

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D173/2004

CATCHWORDS

Domestic Building, weight attributed to unsworn reports where the expert does not attend for cross-examination

APPLICANT The Professional Group Pty Ltd (ACN 076 578 393)

RESPONDENTS Scott Rickard, Robin Brown

WHERE HELD Melbourne

BEFORE Senior Member M Lothian

HEARING TYPE Hearing

DATE OF HEARING 7-10 November 2005

DATE OF ORDER 3 January 2006

[2006] VCAT 1

ORDERS

1. The Applicant must pay the Respondents \$31,841.00 forthwith.
2. There is leave to apply for costs.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For the Applicant Mr M Parker, Director of the Applicant

For the Respondents Mr CD Johnson of Counsel

REASONS

- 1 The Applicant/Respondent by Cross-Claim, (“the Builder”) renovated and extended the home of the Respondents/Applicants by Cross-Claim (“the Owners”) under a contract dated 14 December 2002.
- 2 On 2 November 2005 the application was struck out, leaving the Cross-Claim and defence to Cross-Claim for determination.
- 3 The Owners say the Builder failed to complete the works, failed to work in a proper and workmanlike manner and failed to work in a timely manner. The Builder says the Owners repudiated the contract. The Owners say they did not, and that the Builder invalidly terminated the contract. The parties agree that there were a number of variations. The Owners claim liquidated damages or general damages for delay and say the Builder did not claim extensions of time in writing.
- 4 Mr Johnson for the Owners submitted that the contract price was \$126,000.00 with variations bringing it up to \$146,132.00 of which \$124,688.00 had been paid, leaving a balance of \$21,444.00. Mr Johnson said that Mr Parker mentioned there was \$19,518.00 to be paid on the Contract, but in a note said that there was \$20,202.20 owing.
- 5 The Owners calculate that the cost of completion and rectification is \$56,322.00. When the amount they say is owing to the Builder, \$21,444.00 is deducted, the nett balance to them is \$34,878.00. They also seek \$250.00 per week as liquidated damages for delay from 7 November 2003 for a reasonable period. They submit that the reasonable period is until June of 2004. Additionally or in the alternative the Owners seek general damages. When this was queried Mr Johnson said that the Owners would elect at the end of the hearing whether they would seek liquidated damages or general

damages, however they did not do so. The Tribunal notes the words of the learned authors Dorter and Sharkey (*Building and Construction Contracts in Australia*, paragraph 9-730) “it is very doubtful whether there can be a valid claim for unliquidated damages in the face of a liquidated damages clause; *Bruno Zornow (Builders) Limited v. Beachcraft Developments Limited* (1998) 51 BLR 16”.

- 6 Mr Douglas Buchanan, Quantity Surveyor, of Prowse Quantity Surveyors Pty Ltd, gave evidence for the Owners that the contract value of work performed was \$113,706.00 to the end of fixing stage, plus agreed variations of \$17,455.00, a total of \$131,161.00. Alternatively he has calculated the value of work undertaken, including variations, on an elemental basis as \$131,972.00 in total. He has calculated the cost to rectify and complete as \$56,322.26.

ALLEGED REPUDIATIONS

- 7 As is often the case in building disputes, both parties have alleged that the other has repudiated the contract. The Builder’s allegation is found in its Points of Claim; in particular asserting that the Owners’ letter of 3 June 2004 was wrongful and in breach of the contract.
- 8 It is found that the Builder’s own notice of 17 February 2004 was repudiatory as, among other things, it made substantial monetary claims to which it was not entitled. Although no formal step was taken to accept the repudiation, the Owners and Builders acted in a manner thereafter which was inconsistent with continuation of the contract until Messrs Rigby Cook on behalf of the Builder made a brave attempt to breathe life back into the contract by their letter of 8 June 2006. The contract is treated as having come to an end ten days after the notice, on 27 February 2004.

- 9 It follows that the Owners are entitled to the reasonable cost to them of completion of the work and rectification of defective items.

TIME

- 10 Building work started on 8 April 2003. Under item 10 of Schedule 1 of the contract, the work was to be completed within 150 days – the original completion date was 5 September 2003. The Owners’ evidence is accepted that there were extensions of time which took the date for completion to 7 November 2003. The Owners are entitled to liquidated damages at \$250 from the day after the date for completion, as adjusted, to the date the contract ended on 27 February 2004, being 16 weeks – a sum of \$4,000.
- 11 The Builder was not entitled to time extensions for items such as Mr Parker “getting acquainted with the file” when a previous employee left, and twenty-one days for “Christmas shut down” when the project should have been completed before Christmas. Such claims also demonstrate a pattern of repudiatory conduct, particularly when combined with suspensions of work by the Builder when, it is found, the Builder was not entitled to suspend work under the contract.
- 12 Ms Rickard said, in answer to a question from the Builder, that the Owners had alternate accommodation to the premises between April 2004 and June 2005 – approximately 13 months – in part because the power supply was unreliable and frequently failed. Ms Rickard is a PhD student and needed to be able to work on her laptop computer with an uninterrupted power supply. The Builder said the house at that point was almost complete and the power had been done. Ms Rickard said that the electrical subcontractor to the Builder returned to the property on more than one occasion to rectify the power supply problems but was unable to

fix it. The Builder said that the Owners could have had an electrician test all the wiring rather than move out of the property. Ms Rickard said that the problems with power contributed to vacating the premises but was not the only factor and that they were not having work undertaken by other Builders or subcontractors while they were out of their home. Under re-examination Ms Rickard said that the Builder's electrician suggested the problem with power supply was one of their own appliances and he failed to rectify the problem. She said the problem had since been rectified. It was discovered that a wire in the workshop had been nicked and fused to cause a short circuit.

- 13 Although the living circumstances of the Owners has been very difficult at times, their entitlement to liquidated damages ended with the end of the contract. At that point it was incumbent upon them to make other arrangements to have their home completed and rectified.

VARIATIONS

- 14 The Builder claimed 21 variations, all of which were in writing. The first 19 variations were signed by the Owners and have not been queried with the exception of Variation No. 8, Additional Structural Beams for \$1,740.00. Mr Brown said he told Adam, an employee of the Builder, that he believed the item claimed for Variation 8 was included in the Contract. Mr Brown reported that Adam did not agree and that Mr Brown chose to sign the variation without qualification. He said he did not mention it to Mr Parker and that he had received advice from BACV that sometimes it is worth accepting an item rather than creating a dispute. In these circumstances variation 8 is treated as a valid variation.
- 15 Variations 20 and 21 were not signed by the Owners and not undertaken by the Builder. Variation 20 is "Rectify front entrance wall to make

level". This matter is also referred to below at item 27 of the alleged defects. The problem is that the original house, which was probably built in the 1950s or 1960s, has a wall containing the front door which is not completely vertical. When the Owners purchased the house there was a small nib wall which extended from the corner to the south of the front door, the edge of which was apparently vertical. With the removal of that nib wall, it became apparent that this interior corner is out of plum.

- 16 Variation 21 is for render inside fireplace a total of \$315.45. The variation was not signed by the Owners and the work has not been undertaken.
- 17 Mr Buchanan, adopted the prices agreed for variations. He said he used the BACV report of 30 April 2004 as the basis for determining which items should be costed.
- 18 The value of the 19 signed variations is allowed at the agreed price of \$17,455.00, although variation 5 is dealt with at defective item 21 below. Variations 20 and 21 have neither been included as part of the contract price nor as part of the cost of items to be completed.

Additional Credit to Owners

- 19 In addition to variations, a credit of \$1,195.00 was allowed by the Builder to the Owners in consequence of failing to build in accordance with the dimensions of the design. This is evidenced by the Builder's letter of 11 July 2003 which was signed as accepted by both Owners on 20 August 2003.

COMPLETION AND RECTIFICATION

Completion

20 In the version of his report which was handed up when Mr Buchanan gave evidence he said at paragraph 10:

“My estimate of the cost of rectifying and completing the work is \$42,361.00 including GST (Refer to Appendix B). This cost is restricted to rectification of defects identified in the BACV report as well as completing a number of incomplete items in the report. Those works alone would not bring the works to completion in accordance with the original contract. ... To this must be added the cost of completing the works under the original contract. This includes completing agreed variations which have not been done, and completing electrical, plumbing and communications works etc which have not been completed and certified. If the original builder completed the works he would be entitled to be paid the balance of the contract value which is \$14,161.13 including GST as noted in our progress claim assessment (refer to Appendix A)”.

21 In paragraph 7 of the Owners’ cross claim they pleaded “Items to be completed by the Builder and not yet completed are annexed hereto and marked “A”. The Builder’s defence to this paragraph was: “But for the repudiation of the contract described in the [Builder’s] Points of Claim herein, the [Builder] would have brought the works to completion under the contract.” As indicated above, it is found that the repudiation was not by the Owners but by the Builder, therefore this defence fails.

22 My task is made more difficult because there was no detailed document, like the BACV report, which dealt with these completion items. They are pleaded at Annexure A to the cross-claim, but no evidence was led about who completed most of these items and how much it cost. Some of the items have clearly been completed.

23 For example, item 5.5 refers to an old toilet and laundry plumbing in the master bedroom, which is no longer evident. In contrast, some items in the BACV report also appear in Annexure A. For example, item 41 of the BACV defects list is referred to in item 8.1 of Annexure A.

24 The owners claim \$14,161.13 inclusive of GST for completion. Without more their claim would fail. However Mr Goodwin has valued works to be completed at \$16,839.00. In contrast to Mr Buchanan, who valued rectification works at \$42,361.00 inclusive of GST, Mr Goodwin has valued them at \$13,884.00 plus \$976.00 for “value of variation work remaining”. As the Owners’ value for completion works is less than that provided by the Builders’ expert, the former is accepted, however to avoid the possibility of double charging, items identified by Mr Buchanan as completion rather than rectification are treated as included in the sum allowed of \$14,161.13.

Rectification

25 Mr Buchanan said he has assumed that most items should be rectified rather than demolished and rebuilt. He has also noted that some items are not in accordance with the building contract but do not have a significant effect on the standard of completion of the Owners’ home and have not been costed. For example, the floor slab for the garden shed is significantly higher than drawn, but the cost to rectify would be disproportionate to the fault. He has not allowed anything for items such as this. Mr Buchanan is commended for his approach, although it is noted that where a Builder fails to provide a result which is precisely in accordance with the building contract, the owner is entitled to compensation in accordance with the rule in *Belgrove v Eldridge* (1954) 90 CLR 613.

26 Mr Buchanan remarked in particular on the slab aggregate slab floor and said that the solution he has costed is still a significant compromise but that complete removal and replacement of the aggregate finish would be very expensive indeed. The Tribunal notes that such work could include removal and reinstatement of the kitchen.

- 27 Mr Buchanan costed each item. He concluded that the cost to complete incomplete work was \$3,510.00. The cost to rectify defective work was \$20,000.00 and then he added \$12,000.00 for Builder supervision, overhead and profit. While an addition of more than 50% seems high, a significant portion of the “supervision” would normally be found within the relevant item of work. Mr Buchanan also added \$3,000.00 for consultant’s fees. The total was \$38,510.00 plus GST, being \$42,361.00. Mr Johnson submitted that, as the Owners had not made claims for the items which would not be rectified but were found to be defective, the Tribunal should not reduce the amount payable to the Owners. The Tribunal notes that the Owners must prove every aspect of their claim.
- 28 The Builder did not call any witnesses and therefore the expert reports provided by it have not been the subject of cross-examination. While this reduces the weight to be attributed to those reports, some regard is given to them. The Builder filed reports by Mr Raymond Martin of Build Assess and Mr Roger Goodwin, Quality Survey, of Turner and Townsend Rawlinsons. Mr Martin’s report stated that his curriculum vitae was Attachment A, but there was no such attachment.
- 29 Mr Martin quoted extensively from a letter allegedly sent by the Owners to the Builder. The letter was not tendered by either party. He concluded that limited work needed to be undertaken.
- 30 The majority of Mr Goodwin’s report was concerned with the Builder’s claim for quantum meruit, which has not been considered because the application was struck out, as described in paragraph 2 above. However Annexure E to the report has been considered, as it values defective work. Where there is a discrepancy between Mr Buchanan’s report and Mr Goodwin’s, the former is preferred because Mr Buchanan swore to the accuracy of this report and was cross-examined.

The items:

31 A site inspection of the subject property was carried out on 9 November 2005 and the following item numbers relate to the numbers included in the BACV report of 29 April 2004.

The floor in general

32 In general, the finish of the aggregate floor was poor and unattractive. A brief glance at the floor was sufficient to show that it was not of an acceptable standard. An issue between the parties was whose responsibility this result was. It is noted that although the Builder laid the floor, it was the responsibility of the Owners to grind and polish it. The desired result was a polished concrete similar to, but not of the same standard, as terrazzo. The result fell well short of this. In coming to decisions regarding the floor, the evidence for the Owners of Mr Buchanan and Mr Campbell has been of assistance.

Item 1 – Laundry concrete floor has scar marks due to sloppy surface finish

33 Although scar marks are clearly evident on the laundry floor, the BACV report says that it is “not determined” whether the work of the Builder is defective and Mr Campbell made no comment on this area. It has been costed by Mr Buchanan, but the Owners have failed to prove this defect is due to poor workmanship by the Builder. No allowance is made.

Item 2 – The concrete floor in the dining room has scar marks due to sloppy surface finish.

34 In addition to the scar marks, there is a substantial crack which extends the whole width of the dining room and which is obviously defective. It is noted that Mr Martin accepted that the crack must be repaired. This crack was remarked upon by Mr Campbell, who also suggested that

crack joints be installed. Mr Buchanan's assessment of \$1,000.00 is accepted. The Builder must pay the Owners \$1,000.00 for this item.

Item 3 – Workshop concrete floor has major surface problems indicating a low spot in the south east corner

35 The BACV report recommends that the work be scabbled to remove the existing topping slab and relaid to a level that is in accordance with the guide to standards and tolerances, however since the report was made this area has been carpeted. Mr Buchanan's report assesses the amount to scabble and relay as \$2,400.00. While it is obvious that this work will not be done immediately, it is expected that this it will be done at some stage in the future failing which that amount represents the loss of value to the owners of having a building which contains such a defect. It is noted that Mr Goodwin assessed this item as \$2,320.00.

36 The Builder must pay the Owners \$2,400.00 for this item.

Item 4 – The Builder has laid the new slab approximately 20mm too high above the original timber floor.

37 It is accepted that the Builder laid the hallway slab so that there was a step of 20mm from the lower timber floor to the higher concrete floor. The recommendation of BACV was for the installation of a cover strap to conceal the junction and this was priced by Mr Buchanan as \$120.00. Although the hallway floor has since been ground back to grade the concrete floor from the level of the wooden floor to the overall level of the remainder of the concrete floor the Owners have been left with a result where the floor is permanently out of level.

38 To compensate for the floor being out of level the Builder must pay the Owners \$120.00 for this item.

Item 5 – In the hallway three spots in the concrete have suffered impact damage

39 The BACV report concluded that it could not be determined that the Builder was responsible for the chips and the Owners have failed to prove the Builder's responsibility for this item. No allowance is made for this item.

Item 6 – The ensuite concrete floor has a severe white mark due to a chemical spill caused by the painter

40 The evidence of Mr Campbell is accepted that this noticeable and unattractive white stain was most likely to have been caused by the Builder's tradesman placing polythene over the floor too soon after finishing. The evidence of Mr Buchanan is accepted that the cost to rectify is \$350.00. The Builder must allow the Owners \$350.00 for this item.

Items 7, 8 and 9 – Cloudy white markings exist to the concrete floor throughout the house, the concrete slab has brown muddy appearance and edging of the concrete slab is in poor condition with voids.

41 It is accepted that unattractive cloudy white shades exist throughout the kitchen area and although evidence is accepted that they have been mainly ground out the resulting job looks poor. Similarly, there is a brown tinge in the exposed finish of the concrete floor, in particular where the dining room joins the kitchen.

42 It is accepted that a void in the floor at the corner of the cupboard recess in the dining room has been caused by poor workmanship.

43 It is accepted that Mr Buchanan's assessment of \$2,000.00 is reasonable. The Builder must pay the Owners \$2,000.00 for these items.

Item 10 – The edge of the workshop slab against the western neighbour’s boundary is messy and protrudes onto their property

44 The BACV assessment that the work is defective is accepted and Mr Buchanan’s assessment of \$200.00 to grind, clean and make good the encroaching part of the slab is accepted. The Builder must pay the Owners \$200.00 for this item.

Item 11 – The finish to the workshop steps is poor and renders the intended floor finish as impossible

45 The BACV report is accepted that there is defective workmanship and that the appropriate means of rectification is to alter the concrete steps so that the upper step riser finishes in alignment with the workshop wall at the doorway location and so that riser heights are consistent with the regulations. It is expected that the work will not be undertaken immediately as the steps have been carpeted, however the \$800.00 estimated by Mr Buchanan represents either the cost of undertaking work at some later stage when the carpet is replaced or the diminution of the house value because of the defective steps.

46 The Builder must pay the Owners \$800.00 for this item.

Item 12 – Northern edge of workshop slab

47 The BACV report is accepted that there is defective work which requires rectification, in particular that the external render should be extended down the slab edge to the level of intended landscaping and the cost assessed by Mr Buchanan of \$400.00 is accepted.

48 The Builder must pay the Owners \$400.00 for this item.

Item 13 – The slab rebates should have been four to six bricks deep, however are only approximately two bricks deep

49 This item was identified by BACV as not being defective and has not been costed by Mr Buchanan. No amount is allowed for this item.

Item 14 – Weep holes in brickwork are visible above decking.

50 This item was identified as defective by the BACV but no building work was recommended and it has not been costed by Mr Buchanan. It was noted by the Tribunal, but is not particularly unattractive and no evidence was given that it would cause the deck to deteriorate any quicker than would otherwise be the case. There is no allowance for this item.

Item 15 – The slab edge is visible above the ground.

51 This item was identified by the BACV as defective but no building work was recommended. Mr Buchanan recommended cleaning off edges and costed the item at \$400.00. On the day of the site inspection, soil had been backfilled to the height of the slab and although some concrete dags were still visible, all that would be required now is removal of some rubble. In place of Mr Buchanan's assessment of \$400.00, \$100.00 is all that is allowed.

52 The Builder must pay the Owners \$100.00 for this item.

Item 16 – The spa concrete has been laid incorrectly.

53 The BACV report is accepted that the work is defective and that rectification should include raising the footing height so that the spa room finishes level with timber decking and is fully supported on the spa slab. Mr Buchanan's assessment of \$2,800.00 is accepted.

54 The Builder must pay the Owners \$2,800.00 for this item.

Item 17 – Spa drain and tap not in correct position

55 The BACV report that the spa slab extends past the intended boundary of the spa and the spa drain is half under the deck and half exposed is accepted. The recommended work to alter the tap and drain so that both are located beneath the decking is accepted as is Mr Buchanan's estimation of \$800.00.

56 The Builder must pay the Owners \$800.00 for this item.

Item 18.1 – The garage slab has been laid without a moisture barrier

57 It is accepted that the contract required the Builder to install a moisture barrier to the garage slab although this is usually not required for a garage and it is accepted that the Owners should be allowed a credit for failure to install polythene of \$200.00.

58 The Builder must pay the Owners \$200.00 for this item.

Item 18.2 – The shed slab has been laid without a moisture barrier.

59 The shed slab has been laid significantly thicker than it should have been, as discussed in the next item, however an advantage to this thickness is that, in the words of the BACV report, "damp absorption through the thickness of the concrete would not be expected". The BACV report has not recommended any building work and none has been costed by Mr Buchanan. There is no allowance for this item.

Item 19 – The shed slab is laid higher than that planned

60 The BACV report acknowledges that the work is defective but does not recommend any building work to rectify it. There is no amount allowed by Mr Buchanan for this item. The practical impact on the Owners as submitted by Mr Brown is that the step between ground and slab might make it difficult to remove items such as the lawn mower and wheel barrow.

61 The Tribunal assesses that \$100.00 is reasonable to enable the Owners to construct a ramp. The Builder must allow the Owners \$100.00 for this item.

Item 20 – The height of the garage brick wall on the boundary is two bricks higher than the 3 metre height specified

62 While the Owners raised the possibility that they might need to have plans redrawn and obtain a dispensation from the local authority, they failed to prove that they have suffered any loss regarding this matter and the onus is on them to do so. There is no allowance for this item.

Item 21 – The garage door opening is 2270mm high instead of 2400mm high

63 The BACV report indicates that the clearance height from the floor to the door above the front edge of the slab is 2.3 metres and no work is recommended. This has not been costed by Mr Buchanan but in circumstances where the Owners paid a variation of \$618.00 to increase the garage door height to 2400mm, the Builder must refund the \$618.00.

Item 22 – Brickwork within the workshop is sub-standard

64 The BACV report assesses the building work as defective and recommends that a perimeter skirting around the base of the brickwork be provided to conceal excessively wide mortar joints and inconsistently chipped brickwork. It is noted that in places outside daylight is visible

between bricks. Mr Buchanan's assessment of \$500.00 is accepted for this item.

65 The Builder must allow the Owners \$500.00 for this item.

Item 22 – There is banding on internal brickfaces in areas of the workshop walls

66 As assessed by the BACV report, the work is not defective and there is no allowance for it.

Item 24.1 – Workshop western boundary wall has a number of faults

67 The BACV report is accepted that there is defective work. There are voids in the external brickwork, some bed and perpend joints are outside width tolerances and mortar is missing in some places. Mr Buchanan's estimate of \$250.00 to rectify this wall is allowed.

Item 24.2 – Light court and garage western boundary wall has a number of faults

68 The BACV report is accepted that the work is defective and rectification will include laying new brickwork so that the finish is consistent with the remaining brick face, ensuring that mortar joints are compacted with mortar and ensuring the brickwork does not project beyond the allotment boundary. Mr Buchanan's estimate of \$1,000.00 is accepted and the Builder must allow this amount to the Owners.

Item 25 – The gap beneath the hall – living room door is approximately 50mm

69 The BACV report is accepted that there is a defect. Mr Buchanan's assessment is acceptable in that it recommends the doors be replaced at a cost of \$900.00.

70 The Builder must allow the Owners \$900.00 for this item.

Item 26 – Hall/living room plaster edging around doors is to be flush

71 The Owners submitted that the edging around the double sliding doors between the living room and hallway was meant to be flush and without architraves. They failed to prove this point and no allowance was made by Mr Buchanan. There is no allowance for this item.

Item 27 – The wall around the front door is not plumb

72 It is accepted that the wall around the front door is not plumb but that it is the result of the pre-existing condition of the house, not faulty work by the Builder. No allowance is made for this item.

Item 28 – The gap between the kitchen wall and adjacent sky window is larger on the east side than the west side of the window openings

73 While it is accepted that the positioning of the window is not inherently defective, the narrow area to the east of the window has not been properly treated. The Builder must allow the Owners \$50.00 for the installation of quad and touch-up painting in this area.

Item 29 – The workshop/dining room door is not vertical.

74 It is noted that the BACV report recommends that the Builder “alter verticality of the door jamb and adjust the door as necessary so as the door evenly shuts against the door”. An allowance of \$100.00 has been made to rehang the door by Mr Buchanan, however it was noted on site that the door is warped and needs to be replaced. The Builder must allow the Owners \$200.00 for this item.

Item 30 – One front porch pillar has warped

75 An inspection confirmed that there is a distinct wind in one of the posts which supports the porch. The Builder must allow the Owners the amount assessed by Mr Buchanan which is \$170.00.

76 Item 31 was withdrawn.

Item 32 – Lounge/hall plasterboard join is visible from floor to ceiling.

77 The BACV assessment is accepted that there is defective work which requires sanding and/or restopping of plaster so that the join is flush. This will also require repainting the wall. Mr Buchanan's assessment of cost of \$400.00 is allowed.

Item 33 – Unacceptable marks exist in the master bedroom ceiling near the door

78 The BACV report is accepted that there is defective work which must be patched and repaired so that indents or protrusions are not readily apparent under normal daylight conditions. Mr Buchanan's assessment appears reasonable, however this item is treated as a completion item for which no additional amount is allowed.

Item 34 – Patch marks remain in the lounge ceiling where old light fittings have been removed and add plaster sheet joins where walls were removed.

79 The BACV report that this work is either defective or incomplete is accepted although an inspection indicated that the marks were very minor only. However this item is treated as a completion item for which no additional amount is allowed.

Item 35 – Plaster ledge in the kitchen above the laundry cupboards is damaged.

80 The BACV report was unable to determine whether the work was defective and no amount has been allowed by Mr Buchanan. The cause of the alleged crack is not obvious and it cannot be seen from floor level. No allowance is made.

Item 36 – The shed ceiling is not aligned with the brickwork along the shed’s back wall

81 Although the BACV report finds that there is a defect, no rectification work is suggested and the defect is not particularly obvious. Mr Buchanan has not made a recommendation about any amount for this item and none is allowed.

Item 37 – The Colourbond roof capping at the front edge of the front porch is the wrong size

82 It is accepted that this roof capping needs to be replaced and the Mr Buchanan’s assessment of \$200.00 is accepted. The Builder must pay the Owners \$200.00 for this item.

Item 38 – Walkway from garage to workshop has a leak

83 The BACV report could not determine whether there was a leak and no item was allowed by Mr Buchanan. At the site inspection the Owners reported that the damp patch had gone. No amount is allowed for this item.

Item 39 – There is a persistent damp patch at the back of the workshop on the neighbour’s side

84 The BACV report found that there was no defective building work and recommended no building work for rectification. Mr Buchanan’s report has not attributed a cost to this item and in circumstances where

inspection from the neighbour's side of the property was not possible, no amount is allowed.

Item 40 – Ensuite toilet is incorrectly positioned.

85 The BACV report describes this item as defective. The toilet has been located so close to the wall that the toilet seat is vertical when in the upright position, in consequence of which it can fall forward.

86 Mr Brown's evidence is accepted that the pipes for the toilet have been laid too close to the wall which prevents an easy and inexpensive adjustment of the toilet position. In these circumstances Mr Buchanan's assessment of \$1,000.00 to relocate the pan and sewer pipe is allowed. The Builder must pay the Owners \$1,000.00 for this item.

Item 41 – Edge work to painting around windows is poor. Brush marks are left on the powder coating of the windows

87 Although the BACV report found the item as incomplete rather than defective, it is noted that the window frames need to be cleaned and Mr Buchanan's assessment appears reasonable however this item is treated as a completion item for which no additional amount is allowed.

Item 42 – Painting to edges of window and door architraves and doors are not finished properly

88 The BACV report indicated that the tops and bottoms of the doors to bedrooms 3 and 2 have not been painted. Further, the edges of window architraves had not been painted. While it is sometimes acceptable to do a cheap painting job which excludes the tops and bottoms of interior doors, there was nothing in the contract which indicated this was a cheap job. Given the difficulty of getting access to the tops and bottoms of these doors and the probable need to remove them and rehang them, the

amount assessed by Mr Buchanan of \$1,000.00 is reasonable. The Builder must allow the Owners \$1,000.00 for this item.

Item 43 – Paint finish at junction between top of wall and underside of ceiling cornicing is not satisfactory

89 The BACV report accepts that the work is defective and recommends that cornices be repainted or touched up to provide a clean distinct finish line between ceiling cornicing and the painted walls which are in a contrasting colour. The amount assessed by Mr Buchanan of \$180.00 must be paid by the Builder to the Owners.

Item 44 – Paint splashes on power points, light switches and lights

90 The BACV report confirmed that there was cleaning work to complete, however did not accept it as defective work as it was said “the Builder has instructed that cleaning work is incomplete and this is accepted”. An inspection of the site confirms that further cleaning work is necessary and Mr Buchanan’s assessment appears reasonable however this item is treated as a completion item for which no additional amount is allowed.

Item 45 – The gap between the east side of the kitchen sky window and the wall is painted the wrong colour.

91 No amount is allowed for this item as it has been taken into account at Item 28.

Item 46 – East front bedroom painting of the wall under the cornice is not even.

92 The BACV report has accepted that this is a defect which requires touching up and Mr Buchanan’s assessment of \$180 is acceptable and the Builder must pay this sum.

Item 47 – Front bathroom paintwork to architrave is not satisfactory.

93 It is accepted that sanding and repainting of this area is necessary and Mr Buchanan's assessment appears reasonable however this item is treated as a completion item for which no additional amount is allowed.

Item 48 – Paint finish of architraves and window reveals

94 It is accepted that this area must be sanded and repainted. Mr Buchanan's assessment is reasonable appears reasonable however this item is treated as a completion item for which no additional amount is allowed.

Item 49 – Powder coat finish of windows and doors are scratched and damaged

95 In accordance with the BACV report it has found that there is defective building work and the appropriate rectification is to clean, make good and replace window doors or frames as necessary. Mr Buchanan has recommended \$1,000.00 for this item which is accepted. The Builder must pay the Owners \$1,000.00 for this item.

Item 50 – External sliding door tracks are bent and damaged

96 The BACV reports that the sill to the northern window/door unit to the dining room is dented from impact and recommends that the door be made good or replaced so that it is of proper merchantable quality. The on-site inspection indicated that there is a slight warp but the door is in working condition. In place of the \$1,000.00 allowed by Mr Buchanan to replace the sill, the Builder must allow the Owners \$250.00 as compensation for an item which is not quite as good as they bargained for.

Item 51 – Window flywire screens are damaged

97 The BACV inspector was unable to determine whether the work was defective and the relevant screens were not available for inspection at the site visit. No amount is allowed for this item.

Item 52 – Large cracks exist to the street curb, crossover and footpath

98 Neither the BACV inspector nor I were able to determine whether cracks which were apparent in the footpath had been caused by the Builder. No amount is allowed for this item.

Items 53 (a) and 53 (b) – Driveway paving reinstatement and driveway damaged with mortar and cement

99 Pursuant to 15.1 of the specification the Builder was required to “reinstatement surfaces and elements which have been disturbed such as roads, pavements, kerbs, footpaths and nature strips”. The driveway has been damaged and stained with mortar and cement and an area has been cut to enable a pipe to be installed and not reinstated. Mr Buchanan’s assessment appears reasonable however this item is treated as a completion item for which no additional amount is allowed.

Item 54 – The hallway alignment is incorrect

100 The BACV report was unable to determine whether the position of the new hall’s eastern wall was in accordance with a variation and no amount has been allowed for this item by Mr Buchanan. In those circumstances, given that no submission has been put regarding any allowance that should be made for this item, there is no allowance.

101 The total of the items allowed above is \$19,488.00 and the total of the amount assessed by Mr Buchanan was \$23,510.00. In addition, Mr

Buchanan allowed \$12,000.00 for builders' supervision, overhead and profit and \$3,000.00 for consultant's fees. Consultants' fees, supervision, overhead and profit are allowed at the same percentage rate as that recommended by Mr Buchanan. \$15,000.00 (\$12,000.00 plus \$3,000.00) is 63.8% of \$23,510.00. 68% of \$19,488.00 is \$12,433.00, therefore this sum is allowed for the above items. The total which the Builder must pay or allow the Owners for rectification is \$31,592.00.

CONTRACT RECONCILIATIONS

Contract sum	\$126,340.00
Variations 1-19	<u>\$17,455.00</u>
	\$143,795.00
Credit for dimension charge	<u>\$1,195.00</u>
	\$142,600.00
Paid by Owners	<u>\$124,688.00</u>
Owing to Builder under contract	\$17,912.00
Completion costs	\$14,161.00
Rectification costs	\$31,592.00
Liquidated damages	<u>\$ 4,000.00</u>
Sub-total due to Owners	\$49,753.00
Less owing to Builder	<u>\$17,912.00</u>
Net sum due to Owners	<u>\$31,841.00</u>

102 The Builder must pay the Owners \$31,841.00 forthwith.

Hearing fees of experts

103 The Tribunal notes that Mr Buchanan indicated that his costs of and associated with the hearing were one hour's preparation and four hours attendance on the day on which he gave evidence, at an hourly rate of \$190 plus GST. The amount and the time are reasonable and the total sum can be subject to any application for costs made by the Owners.

104 There is leave to apply for costs.

SENIOR MEMBER, M. LOTHIAN