD-10 there is an indicative drawing of louvres with the notation "Approved architect patent brand shading devices fixed steel frames". There is nothing in the contract documents to say whether any shading device had been approved by the Architect nor is there any mention in the specifications of what the device was to be.

175. Despite a reference to a brand name: "Eclipse" there is nothing in the contract documents to show the details or design of what is to be provided. They are shown in the plans to the extent stated but no detail is given about their size, their design or what they are to be made from. There is nothing in the specification about them. As a consequence, when the Builder priced the job these were not included.

176. The absence of any dimensions or further information about these louvres in the drawings would suggest that what is drawn is intended to be indicative only.

177. Mr Hellyer submitted that, in these circumstances, it would have been impossible for the Builder to assess the cost of supplying and installing the louvres that were ultimately supplied. Moreover, if it were a term of the Contract that the Builder was to supply louvres then the effect would be that it would have to provide whatever it was the engineer designed or whatever it was that the Architect approved, regardless of the cost.

178. When Mr Mani was asked how the Builder could have priced the louvres when no detail of them was given in the tender documents he said that the Builder could have put in a provisional sum or prime cost for supplying them. The Architect gave similar evidence. That could have been done, but it was not done, and at the time the tender was given to the Architect it was apparent from the figures supplied that no such allowance had been made.

179. It was the Builder's responsibility to build what the Contract documents required but those documents only refer to the supply and installation of a louvre system to be approved by the Architect and to be detailed at a later date. In those circumstances, apart from s.28 of the Act, I do not think, on a fair reading of the documents, that these louvres formed part of the scope of works required to be done for the Contract price. I must now consider s.28.

180. The effect of the section is to impose a contractual obligation on a builder to supply or build any fixture or fitting that is "shown in the plans and specifications". An owner looking at plans and reading specifications is entitled to assume that what is depicted or described there will be supplied or built.

181. However if a contractual obligation is imposed it must be possible for a court or tribunal to decide whether or not what has been supplied or built is in accordance with the contract, otherwise, how is the obligation to be enforced? Contractual liability is strict and the builder must supply or build what the contract requires and it must be possible to say what that is.

182. Sometimes, where the parties decide the terms of a contract themselves, a contractual description will be inadequate and the court or tribunal must then determine whether the difficulty can be overcome by interpretation or, perhaps, the implication of a term. If the difficulty cannot be overcome, other consequences might follow.

183. I do not believe that it was the intention of parliament to insert into building contracts obligations of uncertain scope. I think that, for a fixture or fitting to be "…shown in the plans and specifications…" within the meaning of the section it must be depicted or described with sufficient particularity for the builder to supply or build it and for the tribunal to be able to determine whether the builder has done what was required. These louvres were not therefore "…shown in the plans and specifications…" for the reasons given above.

184. The cost of these louvres to the Builder was $11,870. I note from the invoice that they do not appear to be made by a company called "Eclipse"

since they are described as "Axiom Aluminium Louvres". With GST and Builder's margin the price becomes $14,362.70 and that sum will be allowed.

The claim for interest

185. I accept Mr Reid's submission that interest can only be claimed on amounts properly due. The Tribunal also has power to award interest under s.53 of the Act. Mr Hellyer requested that further submissions be invited on the claim for interest once the issues in the proceeding have been determined.

186. A claim for interest seems to be foreshadowed on the retention monies not paid into the retention account. By Clause C2 the Owner was required to pay retention sums into that account and by C2.2 she was required to hold the cash retention, including interest earned on it less bank fees, in the account on trust for the Builder. Mr Reid submitted that there was no damage suffered by the delay in paying the retention into the fund. However, since the Builder was entitled to interest earned on the money on the account, there might have been some loss of interest.

187. The Builder somehow transferred interest earned on the retention out of the account and the Owner complained about that, asserting that it was in breach of contract. However since the money was held by her on trust for the Builder I cannot see that anything flows from it.

188. I will invite further submissions in regard to interest.

The Contractual standard of workmanship

189. As to the standard of work, Mr Casamento suggested a number of times that a high standard of finish was to be expected, given that it was, he said, a multi-million dollar House and a "high end" renovation. Whatever the Contract price might be, an Owner is entitled to expect that the work will be done in accordance with the statutory warranties. Perfection might be an ideal to be sought in building work but it is not expected to be achieved. If the statutory warranties are complied with then the work should be done to a reasonable standard. If an Owner wants a particularly high standard over and above that, then that must be agreed upon in the Contract, either expressly or by necessary implication.

190. It is not sufficient to simply point to the Contract price and say that that indicates that a particularly high standard is required. The Contract price is driven by the extent of the work and the cost of the labour and materials to be provided.

191. The margin being paid to the Builder might be something to be taken into account. In building cases that I have heard over the years, margins charged by Builders have varied from 10% up to 30% of the Contract price. In the present case the margin charged by the Builder, which was known to the Architect, was 6% for overheads and 10% for profit. That seems to me to be towards the middle to lower end of the scale and it is not suggestive in itself

that the parties were expecting that an unusually high standard of work would be provided.

192. If there is no agreement that a particularly high standard is to be achieved then the work is to be done in accordance with the contractual warranties which should produce a result that is to a reasonable standard.

193. Some assistance is also obtained from the *Guide to Standards and Tolerances* 2007 ("the Guide") which, although it has no prescriptive effect, gives guidance as to tolerances generally regarded in the building industry as acceptable.

Defects

194. Mr Reid pointed out that, by Clause M13 of the Contract, the Builder was required to make good defects and incomplete work during the defects liability period which, by Clause M12, commenced on 30 March 2012 and expired on 30 September 2012.

195. The experts prepared a Scott Schedule and, as a result of a conclave, a number of the items were withdrawn and others were agreed to between them..

196. My findings as to the defects are as follows. The numbering is taken from the Scott Schedule.

Item 1. Aluminium frame to plantation shutter

197. The mitre joint has opened up and needs to be rectified. This item was agreed at $350.

Item 2. The location of the computer internet cable.

198. A cable has been brought in from the street and connected to a router which has been connected to what was called a "CAT 5 system" that is wired throughout the House. The supply of the router was required by Sheet WD-13 of the plans and was installed in the computer room. .

199. The Owners have since installed a cable internet modem in the front room of the north building. They have complained that this is an unreasonable location for the modem and that the Builder should have provided it and located it in the computer room. The Builder maintained that the electrical drawings required only a router and the wiring system in the computer room which was supplied.

200. Mr Reid submitted that there was no evidence of any instruction to the Builder to install an ADSL internet connection. The relevant drawing (WD13) shows a telephone router in the position where the Builder has installed it and the expert evidence is that it is connected to a CAT 5 system.

201. Having been referred to the plans I accept Mr Lees' evidence that there was no requirement for anything other than what the Builder has installed and no cabling from the street is shown. Moreover, there was no expert

evidence led from a communications engineer or other expert to the effect that the present internet connection and the CAT 5 system are inadequate. So far as I can see, what has been built is what is on the drawing. This part of the claim is not made out.

Item 3. Grouting to the crazy paving.

202. This item was withdrawn.

Item 4. Flashing above the master bedroom and above bedroom 5.

203. This is flashing around a curved roof at the front of the South Building. The present flashing replaced an earlier flashing that the Builder had installed about which the Owners had also complained. According to the evidence a flashing of this nature has to be rolled into shape by the supplier and is put up in several pieces by the Builder.

204. Mr Casamento said that the standard of workmanship and the appearance of the present replacement flashing is inadequate for what he describes as "a high end Architectural renovation". Mr Lees disagreed and said that, although there was a slight gap between two of the sections of flashing they could be pulled together by a rivet. He did concede however that there was excessive silicone on the top of the flashing although this could only be viewed if one were standing on the roof. He assessed the cost of re-detailing all the flashings throughout the building at $1,000.

205. I am not satisfied that the standard of workmanship of this flashing is inadequate. I will allow Mr Lees figure of $1,000 for re-detailing all of the flashings including inserting the rivet he suggested.

Item 5. Brickwork along the north wall.

206. There was to be a brick wall constructed along the northern boundary from the northern brick wall of the North Building extending east to the garage. There are a number of issues with the wall that has been constructed.

207. The wall was to be built from either new or re-used bricks. Mr Maraffa recommended that new bricks be used but the Architect directed the Builder to re-use bricks from the demolition. Although there were many bricks produced by the demolition works most of these appear to have been painted or hard plastered on one side. The Builder salvaged and stacked a quantity of bricks but there were not enough to construct the wall and so second hand bricks had to be purchased.

208. A supplier attended site to view the bricks in order to obtain a match and further bricks were supplied. Those bricks are not the same size as those in the existing adjacent north wall of the North Building and the mortar beds of the new wall do not align with the brickwork of that pre-existing wall. There are twenty courses in one wall and twenty-one in the other.

209. According to Mr Maraffa's evidence the bricklayer had difficulty lining up the courses of the second hand bricks with the existing bricks. That is apparent.

210. Mr Casamento said that in order to deal with the non matching mortar lines the wall should be rendered and that, since the new wall is adjacent to the pre-existing external north wall of the North Building which has face brickwork, that wall also should also be rendered to match.

211. In his report Mr Lees agreed that there was a significant variation in the alignment of brick courses and pointed out the slight variation in brick sizes. He said that despite the problems for the bricklayer, the brickwork should have been engaged to match the adjoining wall and suggested in his report that it be treated with an acrylic finish. He assessed the cost of treating the wall with an acrylic finish at $1,766. He resiled from this view in his evidence and suggested that the wall was sufficient. He said that, if one were to use the bricks that were used, you could not get it any better.

212. Mr Hellyer pointed to the fact that there had been no point taken about this wall in earlier reports. He also pointed to the brickwork at Christ Church Grammar School, which is over the road from this wall, and the other non-matching brickwork down the street. He referred to the Owner's evidence that she was quite happy with the look of the old cross-over. She said that it was old, but that the whole street was and it fitted in. He said that similar sentiments apply to this wall.

213. Although I understand those points I think I must accept the opinion of Mr Casamento that the Builder should have achieved a better match between the new and existing walls. That was also Mr Lees' original view. I accept Mr Lees' evidence that it is unnecessary to also treat the existing wall of the North Building because that is clearly a different building element. Mr Lees figure of $1,766 will be allowed.

214. There was also a complaint about the extent of the brick cleaning of this wall. Mr Chamberlain said that he had the brick cleaners back twice to attend to it and that what I saw on the inspection was the best they could do. I agree with Mr Casamento that it is unsightly and I accept Mr Lees' assessment of $147 to carry out further brick cleaning.

Item 6. Brickwork at the eastern end of the wall not cleaned

215. It appears from the photographs that this was existing brickwork and not within the scope of works.

Item 7. Discharge of stormwater drain onto footpath.

216. The existing garage was extended north to the property line. A stormwater drainage plan was included amongst the Contractual documents but it makes no provision for the disposal of stormwater from the extended garage roof. The Builder has provided a downpipe at the front of the garage which extends down the inside of the new wall and discharges onto the footpath.

217. I accept Mr Casamento's evidence that this is unlawful. Mr Chamberlain said that there had been no complaint about this and that there was no other way to direct the stormwater. There is certainly nothing on the plans to show how it is to be dealt with.

218. Mr Hellyer pointed out that there were a number of downpipes from properties nearby that discharge onto the footpath. Indeed, it is notorious that this is a common occurrence in the inner suburbs. The work also appears to have been passed by the Building Surveyor and it was not raised as a defect by either the Architect or Mr Mani.

219. However both Mr Casamento and Mr Lees agreed that stormwater needs to be taken to the lawful point of discharge which is the gutter on the road. They also agreed that the only way to ensure a lawful discharge was to obtain a permit from the council, cut the asphalt paving on the footpath and extend the downpipe discharge into the kerb and channel. Mr Casamento's figure for this was $1,171 and Mr Lees figure was $1,155.

220. In determining a claim for damages for a breach of contract I must consider the position in which the Owner would have been, if the Builder had constructed the storm water drainage in this way, and then compare that with the position in which she now finds herself. Since there was nothing in the Contract documents requiring the Builder to carry out this work I think Mr Hellyer is correct in saying that the Builder would have been entitled to claim a variation for the cost of doing so. Since that is what the Owner now claims I do not find that she has suffered any loss because the cost she will have to pay now is not shown to be more than the amount she would have had to pay by way of a variation.

Item 8

221. This item was deleted.

Item 9. Misaligned brickwork.

222. This item has been dealt with as part of 5.

Items 10 and 11

223. These items are deleted.

Item 12. Brickwork perpends not filled with grout and poor cleaning

224. There is a breakdown of mortar in the bottom few courses of the north wall of the North Building. Although this was an existing wall and not part of the scope of work under the Contract, the Builder re-pointed some of this area at no charge. The Owner suggested that the breakdown in the mortar was the fault of the Builder but this is not established by any expert evidence. Moreover, it is not credible, given the age of the wall and the appearance of the mortar.

225. This was existing brickwork and although some re-pointing was done by the Builder without any charge, that does not impose upon it an obligation to do more without charge. Mr Reid submitted that, by doing this work free of charge it was a "no cost variation" which brought it into the scope of the works. There is no evidence that this was an agreed "no cost variation". It was something that the Builder did for nothing.

Item 13. TV cable installed through exterior of north brickwork.

226. There is a television cable emerging from a ventilator at the foot of north wall of the North Building which extends upwards to the top of the wall, presumably connecting to an aerial there. Mr Casamento said that this should have been run inside the House.

227. Mr Chamberlain said that he discussed this cable with Mr Mani and it was agreed to run the cable in this way. Mr Chamberlain also pointed to the presence of the main gas line for the House which runs horizontally from the front of the North Building along the outside of the north wall and enters the House through the wall further back. It is a few centimetres above the footpath. In both instances the gas pipe and the conduit intrude into the same airspace above the footpath. Mr Casamento pointed out that this is unlawful.

228. The gas pipe was pre-existing and there does not appear to have been any complaint about it. Mr Casamento's figure for redirecting the television cable was $2,117. Mr Lees' figure was $736.

229. Since I find that the Architect directed the Builder to install the television cable in this way I do not believe that the Owners can complain of it. If I were to order that it be redirected within the property line then I think the Builder would be entitled to a variation because what it has done was done at the direction of the Architect.

Item 14. No articulation joint between the low wall and the brick wall at the west end of the building.

230. Upon examination it was discovered that there was a joint and the required foam was in the junction between the walls but the joint had been rendered over. The render needs to be removed from the joint in order to expose the foam and the joint then needs to be sealed with a suitable material. Mr Casamento's figure for this was $255. Mr Lees figure was $162. It seems to me that there is little work involved and I prefer Mr Lees figure which I will allow.

Item 15. Front edge of bluestone tread of stairway chipped

231. There is an internal stairway made of bluestone tiles. The nosing of the bottom tread has a small chip in the middle that is perhaps 1mm to 2mm thick. In his report Mr Casamento suggested the removal and replacement of the staircase at a cost of $2,553. Mr Lees pointed out that the chip was no more than 25mm in length and, he said, less than a millimetre in thickness. He said that, given the overhang of the tread over the riser below, the demolition and reconstruction of the stair was unreasonable and the front of the tread should be ground at a cost of $1,096.

232. In further discussion on site it was agreed that if care was taken the whole staircase need not be demolished but rather, the bottom tread could be broken up, the second riser removed, the bottom tread replaced and the second riser reinstated. Mr Lees said that the cost of this scope of works

would be much the same as the cost of grinding the step. Mr Casamento seemed to think it would cost more but gave no precise figure.

233. Mr Hellyer provided me with calculations based upon the labour rates provided by the experts and invited me to calculate the cost myself. His suggested figures were $713 or $1,010. I think that I would be on stronger ground to rely upon the experts for the costing. I will allow $1,096.

Item 16. Sealing of bluestone floor tiles.

234. Some paint was spilt on the floor and had to be removed. In the course of removing it, the sealer over the bluestone tiles was also removed. The tiles need to be resealed and the experts have agreed on a figure of $2,900 for that work. That will be allowed.

Item 17. The kitchen joinery / kicker interface

235. The kitchen joinery is located along the southern wall in the kitchen and the bluestone tiles on the floor have been laid up to the kick-board.

236. Mr Casamento said that the tiles should have been laid under the cabinetry to the wall instead of just up to the kick-board. He suggested that they had been cut short. Mr Casamento said that access was required to the space under the cabinetry in order to service the transformer for the lighting.

237. The join between the bottom of the kick-board and the top of the floor tiles has been caulked with a black caulking material, providing a clean finish, but adhering the bottom of the kick-board to the floor. Mr Casamento assessed an amount of $6,021 as the cost of removing the kick-board, replacing the bluestone paving and reinstalling the kick-board.

238. Mr Lees said that the caulking material held the kick-board in position and prevented the build-up of dust and food particles at the junction of the floor and the kick-board. In his report he suggested that an attempt be made to locate the transformer.

239. By the time we went on site the transformer had been located in the wall space behind a power point in a cupboard. As a consequence, it is not necessary to access the space behind the kick-board for the purpose of replacing the transformer. In any event, Mr Lees demonstrated on site that the kick-board could be folded down and access obtained to the space if that were required.

240. I accept Mr Lees' evidence that there is no defect in what the Builder has done. The tiles have not been cut short. They extend to the line of the cupboards and the interface between the kick-board and the floor tiles has been properly sealed. In any case, it did not appear that Mr Casamento had any further concerns, given that access was not required for the transformer.

Item 18. Kitchen door

241. Since there is a swimming pool in the backyard, the external kitchen door needs to comply with the swimming pool regulations in that it must be self

closing and also latch when closed. It was demonstrated on site that it does not self close. This must be rectified.

242. Mr Casamento had originally costed for the replacement of the door frame because he thought that it was bowed He acknowledged on site that this was not necessary and his assessment was reduced from $1,802 to $427 to fix the defective latch. Mr Lees assessed $217 for adjusting the hinges and the latching of the door.

243. As a result of the experts' operation of the door on site and my own observations I prefer Mr Lees opinion that what is required is an adjustment or replacement of the tongue of the latch. It therefore seems to me that his assessment is more likely to be right than that of Mr Casamento. I will allow the figure of $217.00

Item 19. Powder room

244. There is paint in a recessed door pull. Cost of removal was agreed at $20.

Item 20. Wiring in the computer room.

245. The electrical drawing provides for power points and also connection points for computer cabling to be mounted 250mm above the floor level, which is what the Builder has done. The cables and wiring that the Owner has plugged into these various outlets look unsightly. Mr Casamento has said that this is a defect and has costed an amount of $661 to provide an accessible openable cover to conceal the cabling, which he said was in accordance with good building practice.

246. Mr Lees pointed out that the cables and wiring in question were not installed by the Builder but by the Owner, and all that was necessary was for the cables be bundled together under the desk with cable ties.

247. There is no requirement in the plans or the other Contract documents for the Builder to provide an accessible openable cover which is what Mr Casamento has costed. It seems to me that the present appearance of the wires is a consequence of the Architect's design, which required the outlets to be in their present position and the failure of the Owners to do anything to bundle or conceal the cables plugged into them. I find no defect.

Item 21. Front door.

248. Mr Casamento suggested that the gaps around the door be sealed. He pointed out that there was daylight visible at the edge of the door. When I inspected the door frame on site it was found that the rubber seal inserted in the aluminium extrusion forming part of the doorframe had slid down under its own weight. Mr Lees said that it needs to be glued in place. Mr Casamento has costed the sealing of the gaps around the door at $300 but in view of the very limited scope of the problem I prefer Mr Lees figure of $143.00.

Item 22.

249. This is the same as item 21.

Item 23. Tiling on the balcony

250. The tiles need to be sealed. This item was agreed at $202.00.

Item 24 - 30. A number of doors are warped and require replacement.

251. The quantum of these items was agreed between the experts at $5,400. Mr Maraffa said that the degree of warping was within tolerance and that the door manufacturer will not warrant doors that are more than 2.4 meters high.

252. That may be so but the absence of a warranty from a manufacturer does not mean that the Builder can supply doors that are warped unless there is something in the Contract to that effect, and that was not suggested. I will allow the figure of $5,400.00.

Item 31. Balcony on main bedroom

253. Water ponds on the balcony and the tiling needs to be removed and re-laid to give a proper fall to the outlet. In the course of doing so it was agreed by the experts that the substrate will need to be prepared again and two membranes installed. The junctions will then need to be sealed with a flexible sealant. For this Mr Lees has assessed $2,328.00 and Mr Casamento $3,484.00. I am unclear as to the basis of Mr Casmento's figure which is well in excess of his earlier figures. I prefer Mr Lees' figure.

Item 32. Mirror in en suite.

254. There is a mirror in the en suite that has three lights mounted on it. There is a complaint that there is a chip in the mirror behind the centre light. Mr Casamento said that the mirror would have to be replaced, which he costed at $1,644.

255. Mr Lees allowed a figure of $50 for half an hour's time by an electrician to refit the light fittings in order to cover the problem. He acknowledged that to replace the light fittings would be more expensive.

256. Mr Casamento said that that approach had been tried without success. He said that three larger lights could be installed instead of replacing the mirror at a base cost of $535.00 which, with margins and GST, would come to $803.00.

257. Mr Hellyer suggested in submissions that the defect could be addressed by fitting an annulus of stainless steel to conceal it as suggested in the Tueno report. The practicality and cost of that approach was not explored at the hearing and there is no evidence about it. I will allow Mr Casamento's figure of $803.00.

Item 33. Highlight window in family room ceiling.

258. There is a highlight window giving light to the ground floor. The shaft leading from the upper floor down to the ceiling of the ground floor is plastered and, in glancing light, one can see the join when the plaster sheets meet, although those joins have been very smoothly executed.

259. Mr Lees said that the standard of the plasterwork was satisfactory and that to do any better one would have to plaster over the entire area to achieve a Class five finish. He said that the usual standard was a Class four finish which the Builder had achieved.

260. Mr Casamento agreed that the standard to be achieved was a Class four finish but said that had not been achieved. He said that the join was difficult to see during the view because of the light that was shining through.

261. Mr Hellyer referred me to the following passage from the Guide:

"INSPECTING SURFACES FROM A NORMAL VIEWING POSITION", the Guide states:

> "Generally, variations in the surface, colour texture and finish of wall, ceilings, floors and roofs, and variations in glass and similar transparent materials are to be viewed where possible from a normal viewing position. A normal viewing position is looking at a distance of 1.5m or greater (600 mm for appliances and fixtures) with the surface or material being illuminated by "non-critical light". Non critical light means the light that strikes the surface is diffused and not glancing or parallel to that surface."

262. Having inspected the surfaces myself I prefer Mr Lees' opinion. It was the Builder's responsibility to carry out the work in a proper and workmanlike manner and I think that was done.

Item 34. Internal floor levels

263. The ground floor concrete slab has been tiled in polished bluestone tiles. As one approaches the front door the edges of these tiles can be seen through the window, as can the top of the slab. In addition, when one views the floor of the front bedroom on the right from the garden outside the window of the room, approximately 20mm of the leading edge of the bluestone tiles is visible.

264. Mr Chamberlain said that he set the levels to cope with a 12 mm thick tile whereas the Owner then chose a 20 mm thick tile. I accept that as an explanation for an increased level in the front bedroom but it does not explain what I saw adjacent to the front door. I think that, either the level of the concrete here was set too high or the bottom sill of the window is too low. In any case, the leading edge of the tiles must be covered.

265. Mr Casamento had costed the necessary work at a gross cost before margins at $2,685 and a final cost of $4,032.00. Mr Lees' costing was $649.00.

266. The experts discussed prices further during their concurrent evidence. Mr Casamento's final price was $1,051.00 and Mr Lees was $1,032.00. Whether or not this tiling was a provisional sum is not to the point. The necessity for this work arises from the manner in which the Builder has set its levels. I will allow Mr Casamento's figure of $1,051.00.

Item 35. Exhaust ducting

267. This was rectified by the Builder and the item is withdrawn.

Item 36. External deadlocks incorrectly installed.

268. The front door system contains latching mechanisms provided by the Owner. Set within the door there is a mortise lock incorporating an integral deadlock. However, set in the doorframe is a proprietary striker plate with an electronic release. The mortise lock of the door will latch in this striker plate and when one activates the mechanism the striker plate will release it. However there is no provision within the striker plate to receive the tongue of the deadlock. As a consequence, the Owners are not able to deadlock the front door.

269. Mr Casamento has allowed $518 to remove and replace the door handle and security lock. A reviewed figure of $350 was discussed during evidence.

270. The problem does not appear to me to have been due to any defective workmanship of the Builder. The Owner provided both the mortise lock and the striker plate and the two are simply incompatible. I find no defect.

Item 37. Wrapping of pipes.

271. The Builder did not allow any price to lag any internal waste pipes for sound attenuation because Mr Maraffa was not aware that it was required. However in a part of the specification under the heading "Thermal Insulation" and the sub-heading: "Tiled Roof", there is the sentence: "Wrap entire lengths over all downpipes and soil waste pipes in Rock wool insulation to minimise noise transmission". I accept Mr Maraffa's evidence that he did not notice this sentence when he tendered for the job and that is nor surprising, given its burial in an unrelated section of the specifications.

272. No thickness of the material was specified. According to the evidence, to wrap the pipes within the walls with anything more than a nominal thickness of Rock wool would have been impossible, because the external diameter of the pipes is 90mm and the internal width of the wall spaces is also 90mm. Mr Casamento said that rock wool insulation is either 30 mm or 50 mm thick. That would not have fitted.

273. During the site inspection the upstairs toilets were flushed and noise of water running through the pipes could be heard on the ground floor. It was not loud but it was discernable.

274. Mr Casamento costed to expose and wrap all stormwater and sewer pipes installed within the internal areas of the building at $7,177. Mr Lees costed the same scope of works at $6,621.

275. Mr Chamberlain pointed out that to carry out this work is impossible because the insulating material cannot be fitted into the wall space. That is quite obviously correct, given the fact that the pipes themselves take up the entire thickness of the wall space leaving no room for any wrapping. Mr Casamento acknowledged during cross-examination that it was impossible to comply with the instruction in the Specification. He said that you would just "…do what you could", but that was not the contractual requirement.

276. It did appear on inspection that some limited wrapping could be done above the wall and for that Mr Lees gave a price of $50 for materials and $225.00 for labour. Apart from that it seems to me that this is a design fault. If these pipes were to be wrapped as stated in the specification then a service duct should have been designed to carry them which would have been wide enough to accommodate the required insulation material as well as the pipes. It is simply not possible to do what the specification requires.

277. The Builder should have pointed out to the Architect that to do this part of the work was impossible. A credit should then have been given to the Owner for the value of the work that could not be done. Consequently, rather than allow the small amount costed by Mr Lees for the work that can be done I think that I should allow a credit for the labour and material that would have been used if the work had been possible to do.

278. Mr Maraffa costed the labour and materials at $1,321.83 but in his calculations he has counted GST on the materials twice. When that is corrected the figure becomes $1,230.00 and I will allow that figure.

Item 38. Water staining to eave above the front door.

279. There is a slight marking on the wall above the front door. Mr Casamento initially thought that this indicated a leak and he costed an amount of $2,132.00 to identify the source of the leak and repair it.

280. After discussion on site it was acknowledged that the slight staining observed might have been due to wind driven rain. That was Mr Lees' opinion and I accept it. He assessed a figure of $107.00 to clean and repaint the area but since it will require more than one coat and I cannot assume that a painter would price the job on the basis that he would put on one coat, go away and do something else and then come back and do another coat. I will allow Mr Casamento's figure of $480.00.

Item 39. Front door handle north building

281. Mr Casamento said that an internal door handle has been used as an external handle for the front door of the North Building. He said that it needs to be replaced at a cost of $329. Items 40 and 41 raise the same issue in regard to other handles. This criticism was not made by the Architect in any of the defects lists.

282. Mr Lees said that the handles are stainless steel and suitable for interior or external use. They certainly looked to me like stainless steel.

283. The Owner said in evidence that she had been informed by her supplier that the handles were brass with a matt chrome finish. That appears to be borne out by one of the invoices that she produced.

284. Whatever they are made from, the door handles were supplied by the Owner and were ordered by the Architect. The Owner denied that these handles were supplied for external use. She said that she had ordered an excess number of handles to use internally so that she would have some spares.

285. I find that difficult to believe. First, the handles were ordered in the first instance by the Architect. Secondly, if what she says is true it means that she supplied no handles at all to the Builder for external use. That was not explained, nor was there any explanation as to why she would need any additional internal door handles to use as spares.

286. Finally, I prefer Mr Lees' evidence that these handles are adequate for external use.

Item 40. Garage door handle.

287. This is the same issue and for the same reason no defect is established.

Item 41. Laneway door

288. This is the same issue and for the same reason no defect is established

Item 42. Water in the stanchion

289. There is a steel square hollow section stanchion near the external window in the family room which supports steelwork above. The engineering detail does not provide for any plate to be welded to the top of the steel stanchion. As a consequence, the top was open during construction and water entered it and accumulated at the bottom. When the Owner's curtain installer drilled into the stanchion water came out. The Builder has since drilled at the bottom of the stanchion and removed all of the internal water.

290. Mr Casamento initially assessed a figure of $3,514 to remove the covering around the stanchion, remove the rust, prime and cold galvanise it and replace the covering. Mr Lees said that this is quite unnecessary because there is no evidence to suggest that it was rusted or that it has been standing in water. He pointed out that the metal of the stanchion was 6mm thick and that the rust would only be on the surface.

291. During the concurrent evidence, Mr Casamento suggested a different scope of works being to fill the stanchion with grout at a cost of $405.00. Mr Lees said that the figure was all right but that he thought that this work was unnecessary.

292. Whether or not it was unreasonable for the Builder to have allowed water to enter the top of this piece of steelwork, which was not designed to have a top and so was vulnerable to water entry during construction, the water has now been removed and there is no engineering evidence that anything

further needs to be done in order to preserve its structural integrity. This item is not established.

Item 43. Powder room

293. The towel holder was not connected. This item was agreed at $104.00.

Item 44. External garage door not solid core

294. This item has been removed.

Item 45. Front flashing - north end.

295. This is said to have unsightly joins and short sections. However that reference appears to have been taken from the Tueno report and relates to the flashing referred to earlier. I suggested that to Mr Casamento and he referred me to photograph 36 in his report.

296. The flashing shown in photograph 36 to which Mr Casamento referred was not part of the Builder's work. I do not accept Mr Casamento's suggestion that the provision in the Contract requiring the Builder to make good existing box gutters brought this flashing within the scope of works because it plainly is not a box gutter.

297. Even if it was, photograph 36 supports Mr Lees' evidence that only a minor amount of work would be required to upgrade this flashing. I have already allowed Mr Lees figure of $1,000 to tidy up all of these flashings. Mr Lees said that he thought that was generous and that it would include this item.

Item 46. Pool heating.

298. The Builder did not install 42 square metres of solar heating pipe work for the swimming pool but installed only 27 square metres.

299. Mr Casamento has assessed the cost of providing a further fifteen square metres of solar piping over the garage roof at $3,754.00. Mr Lees assessed a figure of $1,913.00 for the same item.

300. The Owner has obtained a quotation from a Contractor for $1,722.00 to do the work. The Owner said in her witness statement that she had approved the quotation and that the extra piping would be laid. Mr Casamento says that this should attract a margin but Mr Lees pointed out that it was a stand alone item. Since the Owner has arranged this directly I think that is the case. I will allow the amount of the quotation that the Owner has obtained of $1,722.00.

Item 47. The rear walkway

301. There is a flat sheet roof over the walkway that extends from the alfresco to the passenger door into the rear of the garage. The detail of this roof in the plans does not show any gutter. As designed, the water is to run off one side of the roof. The Builder constructed it with two small gutters one on each side that would drain onto the garage roof. The Owner complained that water spilled over the side of these small gutters in heavy rain. The Builder

has cut notches in the gutter to concentrate the flows of water to specific places in order to address the Owner's concerns.

302. Mr Casamento says this is inadequate. He said that there should have been a gutter provided to the roof which should have been connected to the stormwater system.

303. There is nothing in the stormwater design to show the drainage of this roof. Mr Lees said that to put a gutter onto it would look most unsightly. Mr Casamento said that it could be a small gutter. Nevertheless, it would need to be drained and connected to the stormwater system and that would be a variation because none of this was shown on the plans.

304. Since the Contract documents do not require anything more than what the Builder has done I find no defect.

Item 48. South east corner gutter

305. This gutter has a negative fall. Mr Casamento has assessed a figure of $2,492 to remove the gutter and regrade it to fall to the downpipe. It was acknowledged that this was an existing gutter and Mr Lees pointed to the note on drawing WD05 which says "spouting to remain".

306. Mr Casamento referred to the note on drawing WD06 which required the Builder to make good the guttering "when affected by demolition".

307. There is no evidence that this gutter was affected by any demolition works of the Builder. It does not seem to me that this was in the scope of works so this item is not established

Item 49. North building gutter

308. This also has an incorrect fall and Mr Casamento has assessed a price of $1,171 to regrade it. In support of his assessment he referred to a note in Section EE on drawing WD09 in regard to making good box gutters. I think Mr Lees is right that that note is confined to box gutters. The gutter the subject of his assessment is not a box gutter and so I think it is not part of the scope of the Builder's work

Item 50. Lack of insulation in the roof.

309. The insulation in the roof has not been topped off. This item was agreed on by the experts at $1,300.00.

310. In his submission in reply Mr Reid said that, since the tender allowance for insulation was $7,694.43 and invoice 839 was $4,220.00, there was a shortfall of $3,473.40. I am unclear whether he is now saying that this greater sum should be allowed. The figure of $1,300.00 was agreed for this item in terms of rectification. This is really a claim for a credit but as pointed out elsewhere in these reasons, the amount allowed by the Builder in the Tender Document is irrelevant.

Item 51. Loose capping along the north wall.

311. This item was agreed on at $200.00.

Item 52. Circular roof above bedroom

312. This was an existing roof which the plans specified was to remain.

313. There was a variation to replace the North Building roof. Mr Casamento said that it would not be unreasonable that this section of roof would be included in the replacement. He said that it made no sense to replace the majority of the roof and leave the problem of this deteriorated section. Whether or not that is so, it was a decision for the Owner to include this or not. The Builder's obligation was to do only what the variation required.

314. Mr Casamento also pointed out that there was an existing lead flashing that was not compatible with the steel roof as steel is prone to corrosion when in contact with run off water from lead flashing.

315. He assessed a figure of $2,628 to remove all plastic from the roof and replace the steel flashing, regrade the roof canopy and supply an exterior waterproof membrane.

316. The replacement of this roof was not within the scope of works, nor was it within the scope of the variation referred to. During the works, the Builder put a new membrane on the roof free of charge. That does not create an obligation on the part of the Builder to rebuild the roof.

317. Mr Lees agreed that there had to be something done about the inconsistency between the lead flashing and the metal roof. He assessed a figure of $300 to paint the lead that touches the Zincalume, being 3 hours labour and $18 of materials. I accept that evidence and will allow that amount.

Item 53 and 54. Pool paving.

318. The coping tiles on the alfresco side of the pool were said to be incomplete and needed caulking. The defect alleged was that the Builder had used silicone instead of grout to seal the interface between the side of the pool and the underside of the coping tiles. Mr Casamento costed re-grouting the gap and replacing chipped tiling at $1,050.00 (including margins). I do not remember seeing chipped tiles.

319. Mr Lees said that using silicone allowed for movement and was the correct method of installation.

320. I am not satisfied that it has been demonstrated that this is defective work by the Builder.

Item 54. Efflorescence on tiles.

321. It was suggested that water from the pool had flowed under the paving tiles and emerged through the grout, causing calcite deposits in the grout lines. In disputing this, Mr Chamberlain pointed out that much of the calcite complained of was in grout lines some distance away from the pool and that the grout lines near the pool were unaffected.

322. I am not satisfied that it has been demonstrated that the efflorescence that I saw is the result of poor workmanship by the Builder.

Item 55. Pool skimmer box

323. This item was agreed at $50.00

Item 56. Pool wall and boundary wall

324. There is a horizontal white mark along the rendered wall just above the pool. The experts agreed that this is due to water penetrating the wall from the footpath side.

325. The drawings showed and assumed that the base of this wall would be at footpath level. If that had been so, there would have been no need to tank the footpath side. In fact, on the correct levels, the bottom few courses of bricks are below pavement level, raising the necessity for tanking. The Owner suggested that the Builder's sub-contractor had built the pool too low but that was not demonstrated.

326. There were emails between the Builder and the Architect relating to the Builder excavating the footpath and tanking the other side of the wall but no variation was raised by the Architect requiring the Builder to do that.

327. It seems to me that the Architect should have raised a variation requiring the Builder to tank the wall below footpath level. This would have been a variation since the scope of works, as defined by the plans, did not require any tanking to the northern side of that wall. Hence the Owner would have had to have paid to excavate the footpath and tank the wall, which is the scope of works that Mr Casamento has assessed. During their concurrent evidence, both experts agreed with that proposition.

328. When the coping tiles around the pool were replaced a platform was erected for the tiler which rested on legs supported by the bottom of the swimming pool. The Owner said that when the platform was removed it was pulled up the pool and in the course of doing that the platform scraped the wall, causing the horizontal mark that is now seen. I do not accept this evidence. Had that occurred, the damage to the wall would have been on an angle, parallel to the sloping floor of the pool, and not horizontal as it is. The experts have agreed that the white mark is efflorescence and I find that it is.

329. Although I accept that the footpath needs to be excavated and the wall tanked as Mr Casamento has said, this would have been a variation if the Builder had been directed by the Architect to do it.

330. Instead, by an email dated 19 December 2011, Mr Mani directed the Builder to pour temporary concrete into the gaps between the path and the fence. He also asked the Builder for a quote to cut back the concrete path and install a waterproof membrane. The temporary concrete was poured and the further work contemplated does not seem to have been pursued. According to Mr Chamberlain this was because there were no further leaks detected.

331. Mr Mani referred to the Builder filling the gap between the wall and the footpath with cement as being a temporary measure. Thereafter, when water

was first seen to be passing through this wall the Builder cut out a section of footpath, excavated down to the suspected area of water penetration and tanked that area. The footpath was then reinstated. It was thought that this would address the problem but it now appears that it has not.

332. Since the Architect did not raise a variation requiring the Builder to cut back the path and tank the wall, I find no breach by the Builder in not having done that.

333. However Mr Lees acknowledged that, if the Builder had alerted the Architect to the levels and tanked the wall at the time of construction, it would not now be necessary to repair the render and clean the tiles. He assessed that cost at $445.00 base cost. Mr Casamento said that the cost of taking up the footpath would also have been saved but I prefer Mr Lees' evidence that it would not have been.

334. I will allow Mr Lees' figure of $455.00 which. With margins it is $667.50.

Item 57. External soffit

335. This has cracked and Mr Casamento initially assessed a figure of $1,014.00 to fill and paint it. In oral evidence he accepted Mr Lees' figure of $206.00, which I think is more representative of the small amount of work involved.

Item 58. Rear flashing to roof.

336. The only complaint here was that several sections of flashing material were used instead of one full ten metre length. Mr Lees said that it was not practical to do it in one length because of the difficulty of transporting the material without it distorting. This evidence was echoed by Mr Chamberlain who said that it simply could not be done.

337. There is nothing in the drawings that required the Builder to use a single length of flashing. I find no defect.

Item 59. Front wall on south boundary

338. The complaint was that this wall is out of alignment. Inspection revealed that the concrete path of the property next door has been poured at some time in the distant past so as to intrude into the site.

339. There was discussion of the problem that this caused between Mr Mani and Mr Chamberlain, pursuant to which the wall was laid straight from the corner boundary at the front of the property back to the wall of the House. It is on an angle but it is straight and in the circumstances I cannot see what else the Builder could have done. I find no defect.

Item 60. Barbecue area lights.

340. The plans required lights to be fitted in the barbecue area. The lights were to be provided by the Owner but she did not provide any. This seems to be incomplete work.

341. Mr Casamento has allowed in his report $1,321 being one day for an electrician. This was revised on site to $1,021 since it was demonstrated

that the wiring for the lighting was in place within the barbecue wall and simply had to be hooked out when the lights were supplied.

342. It seems to me that the problem was caused by the Owner not having provided the lights. Since there were no lights to fit there is no breach. Nonetheless there has been a saving for the Builder in not having to connect them. Mr Chamberlain allowed the Owner a credit of $313.96 in his variations (above). Mr Lees allowed $75 each for fitting the three lights. Even with margin and GST that is less than the credit the Builder has given. Since I accept Mr Lees' assessment I do not think the Owner is entitled to any more than that.

Item 61. Internal sliding doors.

343. The door handles scrape along the wall and need adjustment. This item is agreed at $60.00.

Item 62. Capping to north west corner of roof.

344. The capping has not been painted. It was original capping but Mr Casamento said that, because the wall was rendered this ought to have been painted. Mr Lees agreed with the item but not the cost claimed.

345. Mr Casamento originally allowed $1,261 but then revised that down to $480. Mr Lees has allowed $148. The area to paint is very small but it will require more than one coat and it is on the roof. I will allow Mr Casamento's figure.

Item 63. Garage door.

346. The complaint was the opening height of 2185mm was not achieved but that was demonstrated on site that it had been. This claim is not established.

Item 64. Pool.

347. This item has been rectified.

Item 65. Windows in the North building

348. The windows in question were period steel windows that were to be restored instead of replaced. To that end a specialist restorer nominated by the Architect was engaged by the Builder to remove the glass, strip back the metal and treat it and the reinstate the windows.

349. There is minor rust staining on parts of the glazing putty. Although this was not listed as a defect in any of the reports it was raised at the hearing.

350. Mr Casamento said that he thought that the rusting indicated that the windows had not been properly treated. He did not provide a detailed costing of the work required but said that the prime cost figure of $2,500 from the Contract should be allowed to rectify the problem.

351. Mr Lees said that the rust stains were minor and could be treated with an oil based sealer. He said they were old steel windows facing west, that they would get a lot of weathering and would require ongoing maintenance.

352. The only evidence that there is anything wrong is the appearance of some rust stains in the putty on these windows in a few places. Mr Lees said that it was a maintenance issue and Mr Casamento said that the stains would not be appearing if the job had been done properly. Yet the specialist restorer, Art Deco Services, was the Architect's nominated sub-contractor and, if the windows were to be dismantled again and another attempt were made to restore them, it was not suggested what another contractor would do now that was any different from what was done before.

353. Mr Lees said that the Guide suggests that the minimum durability of exterior acrylic paintwork was three years.

354. It seems to me that these stains are the result of reusing old period windows that face west and then three years passing without any further maintenance. I accept Mr Lees' evidence that they should now be repainted after first being sealed with an oil based primer but I cannot infer from the presence of these minor rust stains that the windows were not properly restored in the first place.

Preliminaries and margin

355. Mr Casamento has allowed Preliminaries of $11,000.00, onto which he has added a contingency of 5% and builder's margin of 30%. The preliminaries figure includes:

    (a) Preparation of specification and contract by Architect: $3,200

    (b) Site establishment $260

    (c) Supervision by experienced supervisor $4,000

    (d) Site cleaning and rubbish disposal $1,040

    (e) Warranty insurance and council permit $2,000.00.

356. Mr Lees has not provided for a separate Preliminaries figure but has allowed a margin of 32%, of which 7% is for preliminaries.

357. I prefer Mr Lees' approach. The total rectification cost for which the Builder is responsible is not large enough to warrant a separate figure for preliminaries. The work that I have allowed has been canvassed exhaustively in the evidence and it is not demonstrated that it will cost the Owner $3,200 or any other sum to further document those items. The supervision cost is part of the cost of each item and will be included in the margin allowed to the rectifying builder. Site cleaning and rubbish disposal has been included in the individual costings. There will be a cost for warranty insurance which Mr Casamento said would be about half the figure. There are no items that I have allowed that would seem to require a council permit.

358. I think I should allow Mr Lees' margin of 32%, which includes an allowance for preliminaries, plus $1,000.00 for warranty insurance.

Provisional sum and prime cost adjustments

359. There was a substantial disagreement as to how these should be assessed. Section 00870 of the specifications states:

> "A provisional sum includes labour, materials and all costs and margins"

360. The various provisional sums are then set out.

361. According to Mr Marraffa, he did not notice this provision of the specifications at the time of quoting. He said that he was presented with the form of Contract at the time of signing.

362. Special provision in Schedule 2 of the Contract as follows:

> "Manufactured casework- kitchen allowance will be based on Award Cabinets' or similar Architect approved quote.
>
> Any exceeded amount on Award Cabinets' quote for the kitchen only or similar cabinet maker's quote for the same item is to be paid by the client however no margin is to be charged by the Builder on the exceeding amount.
>
> As agreed by the Builder & Architect on the 23/6/2010."

363. Mr Quigley said of this in his report:

> "In effect, any overrun on the provisional sum for manufactured casework would result in an adjustment to the contract sum of the net difference between the provisional sum and the net cost of the work."

364. That interpretation ignores the words "…for the kitchen only…". Although that was his understanding I have to interpret what the provision actually means.

365. There is the added point that, since the order of precedence is, unusually, that the contract document ranks over the specifications, I must prefer the provisions in that document over anything in the specifications.

366. The Builder initially claimed additional payment with respect to provisional sums without regard to this provision in the specification. There have been several further calculations made by the Builder, culminating in a revised figure of $39,981.07 that was provided to me during Mr Hellyer's opening. During the hearing the Builder conceded that it should allow in favour of the Owner an amount of $11,149.40. Following the evidence this was revised to an allowance in favour of the Owner of $15,785.40.

367. Since then, in his rejoinder submission, Mr Hellyer further revised his calculations to take account of what he considered to be the operation of Clauses K2 and K4 of the Contract.

368. Clause K2 is as follows:

> "Architect may instruct regarding provisional or prime cost sum
>
> .1 The Architect may instruct the Contractor to provide a written quotation for work, the supply or supply and installation of an item or the payment of a fee

or charge to an authority for which a *provisional sum* or *prime cost sum* has been allowed.

.2 The quotation must be for the direct cost to the contractor of performing the work, supplying or supplying and installation the item or paying the fee or charge, including *GST* but excluding any margins for overhead or profit.

.3 If the architect agrees with the quotation. The architect may issue an instruction to proceed and the contract price will be adjusted in accordance with clauses K4 or K5, when the next certificate is issued.

.4 If the architect does not agree with the quotation, the architect may instruct the contractor to proceed, in which case the architect must issue a decision in accordance with clause H4."

369. Clause K4 is as follows:

"Adjustment of provisional or prime cost sum

.1 The contract price is to be adjusted by the architect to take account of any difference between a provisional sum or prime cost summand the cost of the performance of the work or the supply, or supply and installation of the item under clause K2.

.2 If the difference is positive, the extra cost will be adjusted by applying the percentage shown in item 13 of schedule 1 and adding the total amount to the contract price.

.3 If the difference is negative, the net difference will be deducted from the contract price.

,4 Any difference to the contract price is to be shown in the next progress certificate."

370. Mr Reid submitted that Mr Hellyer had conceded that the figures provided on 20 November 2014 during the hearing were correct and that the re-agitation of the margin is contrary to that concession. The concessi9on was that the method of calculating the prime cost and provisional sum items that the Builder had previously used was wrong. I do not think that this concession, and the handing up of the document with the calculations that were then made, amounted to an abandonment by Mr Hellyer of any legal entitlement the Builder might have had to a further calculation in accordance with the Contract. The submission that he now makes is open to him.

371. Mr Reid also submitted that Clauses K2.2 and K4 provides that the sum allowed for any work supplying, or supplying and installing, the item or paying the fee or charge, includes GST but excludes any margins for overhead and profit. That is what K2.2 says is to be the quotation, but if the work proceeds, K4 then applies the margin if the difference is positive.

372. I think Mr Hellyer is right and I shall adjust the Provisional sum and prime cost items in accordance with those provisions.

373. Adjustments for Provisional sum and prime cost items are as follows:

Manufactured casement joinery

374. The provisional sum for casement joinery was $100,000.00. The kitchen was manufactured and shipped out from Italy and the ultimate cost of all joinery (ex GST) was $153,068.18, after deducting an amount of $5,300.00 paid directly by the Owner. That was comprised of three invoices from the supplier and four from the cabinet maker (*Tribunal Book 1127*). With the Builder's margin of 10%, the extra claim became $58,374.80 and that was what was initially claimed by the Builder.

375. Mr Reid submitted that there should be no margin on the excess. He relied upon the evidence of Mr Quigley, an architect, to the effect that the Special condition in Schedule 2 of the Contract would result in an adjustment to the contract sum of the net difference between the Provisional Sum and the actual cost of the work without any margin being applied. Mr Quigley's criticism was about a method of calculation that Builder has since abandoned. The interpretation of the Contract is a matter for me, not an expert witness.

376. Mr Hellyer submitted that the Special Condition is "...unenforceable because it is unintelligible, uncertain, vague, ambiguous and incapable of being applied." If those descriptions applied, the term would be void rather than unenforceable. He referred me to some extracts from Cheshire & Fifoot *Law of Contract*, 10th Ed. paragraph 6.3 and 6.4. The thrust of those passages is that, if one cannot determine what has been agreed, one cannot determine whether there has been any breach. He pointed to the Architect's evidence that the clause was "a bit of a furphy" and that he would never do it again.

377. In law, that is certain which can be made certain (*Id certum est quod certum reddi potest*) and before deciding that this provision is void I should first see whether it can be rendered certain.

378. In this regard I am assisted by Mr Reid's reference to the summary by Vickery J of the law governing the rules of interpreting contracts to be found in *Metiers3 Pty Ltd v. Enwerd & Anor* [2014] VSC 80, where his Honour said (at paras. 36 & 37):

> ".36 The provisions of commercial agreements are to be construed according to what a reasonable person would have understood them to mean, having regard to the surrounding circumstances known to the parties and the purpose and object of the transaction: Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd.
>
> 37 This principle is often stated in terms of a necessity to construe commercial agreements so as to accord with 'business commonsense' or 'commercial reality'."

379. Mr Reid submitted that the commercial reality of this transaction was that no margin was to be applied to manufactured casement joinery in excess of

$100,000.00. I do not think that accords with what has been written, which appears to be directed to only to a portion of the provisional sum.

380. In the present case, the clause is apparently intended to create an exception to what the Builder would otherwise be entitled to, namely, a margin on the excess over the provisional sum allowance, but directed only to the kitchen component of the casement joinery. However the problem is in the wording and what it all means..

381. The clause does not talk about a proportion but an allowance, which is said to be "…based on Award Cabinets' or similar Architect approved quote". To say that an allowance is based upon something is not the same as saying what the allowance is. If the allowance were intended to be the Award Cabinets quote or the other quote the clause should have said so.

382. However it was drawn by the Architect, not by a solicitor and in the context of the negotiations I should interpret it to mean that the allowance was to be the "Award Cabinets' or similar Architect approved quote". It does not say that this "allowance" is to be the proportion attributable to the kitchen, although that might have been the intention.

383. The final problem, and one that I think is insurmountable, is that the evidence did not establish what that was.

384. At the time of the negotiations the Builder and the Architect anticipated that the kitchen would cost about $25,000 of the $100,000 provisional sum. However the Owner wanted an imported kitchen worth much more than that.

385. There was some discussion between the Builder and Mr Mani as a result of which the Builder offered to amend the Contract to provide that the kitchen component of the provisional sum, upon which no margin would be charged in the event of an over-run, would be agreed at $25,000 but that offer was not accepted.

386. The Owner must therefore rely upon this clause and I am unable to give it any meaning. The provisions in the contract document therefore apply and the Builder is entitled to its margin on the whole of the overrun.

387. Mr Reid said that a credit should be given for the amount of $5,300.00 paid by the Owner to the cabinet maker and that is allowed in the following calculation..

388. During the hearing it was suggested that the claim was $58,374.80 but I accept Mr Hellyer's submission that, following the procedure in the Contract, it must be calculated as follows:

Cost (incl GST)	$173,675.00
Less Paid by Owner (incl. GST)	$ 5,300.00
Cost (incl. GST) to Builder	$168,375.00
Less provisional sum	$100,000.00

Difference	$ 68,375.00
Plus margin (Item 13 Schedule 1= 10%)	$ 6,837.50
Adjustment to Contract Price	$ 75,212.50

Stone bench top

389. The allowance for stone bench tops was $20,000.00. The Builder spent only $8,116.45 (incl. GST). There is therefore a credit to the Owner of ($11,883.55).

Underground water tank

390. There as an allowance for an underground water tank of $20,000.00. Since none was supplied, the Owner is entitled to a credit in that sum, ($20,000.00).

Bathroom mirrors

391. The allowance for bathroom mirrors was $3,000.00. The cost (incl. GST) was $3,670.00. The Builder is entitled to a further $670.00 which, with its margin, becomes $737.00.

392. Mr Reid submitted that there should be no margin on the excess. He relied upon the evidence of Mr Quigley but Mr Quigley did not say that there should be no margin on the over spending. In any case, the interpretation of the Contract is a matter for me. The Builder is entitled to its margin.

Mechanical services

393. The allowance for mechanical services was $50,000.00. The cost to the Builder (incl. GST) was $51,700.00 was spent. The Builder is entitled to the difference plus margin, which is $1,870.00.

Swimming pool and solar

394. The allowance for the swimming pool and solar heating was $120,000.00. The cost to the Builder (incl. GST) was $124,364.21. The Builder is entitled to the difference plus margin, which is $4,800.63.

Remedial works

395. An allowance of $5,000.00 was made for remedial works, none of which was spent. The Owner is entitled to a credit for the allowance ($5.000.00)

Supply tiles

396. There was an allowance of $100 per square metre for porcelain tiles but no overall provisional sum or prime cost figure. This allowance did not include bathrooms 1 and 3 which were the subject of a separate provision in the Specifications.

397. By multiplying the areas to be tiled by the allowance ($100.00 per square metre) and deducting what the Builder had paid, Mr Chamberlain initially calculated the allowance to the Owner at $12,249.20, but this included an allowance of $2,502.00 with respect to bathrooms 1 and 3. When he

recalculated the allowance without these bathrooms, the figure became $9,747.20 and the Owner is entitled to a credit in that amount ($9,747.20).

Supply pavers

398. As with the tiles, there was no overall provisional sum or prime cost allowance for pavers. Instead there was an allowance of $120.00 per square metre. By multiplying the areas to be paved by the allowance ($120.00 per square metre) and deducting what the Builder had paid, Mr Chamberlain calculated the allowance to the Owner at $8,046.70, and the Owner is entitled to a credit in that amount ($8,046.70).

Metal gates

399. An allowance of $5,000.00 was made for supply of metal gates of which only $1,815.00 (incl. GST) was spent. The Owner is entitled to a credit for the difference ($3,185.00).

Floor and wall tiles

400. In the final claim there was an allowance of $2,728.00 for floor and wall tiles in the belief that it was a provisional sum item but in fact, there was no provisional sum, or prime cost allowance for floor and wall tiles in the Contract. It was a rate per square metre only. Hence no adjustment is due.

Flywire screens

401. There was no specific allowance for flyscreens but the Builder acknowledges that the reference to "Monarch Blinds" was intended to refer to fly screens. The allowance for that was $5,000.00 of which the Builder spent only $1,925.00. The balance is to be allowed to the Owner ($3,075.00).

Fireplace insert

402. The allowances for the supply of a gas fire plus associated work totalled $6,940.00 (incl. margin and GST). The Builder paid $5,057.66 (ex GST) for the unit and labour of $722.00 to install it. With GST these figures total $6,355.42 and after deducting that from the allowance the balance is due to the Owner ($584.64).

Permits, Council's fees etc

403. There was an allowance of $2,200.00 (incl. GST) for permits, Council's fees etc, none of which was spent and so the allowance is due to the Owner ($2,200.00).

Contingency

404. The Builder agrees that the Owner is entitled to a credit of $15,000.00 (GST inclusive) for contingencies.

405. Mr Reid submitted that the allowance should be $15,000 plus GST. However the Contract (Specification 00870 – bottom of page) provided that the Contingency of $15,000.00 was inclusive of GST.

The Owner's claims for credits

406. The Owner has claimed a number of credits, many of which are disputed by the Builder.

407. In the course of dealing with these, Mr Reid referred to amounts the Builder had allowed in the Tender Document but, as already stated, that is not a contractual document.

408. If the Builder spends less on something than the amount it allowed in its tender that is to the benefit of the Builder, unless the item in question was a Prime Cost or Provisional Sum item. The Builder is entitled to the Contract price for performing the scope of works. How the Builder arrived at its tender price is not relevant.

409. The claims for credits are as follows:

Additional bluestone laying costs.

410. All tiles and pavers were to be supplied by the Owner but the Builder was to provide base preparation, grouting, joint fillers and laying. Mr Chamberlain said that the tiles to be laid were to be 12mm thick but that the Owner supplied tiles that were 20mm thick which were more expensive to lay. The tiler, who had been nominated by the Owner, charged the Builder extra for laying the thicker tiles.

411. Mr Reid referred to the various references in the material to the changes in thickness of the tiles and to the Builder's claim for an extra payment to lay such a large tile. He suggested that the Builder's claim in October 2011 of an extra cost was a recent invention but I do not accept that it is. The extra charge is supported by the invoices.

412. A variation request was raised on 7 and 30 November 2011 which included this claim. Item 12 of the Minutes of a site meeting held on 2 December 2011 stated that the Owner agreed to pay the tiler's extra cost for laying the bluestone and that this was to be separated out by Mr Chamberlain..

413. On 8 December 2011 Mr Chamberlain sent a reconciliation to the Owner and to the Architect claiming $6,275.50 as extra costs for laying bluestone tiling. This was Variation 31 and it represented the tiler's charge plus GST without any Builder's margin. The Owner said that she only paid it because Mr Chamberlain threatened to stop work if she did not do so. Mr Chamberlain denied having made such a threat and said that the Variation was accepted at the site meeting on 2 December 2011. The Owner's evidence was not corroborated by the Architect or Mr Mani and I prefer Mr Chamberlain's evidence.

414. The Owner has now claimed that these additional costs should be repaid to her because she ought not to have paid them to the Builder.

415. As I pointed out during the hearing, this was a voluntary payment by the Owner and generally a voluntary payment is not recoverable unless it was

paid by mistake, under compulsion or in some other circumstance which might rob it of its voluntary nature. That is not demonstrated here.

416. Since the Owner knew what it was for there was no mistake and so it is not recoverable. Moreover, she paid it to the tiler, not the Builder.

Credit for roof tiles

417. The Builder agrees that the Owner is entitled to a credit of ($3,279.00) for roofing tiles that it did not have to supply.

Use of electricity and water

418. By Specification 00800 the Builder was to supply temporary power and water to enable the works to be carried out. The Builder had allowed a credit of $650.00 to the Owner for power and water in Progress Claim 13C. That was an estimated figure. In the Owner's Further and Better Particulars of Counterclaim she claimed $1,096.09 a credit due to her for power used by the Builder but made no claim for water.

419. At the hearing she claimed a credit for $3,323.10 for water and $1,096.09 for electricity that she alleged she had to pay for water and power the Builder used. During her cross-examination on this point the bills the Owner had produced were examined and the amounts for supply of water and power were sorted out. It appears that the correct amount was $572.94 for electricity and $909.55 for water. After subtracting the amount of $650.00 that has already been allowed in Progress Claim 13C, the balance due to the Owner becomes ($832.49).

Deletion of outdoor shower and waste

420. The plans showed an external shower next to the barbecue which was deleted on instruction by the Architect in July 2011. The Owner claims a credit of $500.00 for this item. Much of this relates to the cost of trenching of a waste from the barbecue area to the laneway.

421. Mr Chamberlain said that there was a sewer pipe adjacent to the barbecue to which the waste could have been run if it had been required and that since the Owner had been required to supply the shower head and the tapware, the only saving was the deletion of the pipe work. He gives a breakdown of labour and materials of ($120.00) in his witness statement and that sum will be allowed.

Replacement coping tiles

422. The Owner alleged that when the coping tiles were laid around the pool they were laid badly and had to be re-done at a cost of $1,154.82 which she had to pay. Mr Reid said that the Builder had agreed to this claim in its response to the Tueno report but the reference in that document is to the completion of the work, not responsibility for payment.

423. The invoice relied upon in support of this claim is dated 5 March 2012 and is addressed to Harris Pammell Garden design. It is for the supply only of

15 square metres of coping tiles at a cost (including GST) of $1,154.82, which is the amount for which she seeks a credit. This was not canvassed in the evidence but it is the cost of the tiles used in the replacement of the coping tiles to put them closer together.

424. The additional cost of laying coping tiles to achieve this effect was claimed in Variation 47 which I have allowed. I am not satisfied that any credit is due for the tile component for the same reasons. It is not established that the necessity arose from bad workmanship.

Removal of garage footing

425. The Owner claims a credit for $1,848.00 for what she says is the cost of removing a garage footing from the scope of works. Her witness statement in reply is very sparse but as I understand the claim from her evidence, she paid the pool company extra to enlarge the footing for the pool so that it would also support the garage wall and that since this meant the Builder did not have to construct a footing for the garage wall she was entitled to a credit. The amount of $1,848.00 was an invoice received by the Builder from the pool company she was charged extra for.

426. Mr Reid referred to Section E-E on Drawing WD-09. That shows the garage footing to be separate from the pool shell.

427. Mr Chamberlain said that the amount was for the Pool company excavating the footing for the garage where it was extended to the street and that the Architect had documented that work. He said that the amount of the invoice was paid by the Builder. The Invoice includes spraying of concrete and appears to relate to pool construction.

428. Any credit here should have been assessed by the Architect. There is no evidence before me to enable me to decide how much if any the Builder has saved because of the change in construction of the footing. The purpose of adopting this changed method of construction was, according to the Owner, to achieve extra length in the swimming pool. I am not satisfied that it has been demonstrated that any credit is due.

Supply of two less pendant lights.

429. In the Addenda to the Specifications the Builder was to provide power and installation to special lights in eight areas which are identified. The ceilings in two of these areas were solid concrete and could not have pendant lights. Only six lights were installed in the designated areas. She said that there was an allowance of $620.00 for wiring to all eight lights and that she divided that by 4 to arrive at the allowance she sought of ($155.00).

430. That seems logical and reasonable and the credit will be allowed.

Payment to painter for “Weekend painting”

431. The Owner claims $468.40 for a special “Portmans” paint and $880 for labour for painting a feature wall next to the swimming pool that she

arranged herself. The Owner made no claim for this at the time and it appears to have been first raised on 14 July 2014.

432. The Contract (Drawing WD-06) required this wall to be rendered and painted. Mr Chamberlain said that it was rendered and the colour selected by the Owner was in the render and it seems clear that this is what was specified. He said the Owner then decided that she wanted to paint it with special paint and did so.

433. Mr Reid submitted that this was work the Builder would have had to do but I do not think that is right. These walls were to be rendered and the colour selected was to be in the render not in any additional coat of paint.

434. The Owner carried out this work herself without any reference to or agreement of Builder. I do not think that any credit is due.

Extra cost of Paint

435. The Owner claims $449.70 for the additional cost of purchasing paint for exterior rendered walls and lime wash for interior timber floor. The paint referred to is "Porters Paint" which is a special paint that is used in order to produce a special effect.

436. According to Mr Chamberlain's evidence, it was extra work and not within the scope of works in the Contract. The lime wash to the floors was also an extra. The Owner did not appear to dispute that in cross-examination. No credit is due.

Pest control not done

437. This item was agreed at ($2,795.10).

Garden lighting

438. The Owner said that power was not supplied for the garden lighting. The installation of the lighting itself was not the Builder's responsibility but the supply of the power for the lights was.

439. The Specification required to the Architect to confirm garden lights to the front and back yards and then said: "Allow 4 extra lighting points and underground trenching inc. margin and GST $1090".

440. The amount of $1,090.00 claimed is the amount stated in the specification for this item. The Builder denies the claim.

441. In cross-examination the Owner acknowledged that the garden lighting installed by her landscaper was powered by outdoor power points which were provided by the Builder. There was no expert evidence to say that these were not in accordance with this requirement in the specification. The requirement appears to have been that the Builder would supply power sources for the outdoor lights and that has been done. No credit is due.

Paving labour

442. The Owner alleged that the Contract required 150 square metres of outdoor paving and 342 square metres of indoor tiling to be laid at a cost of $75 per square metre. She said that the Builder laid only 130 square metres of outdoor tiles and 318 square metres of indoor tiles. She therefore claims a credit for $1,500 for the outdoor tiles that were not laid and $1,800 for the 24 square metres of indoor tiles that were not laid.

443. The basis for the claim is the assumption that there was a square metre allowance for the laying of tiles but the Contract contains no such allowance.

444. Mr Reid submitted that, since the garden beds were increased in size the area to be paved was reduced. There is no expert evidence of the areas involved or of what saving, if any, resulted to the Builder from these changes to the design. No credit is due.

Engineer's fee

445. This has been variously described in the submissions as an engineer's fee and a building surveyor's fee.

446. On 28 June 2011 the Owner received an account from the engineer which included a charge of $220.00 (GST incl.) for a site visit on 27 June 2011, which the account says was "…to check site conditions". This is the document produced by the Owner to substantiate this claim.

447. The Owner claims that this visit was required because the Builder's workmen hit the foundations with heavy machinery and an inspection was required to ensure the foundations were not damaged. Mr Chamberlain said that the Builder paid the whole of the engineer's account.

448. In cross-examination there appeared to be some confusion about an extra charge by the Building surveyor and it was sought to be demonstrated by Mr Hellyer that there was no such additional charge. That may be so, but that still leaves the engineer's account attached to the Owner's witness statement which shows that the engineer did charge this amount. However, Mr Chamberlain said that it was the Builder that paid it and that evidence was not contradicted.

Damage to garden during rectification

449. The Owner claims $284.75 for damage done to the garden during rectification and the Builder agreed that this credit should be allowed.

Tiling allowance not used for bathrooms

450. The Owner claims a credit of $8,715.00 because she said that the tiling allowance was not used for bathrooms 1 and 3.

451. Item 23 of the Addenda in the specifications said that full height wall tiles were to be supplied to bathrooms 1 and 3 and for this an addition of $8,715.00 was made to the Contract price. This addition was presumably to

allow for the increased cost of full height tiling instead of tiling to what might have been the usual height.

452. In her oral evidence the Owner appeared to revise this claim to a claim for a credit of $484.00 for laying of tiles that she said were delivered to site but were not used. She ascertained that by estimating the areas tiled. This changed claim was not put to Mr Chamberlain in cross-examination.

453. I think she might have confused this item with a separate claim for missing tiles. I am not in a position to say that $484.00 worth of tiles the Owner paid for have not been used without expert evidence to that effect. .

454. Mr Chamberlain said that full height wall tiles were supplied and that is admitted. Mr Reid submitted that during the build, several splashbacks were converted to marble and glass. If so, any net change to the scope of works ought to have been taken up in the resulting variations and the time for assessing any potential credit to the Owner was when those variations were presented to the Architect or to Mr Mani and when they were assessed.

455. There is no basis for any credit on the original claim and insufficient evidence of the changed claim, if that is what it is. Estimating tile usage and allowing for wastage requires expert evidence which I do not have.

Credit for skylights

456. The Builder has already allowed $2,500.00 to the Owner for skylights in the final claim and agreed that she was entitled to a further credit of ($1,047.00) for the skylight not supplied to the en suite. I find that figure is proven by the supplier's quotation of 7 June 2010. The Owner also accepted that allowance in cross-examination.

Not removing hard plaster sill to curved window.

457. The Owner claimed a credit of $575.00 because she said that the Builder did not replace the hard plaster sill to the curved window. Mr Chamberlain said that the sill was replaced and produced what he said was a minute of a site meeting prepared by the Architect acknowledging that it had been.

458. Mr Reid pointed to an email from Mr Mani to the Owner and her husband dated 10 November 2014, stating, inter alia, that the existing sill to level one in the curved window would be removed and rebuilt again. However when Mr Mani was cross-examined he conceded that the sill for the curved window was a new sill, as stipulated in the addenda to the contract.

459. Since the work appears to have been done, no credit is due.

Credits for variations already paid

460. The Owner claims a credit of $5,868.50, being the aggregate of amounts that she paid for Variations 15, 20 and 43. The basis of this claim is Mr Mani's evidence that:

> "I am now aware as a result of this action that variations 15, 20 and 43 which I certified for payment and which were paid are not in fact variations."

461. He then went on to say why in each case he should not have allowed it and, before dealing with Mr Hellyer's submission that the Owner cannot now claw back these payments, I shall deal with each in turn:

462. Mr Mani said that Variation 15 was for 3 phase power and that Section 16350 of the Specification specified that the Builder was to allow for 3 phase power.

463. Mr Chamberlain said that Variation 15 was not for supplying 3 phase power but for running the power underground to a brick pillar in the front fence instead of running it overhead. He said that the metre box also had to be relocated , whereas the drawings (WD13E) said that the existing metre box would remain.

464. Mr Mani said that Variation 20 was for a mechanical roof platform which the Builder was to allow for by Specification 16351. That requires a metal grid platform to support one internal fan coil unit in each roof space and the Builder was directed to refer to an architectural detail for the size and shape of the platform. I have not been referred to any such detail. The fan coil units form part of the heating and cooling.

465. The Builder is also instructed to build two metal grid platforms, presumably external, for condenser or fan cool units. No details of these are given. Again, these will form part of the heating and cooling system.

466. Mr Chamberlain said that there was insufficient detail in the tender documents for pricing purposes. They were ultimately designed by the engineer.

467. I accept that the Builder could not have priced these on the tender documents but in such a case a provisional sum can always be given. That is what was done for the whole of the heating and cooling. The amount paid would therefore have been due as an extra over the provisional sum if it were not allowed as a variation. I think this was more properly an excess cost over a provisional sum but it was both submitted and accepted as a variation and in practical terms it comes down to the same thing.

468. Mr Mani said that Variation 43 was for telecommunications infrastructure which was also required by Specification 16350. In cross-examination Mr Mani agreed that Variation 43 said that it was to "Provide telecommunications infrastructure from pit to house" and that the Specification said that "Telecommunications Services, Telephones" were not part of the builder's works.

469. Each of these payments was made voluntarily and unless I am satisfied that it was paid under a mistake it cannot now be recovered. In this context, the only mistake alleged is that of Mr Mani. The onus of proving such a mistake is upon the Owner and I am not satisfied that the onus has been

discharged. Indeed, the amount in each case appears to have been properly allowed to the Builder and was paid by the Owner.

Credit for tiles

470. The Owner claims a credit for tiles of ($5,800.00) and this is agreed to by the Builder.

Removal of footing

471. The Owner claims a credit of $1,209.42 with respect to the removal of a footing at front of the House. This was removed by her landscaper some time before 29 May 2012 and the amount sought is what she was charged. She said that it was the Builder's responsibility to remove the footing.

472. The Builder was still on site at that time carrying out rectification work but no request was made by the Owner for the Builder to remove it nor was any direction given to the Builder by the Architect to do so.

473. Mr Reid said that this was the footing of the front wall of the South Building which the Builder demolished. He said that the Builder had not noticed the footing. That was not established by the evidence.

474. The Owner relies upon the following extract from Section 02315 of the Specification:

> "(iii) Excavate generally as required or as shown on the drawings, including but not necessarily limited to the following:
>
> Removal of footings and unnatural items below grade;
>
> Preparation of sub-grade as necessary."

475. Mr Reid said that the demolition plans (WD-02, WD-03 and WD-04) required the removal of this footing. He said that it was the footing under the existing glass front window of the South Building. A careful examination of the demolition plans and a comparison of those with the plans for the new work show that the footprint of the South Building at that location has not changed. Accordingly, this cannot have been the footing the Owner claims it to have been.

476. The old footing in question was not shown on the drawings, nor was its removal required in order for the work to be done. Reference must therefore be made be to the phrase "Removal of footings and unnatural items below grade ".

477. The term "grade" does not appear to be defined in the Contract. I think the only sensible meaning to be given to it in the context is "where the works are to be founded." There was to be no clearance of the whole site. Buildings and services on the site were to remain. I do not believe that this clause was intended to require the Builder to comb over the entire site and remove anything from the subsoil that was "unnatural" or that could be described as a footing.

478. It was not otherwise suggested that there was anything in the contract documents that required the Builder to remove any old concrete that might be found beneath the surface. I am not satisfied that any credit is due.

Fireplace deposit

479. The Owner claims a credit of $500.00 that she paid as a deposit for the fireplace. The Builder agrees that she paid the deposit but says that all that has been charged to her for the fireplace is the price less the deposit that she has paid. That was demonstrated during cross-examination. Mr Reid said that an obligation to allow a further $584.58 was conceded but it was not. No further credit is due.

Floor sealing

480. The Builder seeks $3,850.00 for floor sealing costs. The sealing was damaged and has to be rectified and the amount of $2,900.00 is to be allowed as a rectification cost.

481. The Owner claims a credit of the $3,850.00 on the ground that the work was damaged and has to be redone. Mr Reid submitted that, since the work has to be redone, the Owner should not have to pay for it.

482. I accept Mr Hellyer's submission that this would be double recovery. If the rectification cost is to be allowed then the Builder must be entitled to be paid for the work that was later damaged, otherwise the Owner gets the floor both sealed and then rectified, all at no cost.

Relaying coping tiles

483. The Owner claims a credit of $600.00 for relaying existing coping tiles a second time. The $600.00 has not been paid. The Builder is claiming from the Owner for this work. This is really a dispute of the Builders claim to be paid a variation for relaying the coping tiles and I have dealt with it as such. It is not properly a claim for a credit.

Replacement of lights

484. The Owner claims a credit of $1,188.00 for what she says is the cost of replacing two light fittings in the study and one in the corridor that were broken during demolition. Mr Chamberlain agrees that, during floor polishing, a door swung open and damaged a light. He said that the Builder is willing to pay the fair cost of replacing that light. However, that is not the claim that is made.

485. In cross-examination the Owner said that this claim relates to light fittings that were thrown out because, according to the Contract, they were to be replaced with LED downlights. When it transpired that downlights could not be fitted they had to revert to having wall sconces and so replacement fittings had to be bought to replace the lights that the Builder had discarded.

486. It seems to me that this loss arose because, unknown to the parties, it was not possible to fit the light fittings specified because of the nature of the

concrete ceiling in the bedroom and hallway referred to. I do not find any breach of contract by the Builder for having thrown out light fittings that were to be discarded because they were to be replaced.

Mirrors supplied by Owner

487. The Owner claims a credit of $268.00 for mirrors that she supplied. Mr Chamberlain said that, after the Builder had ordered the mirrors for the House the Owner bought two mirrors herself. He said that, as a result, two of the mirrors the Builder had ordered were not used but the Builder nevertheless had to pay for them because they were custom made.

488. The Owner appeared to acknowledge that was the case but said that she wanted the mirrors that could not be used and they had not been delivered to the House. When I asked her if she had asked the Builder for them she said she had not.

489. I do not find any credit due.

Door handles

490. I am unclear about this claim. The Owner pointed out that she had to provide the door handles and that she did so. She said that the Builder was nonetheless claiming the cost from her.

491. Mr Chamberlain said that there were not enough handles supplied and further handles had to be obtained by the Builder. He said that they had to obtain other door furniture as well and charged the Owner $1,530.79 for doing so.

492. The Owner said there ought to be a reconciliation and that she could not see where the various items that she has been charged for are. This seems to be more an expression of concern rather than a request for a credit. No particular figure is demonstrated to be due to the Owner.

Not rewiring some areas

493. The Owner claims a credit of $1,300.00 for the Builder for not rewiring Bedroom 5 and anteroom upstairs, the front north room and study and the corridor downstairs. Mr Chamberlain said that the Contract did not require the Builder to rewire the whole House and the rooms in question did not need rewiring. Unless the Builder was required by the Contract to rewire these areas, no credit would be due.

494. During cross-examination the Owner suggested that the claim was because the electrician did not have to wire in the downlights that could not be fitted. If that is the claim it would be necessary to demonstrate the saving to the Builder from not having to do what the Contract required and doing instead what was done, which was reinstalling lights in the original positions. That would require expert evidence which I do not have.

Kitchen foreign exchange

495. The Owner was entitled to the benefit of any foreign exchange movement in regard to the price of the kitchen. The contract with the nominated subcontractor, Rogersellers, contained the following clause:

> "This project price is based on the buying rate of foreign exchange of 0.693 Euro cents and subject to rise and fall in the event of foreign exchange movement of more than 5 per cent (0.658- 0.727)m - our buying rate is .046 difference in the daily Euro rate."

496. The amount claimed by her was $4,183.00 and she set out in her witness statement in reply how she arrived at this calculation. After enquiries were made of the supplier, Rogerseller, during the course of the hearing, the figure that it said was due was $1,369.87 and the Builder agrees that should be allowed.

497. Mr Reid nonetheless submitted that I should allow the Respondent's higher figure because the Builder would be able to negotiate with its supplier. I do not accept that submission. I have no expert evidence on what is actually due. The clause in the Contract with the supplier that the Owner had negotiated contains technical matters that I do not understand and would need expert evidence to apply. All I have is the Owner's calculation and the Builder's admission that it has been allowed a credit by its nominated subcontractor of $1,369.87 and that the Owner is entitled to the benefit of that.

498. The onus of proof is on the Owner and in the absence of any other evidence the allowance should be the admitted actual saving of ($1,369.87) and that credit will be allowed.

Pool pump replacement

499. The Owner claims the cost of replacing the swimming pool pump, which was $848.00. It appears that the pump outlet was deliberately blocked by the Owner's painter with silicone sealant when he painted the feature wall over the swimming pool and that the pump was damaged when it was switched on. To allow this item I would need expert evidence that the failure was due to some breach by the Builder and I do not have that evidence. The painter who blocked the outlet was engaged directly and paid by the Owner.

Solar hot water

500. This is a repeat of the defects claim for the same item. I am dealing with it and allowing it as a defect. I cannot allow it twice.

Temporary pool fencing

501. Mr Reid submitted that the pool was filled late and the Builder should allow the cost of temporary pool fencing for the additional period, which he said was $480.00. There is no evidence establishing this claim. It appears to

relate to the claim for delay which is dealt with below. Quite obviously, once the pool is filled it must be fenced.

Paint

502. On this item also, I do not know what the claim is about and no evidence was led to substantiate it. It might relate to the Porters paint claim dealt with earlier.

Downlights

503. The Owner claims a credit for the Builder not having installed the required number of downlights.

504. Mr Reid said that the Builder had not installed 51 downlights and seeks a credit of $77.00 for each light.

505. Mr Chamberlain said that the Owner directed the electrician directly about what she wanted and that many changes were made. A credit was raised for $1,355.00 (VR36) but Mr Reid seeks in addition what he says is the labour component of installing the missing lights which he calculates at $3,927.00. He put to Mr Chamberlain in cross-examination that only 97 downlights have been installed, seven with dimmers.

506. Mr Chamberlain did not verify that. There is no evidence about how many downlights have been installed. I am unable to say that the credit already allowed in the variation is inadequate.

Tiling "labour not utilized"

507. Mr Reid submitted that the Owner was entitled to a further allowance because, he said, the areas tiled were less than what the Contract required. I have dealt with a similar claim above.

508. There was no allowance in the Contract specifying areas to be tiled. The Tender Document and its calculations are not part of the Contract. The Builder had to carry out the Contract works. There have been credits for tiling and I am not satisfied that any further credit should be given.

External painting

509. Mr Reid submitted that the external painting was not done but that tinted render was applied instead. He referred to Section 09910 of the Specification which required "…a first quality minimum 3 coat painting application…"

510. What has been supplied to the rendered surfaces is coloured render. The colour of the render was approved by the Architect and the Owner. Mr Reid said that it should also be painted and seeks a credit for the cost of painting but does not say what that should be.

511. It appears that render is applied in several coats. There was no complaint by the Architect that the render had not been painted. It is quite clear that the "paint" of the rendered surfaces was agreed to be the coloured render itself. No credit is due.

Metal windows painting

512. Mr Reid seeks a credit of $2,500.00 for this item. I have dealt with the claim with respect to the metal window under defects. No credit is due.

Render sealer coat

513. Mr Reid seeks a credit for a sealer coat that he says was not applied but this has been allowed in Claim 13B.

514. A credit of $4,000.00 plus GST was raised in favour of the Owner as part of Progress claim 10. There was no evidence to support this further claim.

The Owner's claim for liquidated damages

515. The Owner claimed liquidated damages of $32,000, being 32 weeks at $1,000 per week.

516. The date for practical completion was 19 August 2011 and the date upon which practical completion was achieved and the Owner took possession, which was 30 March 2012. In the meantime the Builder had applied for a short extension of time for bad weather but no other extensions of time because of delays caused by the Owner or the Architect.

517. It is clear from the evidence that there were such delays but no claims for extensions of time were submitted to the Architect. Mr Chamberlain said that he overlooked doing so. He said that most of the Builder's work is architect administered and no owner has claimed liquidated damages before.

518. A meeting took place at the site in June 2013 between Mr Maraffa, Mr Chamberlain, the Owner and her husband. The meeting had been called by Mr Chamberlain to complain about the non-provision of information by Mr Mani and the Architect which was causing delay.

519. According to Mr Chamberlain, the Owner and her husband agreed that the work had been delayed by causes that were not the fault of the Builder and agreed that, provided they were in the House by Christmas they would not claim liquidated damages.

520. Mr Chamberlain said that he told them the Builder would do everything it could to get them into the House by Christmas but that would depend upon whether they received the necessary information and support from the Architect. His evidence in this regard was supported by that of Mr Maraffa.

521. In the Owner's account of the meeting she said that Mr Chamberlain had alleged that she and her husband were partly to blame for the delays because they "had not shown enough interest", a suggestion that she said she found extraordinary. She said that Mr Chamberlain said more than once that he was confident that the work would be completed by December and they could move in by Christmas

522. Mr Mercuri's evidence about the meeting confirmed that Mr Chamberlain and Mr Maraffa blamed the Architect for the delay. He said that the

agreement was that, if they could move in by December 2011, delay damages would not apply.

523. In August 2011, the Owner emailed the Architect expressing concern about progress. She then said:

> "We met with the builders over a month ago (David and Tony) where we agreed to an extension of time till early December (5 months to completion) There is enough time to complete the project if sufficient resources are deployed. Could you provide a completion schedule for this project. Unfortunately no extra extensions are possible."

524. On 28 September 2011 the Owner sent an email to Mr Chamberlain in response to his request to confirm the agreed extension. After referring to the meeting, the Builder's concerns about lack of progress and difficulties Mr Chamberlain said that he had in working with the Architect, she denied any lack of interest on her part and added:

> "We chose to be pragmatic and as a gesture of good faith agreed we would not pursue late completion penalties accrued between August and November if TCM achieved completion and handover to enable us to move back by December, a time frame which you indicated was achievable. We have taken you at your word and reasonably expect that our goodwill is appreciated and returned in kind by TCM."

525. I accept Mr Hellyer's submission that Mr Chamberlain gave no guarantee of completion by Christmas. Rather, he thought that was achievable, provided he received the necessary information from the Architect, Mr Mani or the Owner. However it seems to me from the various accounts of what was said at this meeting that the agreement to make no claim for liquidated damages was conditional upon Practical Completion being achieved by December 2011.

526. Thereafter, a Gantt chart was prepared by the Builder and provided to the Architect, showing an anticipated completion date of 17 December 2011.

527. Practical Completion was not achieved until March 2012. Liquidated damages are now claimed for the full period and I think the June agreement of itself does not stand in the way of such a claim.

528. However the Builder claims that the delay in the completion of the work was the fault of the Architect, Mr Mani or the Owner. Mr Chamberlain gave highly detailed evidence of these delays which are relied upon.

Delays

529. Delays claimed by the Builder were as follows:

(a) Ground water

Mr Chamberlain said that, when excavating for the footings in September 2010 the Builder encountered excessive water which caused the excavation to take six weeks instead of two.

(b) Changes to engineering design

Changes to the engineering design made by the Architect on 16 September 2010 which resulted in a variation (VR1) were said to cause a delay of two days.

(c) Removal of old footing

This was found in the site of the new footing and was the subject of a variation (VR2). Its removal was alleged to have caused a delay of two days.

(d) Floor replacement.

On 22 February 2011 by another variation (VR6), the timber floor of the southern building was to be replaced by a concrete slab. The Architect and engineer were to provide a design of the slab and this was requested by the Builder from 1 March 2011 and thereafter four further emails throughout March 2011. The information was not received until "about the end of April 2011". As a consequence the slab was not poured until 30 April 2011. A delay of four weeks is claimed.

(e) Heating and cooling.

Mechanical works were to be by a subcontractor nominated by the Architect. (Section 16351). The works were not detailed in the Contract documents and were the subject of a provisional sum allowance. According to Mr Chamberlain, between 21 February 2011 and 5 July 2011 he sent 15 emails to Mr Mani requesting the Architect to nominate a subcontractor but the subcontractor was not nominated until 5 July 2011. The nominated subcontractor was engaged by the Builder that same day. Although the emails extended over 134 days, a delay of 6 ½ weeks was suggested.

(f) The kitchen

The joinery and kitchen were to be by nominated subcontractors. In April and May 2011 the Builder requested that the subcontractors be nominated but it was not until 8 June that the Architect issued instructions to the Builder to engage the kitchen supplier, Rogerseller, which it did. The kitchen cabinetry was manufactured in Italy.

Thereafter schedules of finishes had to be agreed to by the Owner with Rogerseller The contract for the supply of the kitchen was entered into by the Builder on 20 June 2011 with an anticipated delivery date of 20 September 2011, which was after the date fixed by the Contract for practical completion.

Communications concerning the kitchen occurred between Rogerseller and the Owner and the Architect as well as the Builder. Installation of the kitchen was not completed until March 2012, having not been commenced until the second half of October 2011.

(g) Joinery.

On 18 May 2011 the Builder asked the Architect to nominate the subcontractor for the joinery and to provide details of the joinery. Between then and July 2011 there were twelve emails from the Builder repeating the request.

On 26 May 2011 the Architect advised that the joinery details had been changed. Amended joinery drawings were not provided to the Builder by the Architect until 28 July 2011 at which time the joinery subcontractor was nominated.

The Architect had dealt with the nominated joinery subcontractor before but the Builder had not. The subcontractor told Mr Chamberlain that because he had not worked for him before he was "down the list". Thereafter Mr Mani appears to have dealt with the joinery subcontractor and advised Mr Chamberlain about progress. In an email of 1 March 2011 Mr Chamberlain sent Mr Mani a list of 17 items for the subcontractor to complete.

The nominated subcontractor was very slow and did not complete the work until 27 March 2012.

(h) Door hardware

The Owner was to supply door hardware. The Builder requested details in fifteen emails between 14 April 2011 and August 2011. On 15 September 2011 the Owner advised Mr Chamberlain that the door hardware was able to be collected from a store in Richmond.

(i) Tiling and paving.

On 8 June 2011 the Builder asked the Architect and the Owner to select the tiles. The interior tiles were not supplied until 13 October 2011 and the tiles for the balcony were not supplied until 24 November 2011. The tiles for the external tiling were not supplied until 17 January 2012. The Architect's nominated tiler did not begin tiling until March 2012 and the set out plan was not confirmed by the Architect until 8 March 2012.

(j) Stone bench tops

From 4 July 2011 Mr Chamberlain requested information as to the type of bench top the Owner wanted and made several subsequent requests. Three subcontractors were nominated on 28 September 2011, 18 November 2011 and 22 September 2011 respectively.

(k) Front fence design.

The design of the front fence was not provided by the Architect until 8 and 9 November 2011 although Mr Chamberlain had requested it on 24 September and in subsequent emails. The design was then changed

a number of times and it was not until 12 December 2011 that the plans for the front courtyard and fence were provided.

Mr Chamberlain said that the front paving could not be carried out until such time as the design of the front courtyard had been provided. The design of the letterbox and front gate was also delayed and these works were ultimately carried out by the Owner using another contractor after they took possession.

(l) Painting colour selection.

Although requested on 23 September 2011 and in subsequent emails the paint and render colours were not selected until January and February 2012 and even then were not provided all at once.

(m) Delay in final inspection

According to Mr Chamberlain, the final inspection by the Building Surveyor was arranged for late February 2012 but it did not occur because the Owner had not paid an earlier invoice from the Building Surveyor. The inspection did not take place until 21 March 2012.

(n) Meter box and power supply.

Because the power was being relocated to a box in the front fence the delay in regard to the design of the front fence held up the installation of the power. As a result the permanent power supply was not connected until the second half of February 2012.

(o) Changes in flooring

Mr Chamberlain said that, in February 2012, the Owner changed the floor paint from lacquer to a particular wood wash that was applied by a specialist contractor who could not do it until March 2012, which is when the work was done. Also during that month, the termite affected floorboards were replaced pursuant to Variation request 53 and that was not completed until 22 March 2012.

(p) Landscaping

The landscaping was the responsibility of the Owner. Her contractor did not complete it until February 2012. Mr Hellyer submitted that I should find that the House could not be considered to have been completed until that was done. However the question is, when was the Builder's scope of works complete? Whether the overall work was completed and whether the House could or could not have been occupied without the landscaping are separate questions.

(q) Selection of sanitary fittings

Mr Hellyer submitted that the delay in the selection of sanitary fittings caused further delay.

530. There are emails in the voluminous material produced to corroborate these allegations and I accept Mr Chamberlain's evidence in regard to them.

531. As to the critical period after June 2011, when there should have been sufficient time for completion, there are specific emails relied upon by Mr Hellyer in his submissions which were sent by Mr Chamberlain between June 2011 and 28 February 2012, warning that the work was being delayed and seeking information. Some extracts from these are as follows:

(a) On 8 June 2011:

"Note only when items that are delaying the critical path of construction are confirmed can a completion date be set."

(b) On 14 June 2011:

"Please be advised that TCM cannot set a completion date until items affecting the critical path of construction are answered. Only once this information is received can a completion date be set."

(c) On 17 June 2011:

"Dear Gabby, attached are all the lists of requests for this project. If the information critical to the flow of this project is not received, TCM has no choice but to put this project on hold until all information is received. Once TCM receives the information a completion date will be set and made contractual. Please let me know when you intend to forward the relevant information."

(d) On 4 July 2011:

"Hi Teata, Please find attached list of questions. Please note that some of these items have held the project up for some time now.

Note: only when items that are delaying the critical path of construction are confirmed can a completion date be set."

(e) On 14 September 2011:

"Hi Teata, Please find list of items to be confirmed. Please note if some of these items are not answered immediately the job program will be affected."

(f) On 13 October 2011:

"Hi Teata/Gabby, Please find attached list. Please note if some of these items are not confirmed asap, the job timetable will be affected."

(g) On 8 November 2011:

"When will I receive the plans for the front fence. If the fence is not built now I won't be able to bring the services into the property before Christmas."

(h) On 29 November 2011:

"Hi Teata/Gabby, Please find attached list. This list needs confirmation asap for this project to move forward. So many items needing confirmation at this point in time is delaying the project. Please respond asap."

(i) On 9 December 2011:

"Teata, the Porters wood wash colour needs to be selected before the floor sander can estimate the additional costs. Apparently the lighter colour may need two coats of stain. As you know he is sanding on Monday so this needs to be finalized tomorrow or we may lose him to another job."

(j) On 28 February 2012:

"3 days to go before handover and there are still outstanding items –

- Front gate
- letter box
- Front fence
- Paving set out
- Garage render – to be priced
- Timber flor stain – earliest Porters can stain floor 8-03-2012
- Landscaping
- Front door pull

PLEASE CONFIRM ASAP."

532. There was some response to these emails but in general it was patchy and slow.

533. In cross-examination the Owner acknowledged that some things took time to decide and that she was more concerned with focussing on the job rather than seeing who was to blame for the delay, which she described as "an endless conversation."

Extension of time

534. Mr Hellyer relied upon Clause H6.1 of the Contract, which is as follows:

> "If the contractor has not made a claim to adjust the contract in relation to any change which results from complying with any instruction given under section J4 for a variation of the works or from causes of delay noted in clauses L1 or L2, the architect may adjust the contract at any time up to the issue of the final certificate under clause N11 or a certificate under clause Q9 or Q17".

535. Clause L1 lists causes of delay that will entitle the Builder to claim an adjustment to the date of Practical Completion. Those relied upon by the Builder are delays caused by:

- "an architect's instruction";
- "the owner's consultants failing to promptly provide necessary information which is properly due to the contractor or which the contractor has specifically requested in writing";
- "A breach of this contract by the owner"; and

- "an act of prevention by the owner not otherwise covered by this clause".

536. Since neither Final Certificate nor a certificate under Clause Q9 or Q17 has been issued the time for practical completion can still be adjusted by the Architect and it seems that, if appropriate I can also exercise the power to adjust it.

537. In *Peninsula Balmain Pty Limited v Abigroup Contractors Pty Limited* [2002] NSWCA 211 the Court of Appeal in New South Wales said of a similar provision (at para 79 et seq.):

> "79. In my opinion, this power is one capable of being exercised in the interests both of the owner and the builder, and in my opinion the Superintendent is obliged to act honestly and impartially in deciding whether to exercise this power. Of course, if a timely claim has not been made, and the ground on which an extension is claimed is one which is difficult to decide because of the time that has elapsed since the time when the claim should have been made, that may be a ground on which the Superintendent can fairly refuse the extension; but there is no suggestion that that is the case here.
>
> 80 In my opinion also, the power to extend time, including the power to do so even if no claim has been made within time, does not automatically come to an end with the termination of the contract for the builder's breach. Clause 35.6, providing for liquidated damages, expressly operates after the contract has been terminated under cl.44; and in order for it to so operate there must be a date for practical completion on which the clause can operate after termination of the contract. If an application had been made within time before termination and not yet determined by the Superintendent at the time of termination, it is plain in my opinion that the Superintendent would have power to determine that claim after termination. If a claim had been made before termination but outside the time provided by cl.35, and the Superintendent had not made a decision in exercise of the Superintendent's power to extend time notwithstanding non-compliance, in my opinion the Superintendent could still do so after termination. In those circumstances, I do not think the Superintendent's power is lost on termination, even if the claim for exercise of the power to extend notwithstanding non-compliance had not been made until after termination.
>
> 81 For those reasons, it was in my opinion open to the referee to do what he considered the Superintendent should have done in response to the claims made to the referee; and it was open to the referee to conclude that the Superintendent, acting fairly, would have granted the extensions which the referee found to be justified."

538. Mr Reid submitted that the Builder has the onus of proving an entitlement to an extension of time and that a general allegation of delay is not enough. He said that the Builder had not adequately identified any time periods, critical activities or periods of delay for which it sought to claim.

539. Certainly the claim has not been broken up in that way but it is trite to say that a Builder cannot build something without plans or instructions.

Conclusion as to time

540. In general, an owner cannot recover liquidated damages for delay in the completion of works by a builder where that delay has been caused by an act or omission of the owner in breach of the contract. This prevention principle does not apply where the building contract, as here, contains a provision giving to the builder a right to an extension of time for delays caused by the owner's breach of contract but the person having power to extend time must exercise it honestly and fairly and the owner will be in breach of contract if he does not do so, even though the builder has no absolute entitlement to an extension of time (see *Built Environs Pty Ltd V Tali Engineering Pty Ltd & Ors* [2013] SASC 84 and the cases there cited).

541. Where work by a builder is dependent upon an owner supplying an instruction, design, material, earlier work or anything else which is required to be done or supplied in order for the work to be performed, the builder cannot be blamed for delay in doing his work insofar as that delay is caused by the failure of the owner to supply what was needed in order for him to do it. In such a case the owner himself is the cause of the delay and it would be most unfair not to extend time for Practical Completion in such circumstances.

542. In this case I am satisfied that the delay in reaching Practical Completion was occasioned wholly by the failure of the Architect and Mr Mani to supply in a timely way what was sought in the many requests that the Builder made. Whether that is their fault or that of the Owner is impossible to say because the evidence as to the extent of the Architect' retainer is unclear. However it does appear that there were many changes to the work and the Owner took a great deal of time to make up her mind about many items.

543. I therefore extend the time for Practical Completion to 30 March 2102. The effect of that extension is that no liquidated damages are payable.

Conclusion

544. The Contract Price of $1,425,370.00 has been adjusted already by the Architect to take account of those matters that have already been allowed. The Contract Price shall be further adjusted to take account of the following further variations, adjustments and credits that I have allowed. There shall be set off against the balance, the damages that I have assessed..

Further variations allowed

545. In addition to the variations already paid, the following further variations are allowed:

Variation	Adjustment to Contract Price
Variation 30	$ 1,471.00

Variation 36	$ 2,159.85
Variation 41	$ 4,235 00
Variation 43	$ 605.00
Variation 44	$ 151.25
Variation 45	$ 387.20
Variation 46	$ 1,754.50
Variation 47	$ 605.00
Variation 48	$ 338.20
Variation 49	$ 1,694.00
Variation 50	$ 532.40
Variation 51	$ 890.19
Variation 53	$ 2,544.61
Variation 8.6	$ 350.90
Variation 8.7	$ 1,162.00
Variation 8.8	$ 605.00
Variation 10.1	$ 4,891.87
Variation 10.2	$14,362.70
Total adjustments for Variations	$38,740.67

Damages for defects and incomplete work

546. Defects are assessed and allowed as follows:

Defects	Damages assessed
Item 1. Plantation shutter	$1,000.00
Item 5. Brickwork	$1,766.00
ditto	$ 147.00
Item 14. No articulation joint	$ 162.00
Item 15. bluestone tread of stairway	$1,096.00
Item 16. Sealing of floor tiles	$2,900.00
Item 18. Kitchen door	$ 217.00
Item 19. Powder room door	$ 20.00
Item 21. Front door	$ 143.00
Item 23. Tiling on the balcony	$ 202.00
Item 24 - 30. Warped doors	$5,400.00

Item 31. Balcony on main bedroom	$2,328.00
Item 32. Mirror in en suite	$ 803.00
Item 34. Internal floor levels	$1,051.00
Item 37. Wrapping of pipes – credit	$1,230.00
Item 38. Water staining to eave	$ 480.00
Item 43. Powder room towel holder	$ 104.00.
Item 46. Pool heating	$1,722.00
Item 50. Lack of insulation	$1,300.00
Item 51. Loose capping	$ 200.00
Item 52. Circular roof	$ 300.00
Item 55. Pool skimmer box	$ 50.00
Item 56. Pool wall	$ 667.50
Item 57. External soffit	$ 206.00
Item 61. Internal sliding doors	$ 60.00
Item 62. Capping to north west corner	$ 480.00
Warranty insurance	$1,000.00
Total damages assessed for defects	$25,384.50

Adjustments for Provisional sums and prime costs

547. Provisional sum and prime cost adjustments are as follows:

Item	**Adjustment to Contract Price**	
In favour of	**Owner**	**Builder**
Manufactured casement		$75,212.50
Stone bench top	$11,883.55	
Underground water tank	$20,000.00	
Bathroom mirrors		$ 737.00.
Mechanical services	$1,870.00	
Swimming pool and solar		$ 4,800.63
Remedial works	$ 5,000.00	
Supply tiles	$ 9,747.20	
Supply pavers	$ 8,046.70	
Metal gates	$ 3,185.00	
Flywire screens	$ 3,075.00	

Fireplace insert	$ 584.64	
Permits, Council's fees etc	$ 2,200.00	
Totals	$63,722.09	$82,620.13
		$63,722.09
Net allowance to Builder		$18,898.04

Assessment of Credits due

548. Credits due to the Owner are as follows:

Item	Credit
Roof tiles	$ 3,279.00
Electricity and water	$ 1,482.49
Deletion of shower and waste	$ 120.00
Pendant lights	$ 155.00
Pest control	$ 2,795.10
Damage to garden	$ 284.75
Credit for skylights	$ 3,547.00
Credit for tiles	$ 5,800.00
Kitchen foreign exchange	$ 1,369.87
Contingency not spent	$15,000.00
Total credits	$33,833.21

Order to be made

549. Unfortunately, I have found the two different numbering systems adopted by the Builder for variations confusing and have had great difficulty reconciling them. I seek further submissions on what the final figure for all variations, including those that have been allowed, should be.

550. It is unclear whether the Owner has paid a total of $1,242,305.69 as alleged in the Points of Claim or $1,252,305.60, as alleged in the Points of Defence and Counterclaim. I note also that in Progress Claim 13 it was suggested that the total received by the Builder was $1,216,074.66.

551. I will direct that the parties file and serve draft orders that should be made consequent upon these reasons for decision and any further submissions related to the amount paid and the total variations allowed. Upon consideration of the said drafts and submissions, final orders will be made.

SENIOR MEMBER R. WALKER