VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO BP282/2015

CATCHWORDS

DOMESTIC BUILDING DISPUTE – Variations – whether s 30(2) of the *Domestic Building Contracts Act 1995* operates where the parties have agreed that additional foundation work is a variation to the scope of the work under the contract; Betterment – whether a credit should be given where damages put a party in a better position than had the breach not occurred; Rectification orders – whether it is appropriate to order that a builder undertake repairs in lieu of paying damages; Delay – whether a written extension of time notice is mandatory and a precondition to any entitlement to extend time under the contract – whether a clause which provides for liquidated damages in respect of delay constitutes a dispositive remedial code and caps any entitlement to damages at common law.

APPLICANT	True Blue Homes Pty Ltd (ACN 118 731 936)
FIRST RESPONDENT	Mr John Kaye
SECOND RESPONDENT	Ms Yvonne Ballueer
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Hearing
DATE OF HEARING	3 February, 31 March, 1 April, 8 and 9 September 2016
DATE OF ORDER	28 October 2016
CITATION	True Blue Homes Pty Ltd v Kaye (Building and Property) [2016] VCAT 1790

ORDER

1. The Applicant must pay the Respondents $45,772.80.
2. Liberty to apply on the question of costs and interest, provided such liberty is exercised within 21 days after receipt of these orders.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicant	Mr Darryn Bass, director
For the Respondents	Both in person

REASONS

INTRODUCTION

1. The Applicant is a builder, specialising in the construction of domestic dwellings (**'the Builder'**). On 6 July 2013, the Builder entered into a building contract with the respondents (**'the Owners'**) under which it was to construct a three level residential dwelling on the Owners' property located in Brunswick West (**'the Property'**). The contract is in the form of a Housing Industry Association *New Homes Contract* (January 2011 version). It incorporates 12 pages of specifications prepared and supplied by the Builder, together with architectural drawings prepared for the Owners (**'the Contract'**).

2. The scope of the work under the Contract (**'the Works'**) also comprised the demolition of an existing dwelling located on the Owners' property. The cost of undertaking that demolition work was included in the aggregate Contract price of $479,805. Like many domestic building contracts, the Contract provided for payments to be made progressively during the construction of the Works upon the Works reaching various stages.

3. A dispute arose between the parties at or close to completion of the Works, which culminated in the Owners taking possession of the Works without the Builder's consent. The Builder now claims monies which are said to be owed under the Contract, in addition to damages for loss of profit and other matters.

4. The Owners counterclaim against the Builder in respect of its delay in completing the Works and for the cost of making good defects alleged by them.

THE CLAIMS

5. The Builder claims $125,541.75 (plus the costs of the proceeding). Particulars of its claim are set out in a document entitled *Overview*:

    (a) Original Contract price: $479,805.50

    (b) Signed variations: $74,315.50

    (c) Adjusted Contract price.....$554,121

    (d) Unsigned variations

        (i) Soil report: $616

        (ii) Removal of soil to garage:.....$2,200

        (iii) Cost of site power:.....$1,174

        (iv) Additional bathroom floor tiling: $550

    (e) Sub-total.....$558,661

(f) Amount paid: ..... ($513,119.25)

(g) Total amount outstanding under Contract: 45,541.75

(h) Financial stress: $30,000

(i) Personal/business impact: $50,000

(j) TOTAL AMOUNT CLAIMED: $125,541.75

6. The Owners counterclaim against the Builder in the amount $90,838.50. That amount is particularised in a document entitled *Amended Points of Counterclaim* dated 19 May 2016. It calculates this sum as follows:

(a) Delay damages: $11,827.50

(b) Rekeying of locks: $473

(c) Installation of hot water system: $5,530

(d) Cost of rectifying defects: ..... $73,008[1]

(e) **TOTAL AMOUNT COUNTERCLAIMED: ..... $90,838.50**[2]

BACKGROUND

7. The architectural drawings depicting the Works were prepared by *Ezy Homes Aust Pty Ltd.* *Ezy Homes* is a company that builds or produces what the parties have referred to as "kit homes". Essentially, large components of a dwelling are constructed off-site and then delivered to the relevant building site before being erected by a builder. It is said that this method of construction is more time and cost efficient than if the whole of the dwelling were constructed on site in the traditional way.

8. In 2013, the Owners approached *Ezy Homes* to provide a design and price for the dwelling which they proposed to have constructed on their land in Brunswick West. As a consequence, *Ezy Homes* prepared architectural drawings which depicted a three level residential dwelling located on the Property. At that stage, there was no contact or contract between the Owners and the Builder.

9. After the architectural drawings had been prepared by *Ezy Homes*, Mr Bass, the director of the Builder, was contacted by a representative from *Ezy Homes* in Queensland and asked to provide a quotation to construct the dwelling based on the design prepared by *Ezy Homes*. It seems that the Builder had some connection with *Ezy Homes*, whereby *Ezy Homes* would nominate the Builder as either their preferred builder or someone with the requisite experience to erect one of their "kit homes".

10. Mr Bass subsequently met with the Owners in mid-2013, after he had been given a copy of architectural drawings prepared by *Ezy Homes*. At that

[1] This amount includes the "other defects not included in expert report" totalling $440.

[2] There is a mathematical error in the Owners' *Amended Points of Counterclaim*. It states that the total amount of their claim is $90,839.50.

time there still remained a single storey dilapidated house on the Property. Mr Bass said that he discussed the proposed building works with the Owners with reference to the basic specification provided by *Ezy Homes* and with a view of developing a more detailed specification.

11. Mr Bass said that he emailed some "guide prices" to the Owners based upon various specifications and minor changes to the design of the Works. He said that he eventually submitted a final quotation dated 18 June 2013, which was based upon the *Ezy Homes* architectural drawings, *Ezy Homes* standard inclusions, and the Builder's more detailed specifications. The quotation price was $479,805, inclusive of GST.

12. The Builder's quotation was accepted by the Owners and the Contract was then prepared by the Builder and executed by the parties on 6 July 2013. The Works under the Contract also comprised the disconnection of electricity and water from the existing dwelling and demolition of that dwelling.

13. A building permit for the demolition of the existing dwelling was subsequently obtained and that dwelling was cleared from the site by 22 October 2013.

14. On 22 November 2013, a separate building permit for the construction of the *Ezy Homes* dwelling was obtained. It is not clear to me whether any work was undertaken by the Builder between 23 October and 22 November 2013 or whether ancillary works connected with the demolition of the existing dwelling occurred during that period. This issue is of some importance because the Contract specified that the construction period was to commence from when the house demolition was complete.[3] Given that the Owners' counterclaim also comprises damages for delay, the starting date from which to count the construction period is critical.

15. During the course of the construction period, issues arose in relation to the interpretation of the *Ezy Homes* plans and other matters, which ultimately resulted in the Builder claiming variations under the Contract. Most of those variations are the subject of written variation notices, most of which have been signed by the Owners. There are a number of variation claims which remain in dispute. Moreover, there are a number of variation claims which are not the subject of any written variation notice. Again, these claims are in dispute.

16. On 15 December 2014, the Owners received a document entitled *Invoice for final payment*, by which the Builder claimed $24,914.25 as its final payment due under the Contract. A handover inspection was organised to take place on the following day. On that day, the Owners provided the Builder with a letter dated 16 December 2014, which stated that the amount claimed by the Builder would not be paid. In particular, the Owners contended that the final claim did not fully take into account delay

[3] Schedule 4 (special conditions).

and further; failed to take into account that payments made by the Owners had already exceeded what was due and payable under the Contract.

17. The discussion between the parties over the final payment led to a dispute and ultimately culminated in the handover of the Works being aborted.

18. According to the Owners, they were then left in a 'desperate' situation. In particular, their rented accommodation was no longer available and they had organised for relatives from overseas to visit and stay with them over the Christmas period. As a consequence, they felt they had no alternative but to take possession of the Property - without the consent of the Builder.

19. What follows is reflected in the impasse between the parties; namely, neither was willing to move from their respective position. On the one hand, the Builder was unwilling to complete what remained outstanding to finalise handover, while on the other hand, the Owners were unwilling to make payment of the final claim under the Contract. As a result, the Owners engaged their own contractors to complete what was required in order for them to occupy the Property. This included the supply and installation of the external hot water service, which the Builder had not installed, given the impasse between the parties. The supply and installation of that external hot water service comprises part of the Owners' counterclaim in the amount of $5,535.

THE ISSUES

20. As indicated above, there are a number of issues which comprise the Builder's claim and Owners' counterclaim. Those issues can be summarised as follows:

    (a) How much money has been paid by the Owners to the Builder under the Contract?

    (b) Is the Builder entitled to payment for the whole of the variation claims made?

    (c) Are the Works defective, and if so, what is the reasonable cost to rectify the defects?

    (d) Is the Builder entitled to damages for loss of profit and stress?

HOW MUCH HAS BEEN PAID BY THE OWNERS TO THE BUILDER?

21. According to the Builder, $513,119.25 was received by it from the Owners. The Owners dispute this. They say that $531,119 was paid by them to the Builder.

22. Very little evidence was led by the Builder in support of its contention that only $513,119.25 was paid by the Owners. By contrast, the Owners provided a spreadsheet detailing each of the payments made by them, the

date paid and the reason for that payment. In addition, bank statements were produced verifying the payments made.[4]

23. Having regard to the Owners' evidence and the documentary evidence in support of payments made to the Builder, I find that the Owners have paid the Builder $531,119 in respect of the Works.

VARIATION CLAIMS

24. There are 16 variation claims made by the Builder during the course of the Works. Four of those variation claims are in dispute. This is despite the fact that most of those disputed variation claims are the subject of a written variation notice signed by the Owners or have already been paid by the Owners.

Variation 2: Front deck ($6,600)

25. Variation 2 relates to what may be described as a discrepancy in the architectural drawings prepared by *Ezy Homes*. Sheet 3 of those drawings depicts the first level and entrance of the dwelling. There is a small balcony leading to the front door. The area is shown as being shaded with gridlines and has the word *DECK* written over it. Other areas on the same plan are also shaded with grid lines. These areas relate to wet areas, such as the Bathroom and powder room. It is understood that the gridlines for those wet areas symbolise a tiled floor. There is also a large area at the rear of the dwelling which is also described as *DECK* but it has parallel lines shading that area, indicating timber decking.

26. During construction, Mr Bass advised the Owners that the architectural drawings required the area leading into the entrance of the dwelling to be a deck, rather than a waterproof balcony. He said that this created a problem because that area was directly above the garage and was required to be waterproof to prevent any water entering into the garage.

27. This led to a dispute between the parties as to how the architectural drawing should be interpreted. On the one hand, the Owners said that the gridlines appearing on the area named as the *DECK* clearly indicated that the area was to be tiled, as was the case with the Bathroom and powder room. They said that it was a typographical error on the architectural plan that the word *DECK* was used instead of the word *BALCONY*. They said this was evident from the fact that the floor plan for the third level contained two areas which were also shaded with gridlines but contained the words *BALCONY*. They also said that it was implicit that the front entrance area had to be waterproof given that there was a plasterboard ceiling directly beneath that area.

28. Mr Bass said that the architectural plans, upon which he quoted, assumed that the front entrance area was not to be a waterproof surface and as a consequence, there would be an additional cost of $6,600 to alter that

[4] Exhibit 'R-1'.

design. He said that in order to reach a compromise, he had agreed to undertake other variation work at no cost, such as the construction of a frame to house a gas fireplace located at the rear of the Rumpus room at no additional cost.

29. A one page document was prepared by the Builder, giving effect to the above agreement, which was signed by the Owners on 18 June 2014. The Owners claim that this document was signed under protest. To that end, the Owners forwarded an email to the Builder dated 9 June 2014, which stated, in part:

> Hi Darryn,
>
> …
>
> Here is what John and I are proposing.
>
> Under 23.2 of the VNHC, a variation of $6600 has occurred.
>
> John and I are very much interested working towards a mutually agreeable solution regarding the variation.
>
> One. Our previous email (25 May 2014, indicated that we are willing to pay the additional $6600 so that the building works can go ahead without interruption.
>
> In return, we are asking in that email from the 25th for you to submit in writing an agreement to counter-balance the amount of $6600 (or close to it - for us as customers that sits at $6000 +-10%) with your own services.
>
> These may be services you and/or your team are capable of performing without outsourcing.
>
> Here are some examples:
>
> - Building the wall to accommodate the gas fireplace ($1500?)
> - Engage in landscaping around the house (provide reasonable quote)
> - Fencing around the property (provide reasonable quote)
> - Building Works regarding the garage (planned by us)
>
> The monetary value of your service provided should equal $6000 +-10%.
>
> 2. Alternatively, your company absorbs the full amount of $6000 plus GST from your profit margin.
>
> 3. We will consider paying the amount of $6600 'under protest' and will see the matter through to VCAT after the building works have been finalised.
>
> …

30. I accept the Owners' evidence, verified by the above email, that the payment of $6600 was paid under protest. The question then arises whether the construction of a waterproof, tiled balcony leading to the front entrance of the dwelling constitutes a variation to the Works.

31. In my view, the architectural drawings required a waterproof balcony to be constructed leading into the front entrance of the dwelling. The word *DECK* is clearly a typographical error and would have been obvious to a professional builder when quoting the project. In that sense, it ill behoves the Builder to have made a claim for additional money in respect of work which clearly was contemplated under the Contract. Putting that proposition into legal context, there is no consideration to validate the variation claim because the work was required to be undertaken under the Contract in any event.

32. Nevertheless, it is common ground that the construction of the framework and wall required to house the gas fireplace located at the back rumpus room was additional work to what was originally required under the Contract. The Builder should be entitled to be paid for that additional work. Having regard to the Owners' email correspondence cited above, I assess the value of that work to be $1,500.

33. Therefore, I will allow $1,500 in respect of Variation 2.

Variation 8: Fire rated plaster ($770)

34. Variation 8 is also the subject of a written variation notice dated 18 July 2014 and signed by the Owners. The work comprising that variation is related to Variation 2. In particular, the Builder claims that the plaster cladding of the concealed fireplace was required to be changed from ordinary plasterboard to fire rated plaster board. It claims $770 for that variation.

35. As I have already indicated, the construction of the concealed fireplace at the rear of the rumpus room constitutes an alteration to the scope of the Works under the Contract. Originally, the architectural drawings depicted a gas fireplace along the wall in the Lounge, which is an area adjoining the Rumpus room. The plans state *GAS FIREPLACE (BY OTHERS)* and show a rectangular area allocated for that installation.

36. The Builder contends that the notation in the architectural drawing means that it had no work to do in respect of the gas fireplace. By contrast, the Owners contend that the architectural drawing required the Builder to construct the infrastructure for the fireplace, albeit that the actual equipment was to be supplied by them. Therefore, they submit that it was always the case that fire rated plasterboard was required to be installed, albeit that the position of the fireplace had now altered.

37. In my view, the architectural drawings are unclear as to what, if anything, was required in order to house the gas fireplace. Moreover, the architectural drawings do not specify that fire rated plasterboard is to be

installed in or around the area nominated for the gas fireplace. In those circumstances, I am of the view that the provision of fire rated plasterboard is a departure from what was required under the architectural drawings provided to the Builder.

38. Consequently, I find that the work, the subject of this variation claim, is work that is additional to the original scope of Works.

39. Further, the Owners have signed a variation notice dated 18 July 2014 agreeing to pay an additional $770. There is no evidence before me that this variation notice was signed under protest.

40. Therefore, I will allow $770 in respect of this variation claim.

Variation 9: Gas line to heater ($660)

41. Variation 9 is also related to Variation 2 and 8. It comprises the work of running a gas line to accommodate the gas fireplace in its new position, at the rear of the Rumpus room. The Builder contends that there was no obligation under the Contract to run any gas line for the gas fireplace because the architectural plans stated that the gas fireplace was to be supplied by others. By contrast, the Owners contend that the architectural plans always contemplated that a gas fireplace was to be installed, therefore, some allowance should have been made for that plumbing work. The Owners concede that the gas line was required to be extended by reason of the repositioning of the gas fireplace. However, they say that the cost claimed by the Builder is excessive.

42. As was the case with Variations 2 and 8, a variation notice was signed by the Owners. It was dated 18 July 2014 and records their agreement to accept the variation proposal.

43. In my view, the plumbing work associated with the repositioning of the gas fireplace is not work forming part of the original scope of Works, nor is it work which forms part of the agreement under Variation 2. In particular, the amount allowed in favour of the Builder for Variation 2 relates to the construction of the housing for the gas fireplace. It does not extend to the additional plumbing work that was required to operate the gas fireplace.

44. There is no evidence that this variation was signed under protest. Accordingly, I find that the parties agreed that an additional $660 would be paid to extend the gas line to service the gas fireplace in its new position. The fact that the amount charged may not represent the actual cost to the Builder is of little consequence. It is what the parties agreed and on that basis, I will allow this variation in the amount of $660.

Variation 10: Concrete slab to garage ($16,445)

45. Variation 10 relates to a change in the engineering design, which impacted on the footings and concrete floor in the garage. Variation 10 was the

subject of a written variation notice, signed by the Owners. The amount of $16,445 was paid by them in satisfaction of that variation claim.

46. The genesis of this variation claim stems from a change in the engineering design from what was originally contemplated at the time when the Works were first priced.

47. According to the Builder, the price of the Works was based upon the soil classification of the site being class "M". At that time, no engineering drawings had been prepared. Nevertheless, the Builder assumed that the soil classification would be class "M" because the architectural drawings did not indicate otherwise. Therefore, the Builder anticipated that the garage floor would be a 100mm in-fill concrete slab. That is what the Builder priced.

48. However, after the Contract had been signed, engineering drawings were prepared, which required that an engineered raft slab, with 500mm edge beams, was to be constructed. Mr Bass said that this was not anticipated at the time when the Builder priced the project. He said that had engineering drawings been provided to the Builder prior to pricing the project, then the cost of the Works would have increased by the amount of the variation claim.

49. Mr Bass said that he explained the change in the design to the Owners and provided them with a variation notice dated 20 July 2014, which gave them two options as to how the concrete slab could be constructed. Ultimately, the Owners agreed to adopt Option 1, which increased the Contract price by $16,445. The variation notice was signed to give effect to that agreement.

50. Mr Bass said that the amount of $16,445 was calculated by reference to the cost of the as-constructed concrete slab, which he estimated was approximately $28,000 less a credit for the redundant in-fill slab. Mr Bass said that the variation notice was not signed under protest and that Mr Kaye had taken the variation notice away with him and undertaken his own internet investigation, following which he indicated that he was satisfied with what the Builder was proposing to do.

51. The specification prepared by the Builder expressly stated that a 100mm infill slab to the garage/basement area was to be supplied. It is common ground that this did not occur and that the engineered slab, the subject of Variation 10, was constructed, in accordance with an engineering design given to the Builder in or around July 2014.

52. The Owners contend that the Builder should not have priced the Works based on a soil classification of class "M" or assumed that an infill slab was to be constructed in the garage/basement area. Mr Kaye referred to s 30(2) of the *Domestic Building Contracts Act 1995* which states:

(2) Before entering into the contract, the builder must obtain foundations data in relation to the building site on which the work is to be carried out.

…

(5) It is not necessary for a builder to commission the preparation of foundations data under this section to the extent that such data already exists and it is reasonable for the builder to rely on that data.

…

(7) After entering into a major domestic building contract, a builder cannot seek from the building owner an amount of money not already provided for in the contract if the additional amount could reasonably have been ascertained had the builder obtained all the foundations data required by this section.

53. Mr Kaye submitted that the construction of the concrete floor in the garage is a component of the footings and as a consequence, s 30(7) prohibits the Builder from claiming any additional amount in respect of that work. He submits that the $16,445 paid by the Owners should never have been applied in satisfaction of the Variation 10 claim. In other words, he contends that there was no legal entitlement to increase the Contract price by reason of that variation claim.

54. A *Foundation Investigation Report* prepared by Home and Industrial Soil Test Pty Ltd was obtained on 29 July 2013, after the Contract had already been signed. It names the "CLIENT" as the Builder. The report classifies the site as class "P" and recommends the construction of a raft slab.

55. Both Mr Bass and Mr Kaye's evidence indicate that the construction of the concrete floor in the garage was somehow integral to the footings of the building, in one manner or another. If that is correct, it is reasonable to infer that had the soil report and the engineering design been obtained prior to the Contract being executed, the Contract price would have been $16,445 more than what it was. In other words, the additional amount ultimately charged might reasonably have been ascertained had the Builder obtained all of the *foundations data* prior to executing the Contract.

56. In my view, absent any agreement to increase the Contract price, the Owners' argument has merit. However, in this case, the Owners agreed to increase the Contract price by $16,445. That is evidenced by them signing the variation notice on 20 July 2014. Apart from Mr Kaye's general comments that the variation notice was signed 'under protest', there is no other evidence corroborating that the variation notice was signed 'under protest'. This is despite the Owners' correspondence dated 16 December 2014, in response to the Builder's final claim, where they state that the basement slab variation was paid under protest. However, it appears that

this is the first occasion where the Owners take issue with the variation claim. There is no evidence to suggest that any issue was raised regarding this variation claim prior to the work being done. In particular, there is no responsive email correspondence stating that the payment would be made under protest, as was the case with the front balcony. Consequently, I do not accept that, at the time the payment was made, it was expressed to be made 'under protest'.

57. Therefore, the terms of the Contract were amended by agreement between the parties, so that *the amount provided for in the Contract* was increased by $16,445 in respect of this aspect of work. In those circumstances, I do not consider that the Builder is seeking from the Owners an amount of money *not already provided for in the Contract*. Had there been no agreement to vary the terms of the Contract, then I accept that it is likely that the Builder would not be entitled to claim any additional amount in respect of this particular aspect of the Works.

58. Given the agreement between the parties to increase the contract price by $16,445, I do not consider that s 30(7) of the *Domestic Building Contracts Act 1995* operates, even if the variation related to the *footings design for the site*. Here, the evidence points to an agreement to increase the Contract price. I find that the payment was not made under protest nor was there was any duress or undue influence placed on the Owners in agreeing to that variation. Therefore, I allow this aspect of the Builder's claim in the amount of $16,445.

Other amounts claimed by the builder

Soil Report ($616)

59. The Builder claims $616 for the cost of obtaining the *Foundation Investigation Report* prepared by Home and Industrial Soil Test Pty Ltd dated 29 July 2013. There is no variation notice reflecting any agreement between the parties that the Owners would pay this amount. Indeed, the Owners dispute that they are obligated to pay this amount.

60. Nevertheless, the original quotation dated 18 June 2013 stated that the soil report was to be provided to the Builder. However, the Contract itself, which was executed on 16 July 2013, did not specify that the soil report was to be provided to the Builder by the Owners. Moreover, Clause 3.0 of the Contract stated:

> 3.0 This Contract is complete in itself and overrides any earlier agreement, whether made verbally or in writing.

61. Further, it appears that the soil report was actually obtained by the Builder, given that it nominates the *CLIENT* as the Builder.

62. Section 30(2) of the *Domestic Building Contracts Act 1995* imposes an obligation on a builder to obtain *foundations data*. In my view, a soil report falls within the category of documents described as *foundations*

data. Therefore, unless the parties have otherwise agreed, it is the Builder's obligation to obtain the soil report and any other documents comprising the *foundations data*.

63. That being the case, I find that the Builder is not entitled to claim the cost of the soil report from the Owners. This aspect of the Builder's claim is dismissed.

Soil removal ($2,200)

64. The Builder claims $2,200 from the Owners, which it contends represents the cost of removing excess soil from the garage area in order to accommodate the engineered raft slab. Mr Bass said that the removal of that soil would not have been required had the 100mm infill slab been built. Therefore, he contends that the work constitutes a variation to the original scope of Works.

65. No variation notice was produced evidencing any agreement between the parties that the Owners would pay for this additional work. Indeed, the Owners dispute this claim.

66. Nevertheless, Schedule 5 of the Contract, which sets out the 'excluded items', states in part:

> Fees by owner - Removal of excess soil for excavation works/basement area.

67. It is common ground that the basement area is the garage area.

68. It appears that the cost of removing excess soil from the *basement area* was first claimed after that work was undertaken. In the Builder's *Invoice for final payment* dated 15 December 2014, states, in part:

> Outstanding amount from previous invoice for concrete basement slab as received for soil removal $2200.

69. The *previous invoice for concrete basement slab*, referred to above, was not produced during the course of the hearing. Accordingly, the only contractual documentation relating to this variation claim is the above *Invoice for final claim* dated 15 December 2014.

70. By correspondence dated 16 December 2014, the Owners disputed any entitlement to this variation (and other variations). The amount has not been paid.

71. In my view, and for the reasons set out in relation to the Variation 10 claim, s 30(7) of the *Domestic Building Contracts Act 1995* prohibits the Builder from claiming this additional amount, even if it has been expressly excluded from the scope of the Works under the Contract. In fact, the exclusion of this work from the scope of the Works simply means that it constitutes a variation. It is not in dispute that this work constitutes a variation to what was originally specified under the Contract. However, it does not follow that the Builder is entitled to be paid for work undertaken

in addition to what was contemplated by the Contract, if *the* [additional] *work could reasonably have been ascertained had the Builder obtained all the foundations data required*. There is no evidence before me that the cost of this work could not have been ascertained, had the Builder obtained all the foundations data required.

72. Even if the work is unrelated to the footings, I am of the opinion that the excavation work is so integral to the construction of the engineered concrete raft slab (Variation 10) that the cost of excavation was implicitly part of the Variation 10, which the Owners agreed to and signed on 20 July 2014. Nowhere in that variation notice does it exclude the excavation necessary to construct the engineered concrete raft slab. In fact, Variation 10 expressly states:

> Does not include plumbing works costs previously quoted – Builder to remove waste materials…
>
> [Underlining added]

73. In my view, it reasonable to infer that Variation 10, either expressly or by implication, included the excavation work necessary to carry out the construction of that raft slab.

74. Accordingly, for the reasons set out above, this aspect of the Builder's claim is dismissed.

Cost of site power ($1,174)

75. The Builder's *Invoice for final claim* states, in part:

> Builder has paid power to site during construction - contract notes that this cost has to be met by client = $1174.

76. The Contract states under Schedule 5 that the *cost of power during construction* is excluded from the building Works. Therefore, the Builder claims $1,174. The amount claimed relates to both the cost of electricity and the hire of a site power pole.

77. On the second page of the *Invoice for final claim*, the Builder reduces the amount claimed in respect of site power to $174. This is because the Builder acknowledges that it was two months late in completing the Works. Consequently, it sought to offset liquidated damages for delay of $1,000 against the cost of site power, leaving a balance of $174.

78. It seems, however, that this methodology was abandoned in the Builder's claim, as the full amount of $1,174 is now claimed. The Owners dispute any obligation to pay that amount.

79. There is no variation notice in respect of this part of the Builder's claim. As I have indicated, it would appear that the first notice of this claim was as set out in the *Invoice for final claim*.

80. Based on the terms of the Contract, it appears that the parties had agreed that this cost was to be borne by the Owners. It is not disputed that the

amount claimed represents the cost to the Builder of site power. It is also not disputed that the Builder has paid for this expense. In those circumstances, I find that the Builder should be reimbursed for the cost of site power.

81. It would appear that the *Invoice for final claim* admits that the Builder was two months late in completing the Works. Obviously, that delay results in the Owners being exposed to additional costs associated with site power, than would otherwise have been the case if there was no delay, Nevertheless, Clause 40, together with Item 9 of Schedule 1 of the Contract provides that the Owners are entitled to $250 per week as compensation for any delay in completion of the Works. In my view, any additional cost for site power is a component of the damages suffered by the Owners due to delay, and which the parties have agreed would be fixed in the amount of $250 per week.[5] Therefore, I will allow the Builder's claim for site power in full.

Bathroom floor tiling - extra ($550)

82. The Builder claims an additional $550 in respect of floor and wall tiling, together with additional waterproofing. This arises out of a minor change to the internal layout of the dwelling, which slightly increased the size of the bathroom. There is no specific variation notice dealing with the additional tiling and waterproofing. However, Variation 4 deals with the change to the internal layout of the dwelling. It states, in part:

> Documentation will include for modification/extension to the main bathroom floor area to allow better use of the toilet - pushing the wall towards the back of the house by 250 mm aprox from our contract as originally quoted - requested by the owners, and compliance with current plans.
>
> (This work will require more floor tiles, and waterproofing shall be required - This work will be costed out depending on the tile selection selected by client.)
>
> I would anticipate $1000 to cover the cost of the additional tiles, floor tiler and water proofing now required.
>
> Variation of frame/floor extension $000 incl gst
>
> Total value of variation being $000 incl gst

83. As reflected in the above variation notice, no additional amount was claimed in respect of changing the internal layout. However, the variation notice contemplated that approximately $1,000 would be charged in relation to additional tiling and waterproofing.

84. The Owners dispute this variation claim on the ground that the amount claimed is excessive. Mr Kaye gave evidence that the difference in the

[5] This is considered further in the determination of the Owners' counterclaim.

size of the bathroom from what was depicted on the architectural drawings is only 60mm. Therefore, on that basis the amount charged represents approximately $2,000 per square metre for any additional tiling and waterproofing. It was not made clear to me how Mr Kaye has calculated this figure.

85. The Contract does not make any provision for tiling and waterproofing to be costed on a provisional basis. It is a fixed price contract. Nevertheless, I accept that the related Variation 4 contemplates that additional tiles and waterproofing will be required by reason of the increased size of the bathroom. This variation notice was signed by the Owners, evidencing their agreement to that change and their agreement that an additional amount would be charged in respect of tiling and waterproofing, albeit that the amount for that tiling and waterproofing was not fixed.

86. Neither party has provided a detailed costing for the additional tiling and waterproofing. Mr Bass said that the additional amount was calculated by reference to increasing the size of the bathroom by 250mm. As indicated above, Mr Kaye said that the bathroom was only increased in size by 60mm, which is 24% of what Mr Bass based his costing on.

87. If I accept Mr Bass' evidence as to the rate used to calculate the additional cost of tiling and waterproofing ($550 for an increased size of 250mm) and also accept Mr Kaye's evidence as to the actual difference in size (60mm as opposed to 250mm), I arrive at a figure of $132, being 24% of $550. I will allow this amount.

Claim for financial stress, personal/business impact ($80,000)

88. Mr Bass said that the Builder also claims for financial stress in the amount of $30,000. Having regard to the fact that the Builder is a corporate entity, I find this aspect of the claim unsustainable. In any event, there is no evidence going to this issue.

89. Mr Bass also said that the Builder claims damages by reason of the Owners having adversely impacted on the business activities of the Builder. $50,000 is claimed under this head of damage.

90. There is no evidence demonstrating how the business activities of the Builder have been damaged by reason of any act or omission on the part of the Owners. Consequently. this aspect of the Builder's claim is unproven and therefore dismissed.

SUMMARY OF BUILDER'S CLAIM

91. Having regard to my findings set out above and subject to any set-off by reason of the Owners' counterclaim, I find that $19,207.50 remains to be paid under the Contract, calculated as follows:

Description	Amount
Original contract sum	$479,805
Variation 1 (windows)	$31,592.50

Variation 2 (front deck and fireplace)	$1,500
Variation 3 (cladding)	0
Variation 4 (bathroom extension)	0
Variation 5 (bath selection)	$75
Variation 6 (glass handrails)	0
Variation 7 (kitchen range hood)	$440
Variation 8 (fire rated plasterboard)	$770
Variation 9 (gas line to heater)	$660
Variation 10 (concrete slab to garage)	$16,445
Variation 11 (bar upgrade)	$3,625
Variation 12 (toilet upgrade)	$500
Variation 13 (kitchen upgrade)	$5,750
Variation 14 (laundry upgrade)	$1,630
Variation 15 (shower rose)	$603
Variation 16 (electrical work upgrade)	$5,625
Soil report	0
Soil removal	0
Site power	$1,174
Extra tiling and waterproofing	$132
Financial stress	0
Personal/business impact	0
Subtotal	$550,326.50
LESS AMOUNT PAID	($531,119)
TOTAL REMAINING TO BE PAID UNDER THE CONTRACT	**$19,207.50**

92. In calculating the above amount, I note that Variation numbers 1, 3, 4, 5, 6, 7, 11, 12, 13, 14, 15 and 16 are admitted by the Owners. There is no dispute in respect of those variations and the amounts claimed. Therefore the full amount of those variation claims is allowed.

OWNERS' COUNTERCLAIM

93. As indicated above, the Owners' counterclaim against the Builder in the amount $90,838.50, particularised as follows:

(a) Delay damages:.....$11,827.50

(b) Rekeying of locks: $473

(c) Installation of hot water system:.....$5,530

(d) Cost of rectifying defects:.....$73,008

TOTAL AMOUNT COUNTERCLAIMED:.....$90,838.50

DEFECTS

94. The Owners allege that the Works completed by the Builder are defective. They relied upon two reports prepared by Ian Johnson, building

consultant, together with his oral evidence given during the course of the hearing. In response, the Builder called a number of building practitioners to give the following evidence:

(a) Ron Goddard, the private building surveyor engaged by the Builder to issue the building permit. Mr Goddard prepared a short report responding to some of the matters raised by Mr Johnson. He also gave oral evidence during the course of the hearing.

(b) Gerald Mahoney, the contractor who sanded and polished the strip flooring laid by the Builder. His evidence was confined to defects concerning the strip flooring.

(c) Jason Stafford, the staircase manufacturer. His evidence was confined solely to the timber staircase.

(d) David Lawson, from *National Masonry*. Mr Lawson's evidence related to the defects concerning the masonry blockwork.

(e) David Rodeck from *BGC Plasterboard*, who gave evidence in relation to the *Scyon Matrix* cladding installed by the Builder to the east, north, west and south side of the dwelling.

95. In addition, Mr Bass also gave evidence of a technical nature in relation to the work performed by the Builder.

96. Mr Johnson has quantified what he considers to be the defective Works on two basis. First, he quantified the cost of rectification if completed by the Builder to be $64,626. Second, he quantified the cost of rectification if the work were completed by a rectifying builder to be $87,514.[6] The difference between the two cost estimates is explained by the 'rectifying builder' estimate including builder's margin and an allowance for a new building permit and insurance. Otherwise, the labour rates and the time allocated for each component of work is the same.

97. There is no detailed costing provided by the Builder, apart from some oral evidence given by Mr Bass and Mr Goddard during the course of the hearing. Essentially, the Builder contends that if one or more of the alleged defects are found proven, then an order should be made allowing the Builder access to the Property for the purpose of undertaking rectification work. The Owners oppose any such order.

Should the Builder be permitted to carry out rectification work?

98. The Owners contend that it would be unfair to order that they give access to the Builder for the purpose of carrying out rectification work. They say that the relationship between them and the Builder has deteriorated to such

[6] Mr Johnson's cost estimates were later revised after Mr Johnson re-considered the proposed remedial work to the east and west balconies, having regard to Mr Bass' evidence given during the first part of the hearing. Consequently, the Owners' *Amended Points of Counterclaim* state that the amount claimed for defective works, as assessed by Mr Johnson, is $72,568, based on a 'rectifying builders' costing.

a point that they have lost confidence with the Builder's ability to effectively carry out repair work. They further contend that the relationship between them and Mr Bass is no longer amicable and an order allowing him to access the Property would be intolerable, having regard that they currently reside in the Property.

99. The Tribunal has power to order that an owner allow a builder access for the purpose of carrying out repair work. However, such an order can be problematic in circumstances where the relationship between the parties has broken down. The problems associated with compelling parties to work together was explained by the Federal Court of Australia in *Turner v Australasian Shale Employees' Federation*,[7] in the context of an employment contract:

> Another feature of contracts of employment which has caused concern in some of the authorities is the suggested rule that specific performance of a contract of employment can never be granted. This supposed rule is based upon two considerations. First, it is said that a repudiation of the contract by one party destroys the mutual confidence which must exist between employer and employee, and equity will not compel the parties to continue in an employment relationship where such confidence is absent. Secondly, it is argued that to compel the existence of an employment relationship would be to require the court to supervise the conduct of both parties to that relationship on a continuing basis.[8]
>
> …
>
> There are situations in which, in the exercise of its discretion to refuse an equitable remedy, a court will decline to grant specific performance which would involve constant recourse to the court by the parties and determinations by the court of the rights and wrongs of the multiplicity of obligations in the contract. Such cases are, however, matters of discretion, and not matters of hard and fast rule that specific performance cannot be granted.[9]

100. In my view, the rationale adopted by the courts in relation to employment contracts can be applied to building contracts and in particular, to the power of the Tribunal to order a builder to return to site and undertake remedial work. Moreover, the reasoning set out in the extract of *Turner v Australasian Shale Employees' Federation* provides some guidance as to how the Tribunal should exercise that power.

101. In the present case, I consider that it would be inappropriate to order that the Builder be permitted to regain possession of the Property for the purpose of carrying out rectification work. In that respect, I accept the

[7] (1984) 55 ALR 635.
[8] Ibid at 648.
[9] Ibid at 649.

Owners' evidence that the relationship between the parties has broken down and that an order compelling the Owners to allow access to the Builder would be fraught with difficulty.

102. Consequently, I find that the Owners' counterclaim is to be assessed, in the main, on a monetary basis; namely, what it would cost to repair any defects found proven, rather than allowing or compelling the Builder to carry out further work.

How should the cost to repair defects be assessed?

103. That raises another question; namely, should the cost of repairs be assessed on the basis of the Builder carrying out rectification work or alternatively, on the basis of what it would cost the Owners to engage another builder to rectify defective work?

104. In my view, if defects are found to be proven, they are to be assessed on the basis of what it would cost to engage another builder to rectify the defects. I have formed this view because, apart from Mr Bass stating in open Tribunal hearing that the Builder should be given an opportunity to return to the Property and make good any defects found proven, there is no evidence suggesting that the Builder either admitted the defects alleged in Mr Johnson's report or was denied an opportunity to return to the Property and undertake remedial work.

105. Regrettably, the Builder did not file a defence to the Owners' *Points of Counterclaim* (which attached Mr Johnson's report), despite being ordered to do so, and despite being given a further indulgence when the Tribunal extended the date by which the Builder was to file *Points of Defence*. Therefore, it was difficult to know which of the defects alleged in Mr Johnson's report were admitted or contested by the Builder. Further, there is no evidence that the Builder ever sought to attend to the major defects listed in Mr Johnson's report, apart from undertaking some minor work. In those circumstances, it is reasonable to infer that the Builder was contesting the vast majority of the defects alleged in the Owners' counterclaim.

106. Therefore, I do not consider that the present case is one where the Builder has admitted defects, has actively sought access to repair those defects, but has been denied access. In that scenario, it might be arguable that a builder should not be held liable for the cost of engaging another builder to undertake remedial work, especially in circumstances where the Contract provides for the original builder to return to the building site and carry out remedial work.[10]

107. However, here, it appears that the Builder has decided not to return to the Property or respond to the allegations of defective work set out in Mr Johnson's report, until such time as the Tribunal has made a determination

[10] *Pearce & High Ltd v Baxter* [1999] BLR 101; *Turner Corp Pty Ltd v Austotel Pty Ltd* (1994) BCL 378.

on the Owners' counterclaim. Therefore, the Builder's fall-back position is that it is willing to repair but only in circumstances where the Tribunal determines the alleged defect to be proven. In my view, that position does not justify that the cost of rectification should necessarily be assessed by reference to what it would cost the Builder to undertake remedial work.[11]

108. With that in mind, what follows is my assessment of the alleged defects claimed by the Owners.

Base blockwork

109. Masonry blockwork has been used to construct the base of the dwelling. That blockwork also forms the interior walls to the garage/basement area. However, masonry blockwork was not originally specified in the architectural drawings. Those drawings specified that a 200mm *Dincel* wall system *to engineers details* was to be constructed. A *Dincel* wall system comprises panels of polymer formwork, which are locked together and then filled with cement, creating a solid, continuous wall. Given that the formwork is permanent and made of polymer, it is said to be waterproof, eliminating the need for a waterproof membrane to ensure that the garage/basement area is kept dry. However, for reasons unknown to me, the parties agreed to depart from the architectural drawings and construct the base brickwork from masonry blockwork, rather than using the *Dincel* wall system. It does not appear that a variation notice was raised in respect of this change. It is that masonry blockwork which is now the subject of complaint.

110. Mr Johnson gave evidence that the base blockwork on the east, north and west sides of the dwelling contained a number of defects, which he described as follows:

> a) The colour of the mortar varies considerably and the surface of the walls has not been cleaned to an acceptable standard…
>
> b) Excess mortar has not been cleaned off blocks in some areas…
>
> c) The width of the perpends in any one panel varies in some locations by over 8 mm…
>
> d) The thickness of the bed joints in any one panel vary in some locations by over 7 mm…
>
> e) The joints in the blockwork to the First Floor south side Entry area have not been raked out … as well and is in other isolated locations…
>
> f) Mortar has been used in the joints to the perimeter of the windows … and against cladding…
>
> g) Mortar has been used to fill holes in blocks in places … While holes have been left in joints elsewhere…

[11] Subject to certain exceptions discussed below.

h) Penetration through the blockwork for pipes have not been sealed…[12]

111. Mr Johnson said that the base blockwork needed to be rendered in order to remedy the above defects. Mr Goddard agreed.

112. Mr Lawson gave evidence that he considered the base blockwork to comply with the relevant Australian Standard. However, I understood his evidence to be confined to the actual masonry blocks, rather than the standard of workmanship in laying that blockwork. Indeed, when asked by Mr Kaye during cross-examination to comment on the mortar joints, he said that he could not comment because *he was not qualified on the construction side.*

113. Consequently, I accept what is largely uncontested evidence that the base blockwork is defective and that this constitutes a breach of the warranties under Clause 11.0 of the Contract - that the Works would be carried out with reasonable care and skill. I further find that it is reasonable to render that blockwork in order to remedy those defects.

114. Mr Johnson has quantified the cost of undertaking that remedial work in the amount of $3,863.16. I will allow this amount for this item.

Incorrect finish to lintel over the Garage door

115. Mr Johnston gave evidence that when he first inspected the Property, the steel lintel supporting the concrete blockwork over the right roller door had only been prime painted and was showing signs of minor rusting.

116. However, following a further inspection of the Property on 31 March 2016, it appeared that the lintel had been re-painted. This was confirmed by Mr Bass who said that he went to the Property in late 2015 or early 2016 and cleaned and applied another undercoat to the lintel. He said that Mr Kaye was happy with what he did. Mr Johnson gave evidence that he could not say whether any further work was required. Mr Goddard agreed.

117. In those circumstances, I am of the view that there is insufficient evidence to substantiate that a defect currently exists. Therefore, this aspect of the Owners' counterclaim is dismissed.

East side deck (balcony to entrance)

118. The balcony leading to the entrance of the dwelling is marked on the architectural drawings as being a deck. As previously discussed, I find the reference to a deck is a typographical error as it is obvious that the area needed to be waterproofed, given that the garage/basement area is directly beneath that balcony. Pursuant to Variation 2, this area has been tiled by the Builder. There is no evidence of any water ingress into the garage/basement area. Nevertheless, Mr Johnson has criticised the

[12] *BSS Group Pty Ltd* building inspection report prepared by Ian Johnson dated 13 July 2015 at page 10.

construction of that balcony area. In his report, he makes the following comments:

> The following observations are relevant to the defective construction of the east side Deck which serves the front Entry at First Floor level:
>
> a) There is a drainage point located approximately centre of the Deck area and a balustrade wall has been constructed on the east side of the Deck area…
>
> b) The fall from the north end towards the drainage point is 0.20 (photos 28 & 29), 0.6° and from the south end 0.1°…
>
> c) Localised fall has been created around the drainage grate…
>
> d) It appears there has been an attempt to create a waterpath towards the end of the balustrade wall at the location of the steps; however this is only localised…
>
> e) There is no step down from the internal floor level to the surface of the Deck; the external surface is higher than that internally…
>
> d) There is no evidence of a waterproofing membrane having been installed in accordance with the prevailing regulations. Photo 37 shows the outer edge of the Deck, a waterproofing membrane is not apparent.

119. Initially, Mr Johnson had recommended that the balcony be demolished and that the structural framing of the balcony be modified to allow for a step down between the internal floor level and the surface of the balcony. However, it was put to Mr Johnson during cross-examination that it was not possible to modify the structural framing of the balcony because the frame was part of the steel frame of the dwelling. Consequently, Mr Johnson conceded that he would need to speak to a structural engineer before he could confidently say what was needed to remedy what he considered to be defects in its construction.

120. Mr Goddard agreed that the failure to create a freeboard between the balcony surface and the internal surface of the dwelling meant that the balcony did not comply with the Building Code of Australia (**'the BCA'**). However, he noted that the BCA was a performance based code and in the present circumstances, there was no evidence of any ingress of water in the 8 to 10 months since the balcony had been constructed, which indicated that the balcony was performing adequately. Nevertheless, Mr Goddard conceded that he could not say for how long the as-constructed system would perform.

121. Mr Johnson questioned whether a waterproof membrane had been applied and if so, whether it had been installed in a proper manner. A certificate

dated 28 July 2014 was produced by the Builder to show that a waterproofing membrane had been installed. The certificate had been prepared by the tiling contractor. However, the certificate did not state that the waterproof membrane had been applied in accordance with the BCA. Mr Johnson commented, and Mr Goddard conceded, that this was unusual and put into question, the validity of the certificate.

122. Given the constraints on modifying the structural framework, Mr Johnson prepared a supplementary report, which the parties agreed was to be entered into evidence. The report relates to the east side balcony and the other balconies on the upper level of the dwelling, which appear to have been constructed in a similar manner. Mr Johnson's revised scope of remedial work does not entail any modification to the structure of the balcony but rather, contemplates that a timber framed cement sheet clad hob be constructed to the base of the doorframe opening to create freeboard between the doorframe and the level of the balcony. The scope of remedial work also included uplifting the tiles and laying a new waterproof membrane in accordance with the relevant Australian Standards. According to Mr Johnson, the re-tiling of the balcony would then allow the tiling contractor to create a minimal fall of 1.0°. Mr Johnson estimated that the cost of undertaking that work was $4,305.55. According to Mr Johnson, that work would cure most of the defects which he observed with the east side balcony and represented a good compromise between what he had originally recommended to what could be done, given the framing constraints.

123. Mr Bridgford, the construction manager of *Ezy Homes*, was called to give evidence on behalf of the Builder. He explained that the style of the dwelling had not changed significantly over the past 16 years. He said the balconies were required to be constructed with a minimum 1.0° fall. According to the architectural drawings, he estimated that the fall to the outside edge of the east side balcony should have been approximately 12mm. When asked the question how to create a step down from the internal floor level to the exterior balcony level, he suggested that the sill of the door could be raised, although he commented that if no water was entering the dwelling, then it may be appropriate to leave the construction as is.

124. I asked Mr Bridgford whether he agreed with the recommendations made by Mr Johnson. He answered that if a 1 in 100 fall (1.0°) was to be achieved, then Mr Johnson's methodology was the correct way to effect that outcome.

125. In my view, Mr Johnson's revised recommended remedial work constitutes a reasonable compromise between what should have been designed and constructed and what can be now done, given the structural constraints of the steel frame. I find that this methodology should have been adopted by the Builder. I have formed this view notwithstanding

some ambiguity in the architectural drawings, in that those drawings did not provide for a step down from the internal floor level to the balcony surface, which appears to be a design fault. Nevertheless, the Builder is a professional builder of some experience and is controlled by Mr Bass who is a registered building practitioner. In those circumstances, it not open for the Builder to simply ignore the requirements of the BCA. To do so constitutes a breach of the statutory warranties, which are repeated under Clause 11.0 of the Contract. Those warranties include a warranty that requires the Works to be carried out in accordance with and to comply with all laws and legal requirements including the *Building Act 1993* and the regulations made under that Act. Those regulations incorporate the BCA.

126. Therefore, I find in favour of the Owners in respect of this defect. I will allow $4,305.55 for this item.

South side porch entry

127. A small concrete porch has been constructed to the south side Entrance on the ground floor level of the dwelling. Mr Johnson said that the fall of the concrete porch was approximately 0.3° and that the surface dipped slightly to the north east corner. Further, the concrete slab had been constructed hard up under the door sill and its surface height made no allowance for tiles to be laid. He recommended that the concrete porch be demolished and reconstructed with adequate fall and a height to allow for the surface to be tiled. Mr Johnston estimated the cost of that work to be $571.

128. Mr Goddard agreed that the construction of the concrete porch was non-compliant with the BCA. He said that as the porch was a simple infill slab, it should be demolished and rebuilt.

129. Given the common ground between the experts, I find that the construction of the south side porch is defective in contravention of the terms of the Contract, and needs to be rebuilt. I will allow $571 for this item.

Pits required for agricultural drains

130. Mr Johnson gave evidence that agricultural drains have been installed in the base of the retaining walls on the north, west and south sides of the dwelling. However, according to Mr Johnson only one stormwater pit has been installed to the north-east corner and has not been continued to ground level. Mr Johnson said that the relevant Australian Standard requires that there should be four pits installed, one at each corner of the dwelling, because of a change of direction in the agricultural drains. Mr Johnson has estimated that the cost of installing the additional pits is $1,315.28.

131. Mr Goddard agreed that the Australian Standard required pits to be installed on each corner of the dwelling but commented that the Victorian Building Authority had inspected the site and did not raise that as an issue

when it reported on the plumbing work. Nevertheless, Mr Goddard agreed that what was constructed did not comply with the code and that he was surprised that it was not included in the Victorian Building Authority Report.

132. Mr Bass said that the Builder had installed two pits at the front of the dwelling on each side. However, one of those pits had been covered over by landscaping works undertaken by the Owners. According to Mr Bass, there was no requirement for pits to be installed at the rear corners of the dwelling because the agricultural pipes were interrupted as they wrapped around the rear of the dwelling.

133. Mr Johnson did not dispute that one of the pits may be covered over by landscaping works. However, he maintained his opinion that two additional pits were required at each corner of the rear of the dwelling in order to comply with the relevant Australian Standard.

134. I accept Mr Johnson's evidence. It is supported by that of Mr Goddard. Therefore, I find that two additional pits need to be installed in order for the Works to comply with the BCA, the relevant Australian Standard and the Contract. As Mr Johnson has costed this work on the basis of three additional pits being supplied and installed, I find that 75 per cent of his assessment represents a fair assessment of the reasonable cost of rectifying this item. Consequently, I will allow $986.46 for this item.

Cladding to east side (front façade) of dwelling

135. James Hardie *Scycon Matrix* cladding has been installed to the front facade of the dwelling and to the north return walls of the Study and Bedroom 1. Mr Johnson said that the installation of the cladding system did not comply with the manufacturer's recommendations. In particular:

> a) Fixing screws have been driven past the face of the sheets in many locations without the necessary filling over of the screw heads…
>
> b) The proprietary 19 mm thick cavity trim has not been used behind vertical joints and there is no evidence that the necessary sealant has been used at the joints…
>
> c) The proprietary backing strip has not been used at horizontal joints and the required 10 mm gap has not been achieved…
>
> d) The proprietary cavity vent strip has not been used at the base of the sheets as required…
>
> e) The required 50 mm clearance between the bottom of the sheets on the top of the Balcony (photo 47) and Deck (photo 26) surfaces has not been achieved.
>
> f) The flashing details and window styles and sills has not been followed…

g) The specified 10 mm gap between cladding sheets and vertical and horizontal joints has not been created … and the gaps widths are inconsistent.

h) The required gaps and internal corner junctions have not been created…

i) Screws have been installed too close to the edges of sheets.

…

j) The line of sheets above the Deck surface is not consistent…

k) Small cladding sheets have been used creating unnecessary joints in some locations at the Deck and Balcony areas…

l) The cladding sheets to the north wall of Bed 1 have not been cut and installed to straight lines…

m) The north end of the east wall of the Second Floor Living area is out of plumb by approximately 35mm over 2m…

136. Mr Johnson recommended that all of the cladding be removed and that the wall framing be rectified before the cladding was reinstalled. That work would entail the supply of new cladding material. The total cost of undertaking this work is estimated to be $11,554.60.

137. Mr Goddard said that the complaints related to aesthetic matters and did not affect the structural integrity of the dwelling. Nevertheless, he conceded that the cladding should have been installed in accordance with the manufacturer's recommendations.

138. Mr Bass also conceded that the installation of the cladding did not strictly comply with the manufacturer's recommendations. However, he said that the Owners observed the installation methodology and said that it was *okay*.

139. Mr Kaye disputed that he had approved the installation methodology. He said that he had complained, but that Mr Bass had told him that he would paint black lines where the cladding sheets abutted each other to create the appearance of express joints.

140. In my view, the installation of the cladding to the front facade is defective. The cladding system was to have had the appearance of separate panels separated by express joints. This appearance has not been achieved and I find that the Owners did not accept the methodology adopted by the Builder. Moreover, there are numerous other defects with the cladding, which are listed in Mr Johnson's report, and which I find are unacceptable. Consequently, I find that in order to comply with the terms of the Contract, it is reasonable to remove the cladding and undertake the remedial work as outlined in Mr Johnson's report.

141. Consequently, I find that the remedial work outlined by Mr Johnson is appropriate and that his cost of rectification reasonable. Therefore, I will allow $11,554.60 for this item.

Cladding to north, west and south sides of dwelling

142. BGC *Duraplank* exterior cladding has been installed to the north, west and south sides of the dwelling. The planks are 300mm wide and generally have a 25mm to 30mm overlap. According to Mr Johnson, the installation of this cladding system does not comply with the manufacturer's requirements. In particular:

a) Nails have been driven into below the surface of the planks in some instances and in other cases have been left proud… The fasteners are required to be driven flush with the face of the cladding.

b) Fasteners have not been installed at every stud as required and in some cases the distance between nails is up to 1600 mm…

c) For areas where the sub-floor area is open the lower part of the planks is unsupported and not fastened… The maximum unsupported overhang is 50 mm which is exceeded in this situation.

d) A starter strip has not been used behind the first row of planks to ensure that they are installed at the correct angle…

e) The fasteners are located above the overlap between the planks… The nails should be at the centre of the overlap; approximately 12 mm from the bottom edge of the plank.

f) The planks have apparently been joined over studs and in some location movement has occurred… The planks are designed to be joined off studs using a proprietary metal off stud soaker or a proprietary PVC jointer.

g) Clearance gaps have not been sealed in places…

h) In the internal corner behind the hot water service on the west side of the house gaps exist that will allow water penetration… Effective flashing is required.

i) Proprietary metal soakers have not been installed at one corner of windows less than 1800 mm wide where the plank under the sill has been reduced in width as required…

j) Metal soakers have not been installed at the corners of windows in excess of 1800 mm wide as required…

143. Mr Johnson has recommended significant remedial work to refix, fill, seal and paint the cladding material. He has estimated the cost of the work to

be $14,517.66. This includes $4,000 in respect of scaffolding costs. He has also allowed 48 hours of labour for a carpenter to carry out the work, together with 20 hours required to repaint the cladding material.

144. Mr Goddard said that 'builders bog' could be used to fill over-driven fixings and under-driven fixings could be nailed-in further. He conceded that he was not familiar with the product but he understood that plastic joiners could be installed to remedy jointing. He suggested that the work would take one week and that the cost of scaffolding should only be $2,000.

145. The Builder also relied upon a report prepared by David Rodek dated 25 September 2015. By consent, this report was admitted into evidence, despite Mr Rodek not being available for cross-examination.

146. Mr Rodek is described in the report as being the *Distributor Channel Manager, BGC Fibre Cement and BGC Plasterboard*. It is not clear what Mr Rodek's qualifications are, other than being involved in the sale of BGC *Duraplank* exterior cladding and other materials. Nevertheless, Mr Rodek inspected the cladding and made the following comments:

> On inspection of the BGC Duraplank, overall the materials appear to be in good order and fit for purpose as per AS2908.2 Cellulose-Cement Products and are classified as Type A Category 3 for External Use.
>
> …
>
> Duraplank™ is fixed to timber framing using 40 x 2.8 mm galvanised flathead nails. Nails should be driven flush with the sheet face.
>
> The installation of the fasteners overall appear to be true and correct using a galvanised flat head nail. If fasteners are slightly overdriven, the use of a suitable 'builders bog' may be used to fill and finish the fasteners.
>
> If fasteners are underdriven then it is recommended to finish these flush with the surface.
>
> Recommended to install appropriate fasteners and repaint.
>
> Overall installation of the BGC Duraplank appears to be of an acceptable standard.
>
> The Duraplank joined on stud and caulked with a polyurethane whilst not covered in the BGC Duraplank literature is an acceptable building practice.

147. Mr Rodek's evidence is generally consistent with that of Mr Goddard. However, he has failed to respond to aspects of Mr Johnson's evidence. In particular, Mr Rodek does not comment on the lack of metal soakers to the windows, nor does he comment on the excessive gaps behind the hot water service, which Mr Johnson opines would allow water penetration. Nevertheless, Mr Rodek concedes that additional fixings are required and

that some of the fixings need further attention. He says that this would require filling and sanding, and then repainting the cladding. However, no costing has been provided as to what that work would cost.

148. Mr Bass said that if the Builder was undertaking the remedial work, it would use its own scaffold, further reducing the cost of rectification. He agreed that it would take approximately one week to undertake the remedial work. He suggested that the cost of rectification would be $7,000 to $8,000.

149. Mr Johnson's costing is detailed and provides a breakdown of labour, materials, preliminaries and other fixed overheads. When cross-examined on his costing, he said that he stood by his assessment. By contrast, Mr Goddard's evidence as to the cost of rectification was not referenced to any report that he had previously prepared. Moreover, he did not provide any breakdown of labour, other than to say that he believed the remedial work would take approximately one week to complete. In addition, no details were given as to the cost of materials. His assessment was in the nature of a global 'gestimate' rather than an assessment by reference to priced bills of quantities.

150. For that reason, I prefer Mr Johnson's evidence over that of Mr Bass, Mr Goddard and Mr Rodek regarding this particular item. In so doing, I appreciate that if the Builder undertook the work itself, the cost would be substantially less than the cost estimate of Mr Johnson. However, for the reasons which I have already outlined above, I do not consider that it is appropriate to assess the Owners' damages by reference to what it would cost the Builder to undertake this remedial work. Therefore, I find that the installation of the cladding to the north, west and south sides of the dwelling are defective in the manner described by Mr Johnson and in contravention of the terms of the Contract. I further find that the reasonable cost of rectification is $14,517.66. Therefore, I will allow $14,517.66 for this item.

East and west side balconies

151. The second level of the dwelling has two small balconies on the east and west side of the property. Mr Johnson gave evidence that both these balconies suffer from substantially the same defects as what affects the entrance balcony. In essence, there is insufficient fall away from the dwelling and there is no step down from the internal floor level to the surface of the balcony. Mr Johnson also questions whether any waterproofing membrane has been installed.

152. As mentioned above, after learning that the framework of the dwelling was steel and having regard to the difficulty in modifying that framework, Mr Johnson revised his earlier report, insofar as it related to the Entrance balcony, and the east and west side balconies on the floor above. The recommended scope of remedial work is substantially the same in respect of all of these three balconies. It entails uplifting the tiles and screed,

removing the door, door frame, architraves and skirting and then constructing a timber framed cement sheet clad hob to the base of the doorframe, before reinstating the work. Mr Johnson has estimated the cost to undertake the work to be $4,395.64 for each balcony. Therefore, in respect of the east and west side balconies on the upper level of the dwelling, the total cost is estimated to be $8,791.28.

153. The evidence of Mr Goddard, Mr Bridgford and Mr Bass in relation to these two balconies mirrors their evidence in relation to the Entrance balcony. Importantly, they noted that none of the balconies were showing signs of water ingress. However, they acknowledged that the construction of both these balconies did not comply with the BCA and that there were questions as to whether adequate fall had been provided.

154. In my view, it is appropriate for the east and west side balconies on the upper level of the dwelling to be reconstructed in accordance with the recommendations of Mr Johnson. In that respect, I accept Mr Johnson's evidence, and the concession made by Mr Goddard, that the long-term integrity of the balconies cannot be guaranteed, having regard to the way in which they have been constructed. Consequently, I find that the construction of the balconies constitutes a defect in breach of the contractual warranties given under the Contract and that the reasonable cost of rectification is $8,791.28. I will allow $8,791.28 for these two items.

Rust spots on roof

155. Mr Johnson said that rust spots were visible on the *Colorbond* metal roofing over the north side of the Rumpus room at the north-east and south-west corners of the first level of the dwelling. He recommended that all roof areas should be cleaned down thoroughly. He said that if the rust particles could not be removed without damaging the *Colorbond* coating, then any affected sheets should be replaced. Mr Johnson estimated the cost of carrying out that work to be $1,022.16. That estimate made an allowance for the replacement of one sheet of *Colorbond* roofing at a cost of $300.

156. Mr Goddard agreed with Mr Johnson's assessment of this item. However, Mr Bass suggested that the rust spots could be rubbed off with mineral turpentine. He said one tin of mineral turpentine would cost $20 and it would only take three to four hours to complete that work. In response, Mr Johnson said that he had allowed for some roof sheet replacement in the event that the rust spots could not be removed. Mr Goddard did not dispute that the remedial work may require the replacement of some sheets of *Colorbond* cladding. He further commented that he believed the work would take no more than one day to complete, which is consistent with Mr Johnson's assessment of the time required to undertake that remedial work.

157. I find that the rust spots on the roof constitutes a defect in breach of the contractual warranties given under the Contract. I further consider that it is reasonable to make allowance for the replacement of some roof cladding, in assessing the reasonable cost of repair. Consequently, I find that the reasonable cost to remedy that defect is $1,022.16. I will allow $1,022.16 for this item.

Timber flooring

158. Polished kiln-dried hardwood timber flooring has been installed to large parts of the first floor. Mr Johnson gave evidence that in all areas, timber filler has been applied over the majority of the joints which is visible and cracking. He said this constituted a defect in the flooring which required rectification. He recommended that the furniture be relocated to rooms which were not affected and that the timber floors be re-sanded and re-polished. He estimated that the cost of undertaking the work was $8,973.95.

159. Both Mr Goddard and Mr Bass agreed that the timber flooring required re-sanding and re-polishing. However, both disagreed with Mr Johnson's assessment of the cost to undertake that work.

160. Mr Bass said that the original price for the floor sanding and polishing was $4,400 including GST. Mr Goddard said that the cost to sand and polish hardwood floors would usually be around $25 per square metre, as opposed to $30 per square metre, allowed for in Mr Johnson's estimate. In addition, Mr Bass questioned the need to allow for a cleaning subcontractor ($720), accommodation ($750) and a labourer to move furniture ($360), all of which forms part of Mr Johnson's cost estimate.

161. Mr Bass said that the flooring sub-contractor was willing to re-sand and re-polish the floor at no cost to the Owners. That work would comprise moving furniture, where appropriate, and cleaning up after the work was completed. Indeed, the flooring sub-contractor, Gerald Mahoney from *Floors Plus*, attended the Tribunal's view of the dwelling on 31 March 2016 and confirmed that he was willing to undertake that work.

162. It is uncontested that the timber strip flooring requires re-sanding and re-polishing in order for there to be compliance with the Contract. What is in contention is the amount of damages claimed by the Owners in respect of this defect. I accept the evidence of Mr Bass that he made an open offer to the Owners that the flooring subcontractor would return to re-sand and re-polish the timber flooring at no cost. For reasons unknown to me, the Owners are yet to accept this offer.

163. Although I have found that the Owners' damages are to be assessed on the basis of what it would cost them to engage another builder to carry out remedial work, I consider that this defect is distinguishable and requires separate consideration. In particular, I find that with this defect, the

reasonable cost should be assessed by reference to the *Builder's costing* in Mr Johnson's report. I have formed this view for two reasons.

164. First, it was open for the Owners to allow the flooring contractor to undertake that work at no cost to them. That would not require any direct contact with the Builder or Mr Bass. Therefore, I am unaware of any reason why that offer was not accepted. In that respect, it might be said that the Owners have failed to mitigate their loss.

165. Second, even if the Owners were not comfortable in allowing the original contractor to undertake that work, this particular item of work is distinct and able to be organised separately to other remedial work. Unlike other remedial work, re-sanding and re-polishing of the timber strip flooring would not require the engagement of a registered building practitioner or require building approval or warranty insurance. Moreover, separating this work from the other remedial work gives the Owners flexibility, in terms of arranging for a mutually convenient time for that work to be undertaken, given that it will require the Owners to vacate the Property for one night.

166. Therefore, I find that the reasonable cost of rectifying this defect is $4,140 plus GST ($4,554).[13] In my view, the amount of $4,554, which equates to a rate of $30 per square metre includes the cost of moving furniture and cleaning after the work has been done.

167. I further find that an allowance of $750 plus GST ($825) should be added to that cost for alternate accommodation for one night. Consequently, I will allow $5,379 for this item.

East side entry door gap

168. Mr Johnson gave evidence that there were gaps between the door and the frame on the east side Entry to the dwelling. He said the gaps were uneven and excessive in places being 6mm on the bottom left side, 3mm at the top left hand side and 6mm at the top right hand side. Mr Johnson allowed one hour for a carpenter to undertake that work. He assessed the cost to be $90.19.

169. Both Mr Goddard and Mr Bass agreed that it would take approximately one hour to remedy that defect.

170. Given that this item of the Owners' counterclaim is uncontested, I find that the gap to the east side Entry door constitutes a defect in contravention of the warranties given under the Contract. I further find that the reasonable cost to remedy that defect is $90.19. Consequently, I will allow $90.19 for this item.

[13] This is the raw cost of floor sanding assessed by Mr Johnson in his report.

Sub-standard paintwork

171. Mr Johnson gave evidence that there are numerous defects in the internal paintwork which included, overruns, incomplete coats, brush marks, rough finishes, over painting and a failure to paint top and bottom edges of doors. Mr Johnson opined that the most appropriate course was for the whole dwelling to be given another coat of paint. He estimated that the cost of this work was $10,913.04. That included an allowance of 72 hours for painting and eight hours for a carpenter, to remove and reinstate doors.

172. Mr Goddard did not dispute that there were various areas within the dwelling that required repainting. He said that paint coats in some areas were somewhat thin. He opined that it would take approximately one week for two people to complete that work at a cost of under $6,000. Mr Bass conceded that further painting work was required. He said that the painting defects could be completed within two days by two men. He contended that if the whole of the dwelling was to be given one further coat of paint, then some allowance should be made for the fact that the Owners had been living in the dwelling for 15 months and as a consequence, there was fair wear and tear. He estimated that the total cost of undertaking the remedial work was $2,000.

173. In essence, Mr Bass submitted that there should be some discount of the actual cost of repainting to take into account betterment. Although Mr Bass did not refer to any authority in support of that proposition, I accept that in certain circumstances some credit should be given where the measure of damages results in the party which suffered the loss, receiving damages which ultimately put that person in a better position than if the breach had not occurred in the first place.[14] In my view, applying a fresh coat of paint to the whole of the interior of dwelling would result in some betterment, having regard to the fact that fair wear and tear is likely to have deteriorated the condition of the paintwork in any event, through the expiration of time.

174. Therefore, if the whole of the interior of the dwelling is to be repainted, some areas which are not defective will benefit by having a fresh coat of paint. Consequently, as the dwelling has now been lived in for a period of time, the remedial work recommended by Mr Johnson will not only remedy the defects but also make good ordinary wear and tear, for which the Builder is not responsible.

175. With that in mind, I accept what is largely uncontested evidence that a large component of the internal painting work requires to be re-coated, in order to achieve compliance with the terms of the Contract. Mr Johnson has adopted a rate of $85 per hour (inclusive of materials) for painting. However, this rate relates to the painting of unpainted services, rather than re-coating of already painted surfaces. As such, I find that the cost of

[14] See *Tyco Australia Pty Ltd v Optus Networks Pty Ltd* [2004] NSWCA 333.

materials will be less than what would otherwise be the case. Moreover, I consider that less preparation would be required than would otherwise be the case. Further, I find that although there are numerous aspects of the dwelling which require recoating, not all of the dwelling is affected.

176. In my view, the rate of $85 per hour should be reduced to reflect these factors. Having regard to the evidence of Mr Goddard, Mr Bass and Mr Johnson and taking into consideration some betterment, I find that the reasonable rate that should be adopted for painting is $60 per hour. This would make the cost of repainting $4,320 plus GST ($4,752). Further, I do not accept that a carpenter is required to remove and reinstate any of the doors which have not had their edges painted. In my view, that work can be done by the painters, given that the doors have already been professionally hung. Therefore, I will allow a further four hours of labour cost, amounting to $240 plus GST, to remove and rehang doors.

177. In my view, the contract for the repainting of the dwelling is, in one sense, similar to the contract for the re-sanding and repolishing of the timber strip flooring. In particular, it is not work to be done by a registered building practitioner, nor does it require a building permit or warranty insurance. Like the re-sanding and re-polishing of the timber strip flooring, that work can be carried out under a separate contract organised by the Owners, so as to allow the work to be undertaken at a mutually convenient time. For that reason, I do not consider it reasonable that the assessment of damages should include an allowance for builder's margin, preliminaries or contingency. Consequently I find that the reasonable cost to remedy this defect is $5,016. I will allow $5,016 for this item.

Tiling around bath

178. Mr Johnson said that the bath in the main bathroom has been installed so that the hobs at both ends abut the edge of the bath, rather than allowing the bath lip to sit on top of the hob.

179. Mr Johnson recommended that the splashback tiles above the bath should be removed to allow the bath surround frame to be reconstructed so that the bath can be positioned in such a way that the hobs are under the edges of the bath lip. He estimated that the cost of undertaking that work to be $1,525.72.

180. Mr Goddard said that he inspected the bath during construction. He said at the time he adjudged it to be appropriate, notwithstanding that it did not strictly comply with the BCA. He commented that the method of construction resulted in waterproofing being wholly dependent upon the caulking and this may require ongoing maintenance. However, he did consider this factor to constitute a defect. Consequently, he deemed its construction methodology to be acceptable. Mr Johnson responded to Mr Goddard's evidence. He said that if Mr Goddard found the construction methodology to be acceptable, then he would not argue against that, given that he had not viewed the bath installation during construction.

181. Ms Ballueer gave evidence that the construction of the bath created a further problem; namely, its position left a small gap between the edge of the bath and the edge of the vanity unit. The gap created a void, which made cleaning difficult. She suggested that the position of the bath was not in accordance with the architectural drawings, which showed the edge of the bath hard up against vanity unit.

182. Ms Ballueer's comments were not the subject of any expert evidence. As such, it is not clear whether the bath could have been constructed further out from the wall. Moreover, the architectural drawing depicting the bath appears to have it positioned hard up against the internal south wall, without any hob. Obviously, if that were the case, it would confirm that its current position is in accordance with the plans.

183. There is no evidence of any water damage resulting from the method of construction adopted by the Builder. It appears that the junction of the bath lip with the two hobs at each end is watertight. Therefore, having regard to this factor, and the concession made by Mr Johnson together with the observations of Mr Goddard, I do not consider that this aspect of the Works is defective, notwithstanding that its construction may not strictly comply with the BCA. Consequently, this aspect of the Owners' counterclaim is dismissed.

Stair at South side Entry

184. The south side entry at ground level opens to a stair landing which then leads in one direction to the Basement and in the other direction to the first floor level. The location of the Entry door is such that the east side of the doorway does not line up with the stair landing. This means that part of the door entry opens onto a stair landing while another part misses the landing and opens to the first descending stair tread. Mr Johnson observed that it is unsafe to step down from the east side of the doorway.

185. Mr Johnson said that the existing landing had to be removed and a new landing incorporating a half winder leading to the downward flight of stairs be installed. Further sanding and polishing would be required to match the new landing with the existing. He estimated that the cost of undertaking that work was $1,112.35.

186. Mr Goddard observed that the dwelling could not be constructed strictly in accordance with the plans due to steel structural members impinging on the location of the south side Entry doorway. Therefore, the doorway had to be moved further to the centre which created the mismatch between the stair landing and the entrance. He suggested that a 45° landing would remedy the situation. He agreed that the cost of $1,112.35 represented a reasonable amount to undertake the work.

187. Mr Bass conceded that the staircase needed rectification in order to comply with the Contract. He said that the staircase manufacturer had offered to install the quarter winder and only required access in order to

undertake that work. He said the work would take approximately four hours. Indeed, the staircase manufacturer, Mr Jason Stafford from *Stairlock International*, attended the Tribunal's view of the Property, during which he confirmed that his company was willing to undertake that work.

188. For the same reasons given in relation to the timber flooring and the painting, I consider that damages in relation to this particular item should be assessed on the basis of what it would cost the Owners to separately engage a joiner to carry out this work. Mr Johnson has estimated that the work of supplying and installing a 45° landing would cost $704, excluding any necessary floor sanding and polishing upon completion of that work. Given that sanding and polishing is to be undertaken to the timber strip flooring, in any event, I consider that a reasonable sum to compensate the Owners in relation to this aspect of the Works should be limited to $704. Consequently, I will allow $704 for this item.

Inaccessible inlet to water tank

189. The stormwater storage tank has been installed in the south west corner of the garage/basement. The strainer at the location of the downpipe discharge point is difficult to access as it is positioned deep into that corner. This means that a person needs to manoeuvre around the water tank to its far side to access the strainer. This is difficult, although not impossible.

190. The strainer needs to be cleaned on a regular basis to prevent any overflow into the garage/basement. Therefore access is imperative.

191. Mr Johnson has recommended that the leaf strainer could be installed externally. This would require the downpipes to be diverted to an external leaf strainer before re-connecting into the water tank. He estimated that the cost of this work would be $638.95.

192. I am not persuaded that this particular item of complaint constitutes a defect, notwithstanding that the position of the strainer is somewhat awkward to access. However, the Contract does not specify that the strainer is to be installed externally and in those circumstances, I find that there was no obligation to do so. In my view, the installation of an external strainer would have constituted a variation to the Contract. Consequently, this aspect of the Owners' counterclaim is dismissed.[15]

DELAY CLAIM

193. The Owners claim $11,827.50, which they contend represents the payment of rent over a period commensurate with the delay in completing the Works. Two rent statements have been produced to substantiate that claim. In essence, the Owners contend that the Works should have been completed on 29 April 2014. They took possession of the works on 16

[15] It appears that this item has, in any event, been withdrawn from the Owners' counterclaim.

December 2014. Therefore, they submit that the period of delay is 231 days.

194. The Builder partly denies the delay claim. It says that the date for completion of the Works was extended as a result of variations and work undertaken by the Owners' separate contractors.

What is the contractual commencement and completion dates?

195. Schedule 4 the Contract specified that the construction period was to commence once the demolition of the existing dwelling was complete. According to Mr Kaye, the existing dwelling was removed from the site on 22 October 2013. The Builder does not dispute that. However, the building permit for the construction of the Works was not issued until 22 November 2013. Mr Kaye gave evidence that the work of constructing the new dwelling actually commenced in December 2013. Consequently, there is a hiatus between those dates.

196. There is no evidence as to what occurred between when the original dwelling was removed and when construction on the new dwelling commenced in December 2013. It is not clear whether no work occurred or whether ancillary work to the demolition was continuing, such as levelling the site, et cetera. The general conditions of the Contract state that commencement of the Works must occur within 21 days after the Builder receives the *essential information*, necessary building and planning permits and payment of the deposit. There is no evidence to suggest that the *essential information*, which includes evidence of finance, title and the like was not provided. Moreover, there is no evidence to suggest that the deposit was not paid. Therefore, it is reasonable to infer that in the absence of the special condition set out under Schedule 4, the Works of constructing the new dwelling should have commenced within three weeks of 23 November 2013, being 13 December 2013.

197. Doing the best I can with the evidence before me, I find that this is the contractual commencement date.

198. The Contract provided that the Works were to be completed within 185 calendar days from the date of commencement. Consequently, if there were no extensions of time to the date for completion, the Works should have been completed by 16 June 2014.

THE BUILDER'S EXTENSION OF TIME CLAIMS

199. The Builder contends that the following delays extended the date for completion of the Works:

(a) One calendar month as a result of late bank payments.

(b) Thirty four calendar days by reason of variation work.

(c) Eight calendar weeks of delay as a result of the installation of the hydronic heating rough-in, which was organised by the Owners through a separate contract with their own contractor.

(d) One calendar month of delay in relation to the installation of the gas meter.

200. Therefore, if the above extensions of time were applied to the original date for completion of 16 June 2014, the revised date for completion would be 9 January 2015. Given that the Owners took possession of the Property on 16 December 2014, there would be no basis for the Owners to claim any damages as a result of delay.

201. However, documents produced by the Builder are inconsistent with the Builder's extension of time claims. In particular, the *Invoice for final payment* acknowledged that the Builder was four weeks late in completing Works. It credited the Owners with $1,000 in respect of delay. That amount was calculated by reference to Clause 40 and Item 9 of the Contract which provided that if the Builder was late in completing the works, it would compensate the Owners by paying or crediting them $250 per week for each week of delay.

Delay by reason of late payments

202. No evidence was given on behalf of the Builder demonstrating that it was delayed by reason of any late payment of progress claims. In the absence of any evidence demonstrating that a late payment of a progress claim either gave rise to an extension of time claim or in some way affected the critical path of the Works, that claim is unsustainable.

203. Therefore, I find that no delay was caused as a result of any late payment of a progress claim, if in fact that occurred.

Delay by reason of variations

204. The Contract provides a regime whereby the completion date can be extended by reason of a variation. The clauses of the Contract state, in part:

> 23.2 If the Builder requests the variation, the notice given by the Builder must state the following further particulars:
>
> - …
> - If the variation will result in any delays, the Builder's estimate of such delay; and
> - …
>
> 24.0 When a variation has been effected under Clauses 12, 23 or 38:
>
> …
>
> - The Completion Date or the number of days required to finish the work are read as that date or number of Days, as adjusted to take account of the variation.

205. Some of the variation notices submitted by the Builder state that the Works will be delayed by reason of the variation and give an estimate of the period of delay. In particular:

Variation number	Date	Period of delay (days)
1	12 December 2013	0
2	18 June 2014	0
3	18 July 2014	7
4	18 July 2014	0
5	18 July 2014	1
6	18 July 2014	3
7	18 July 2014	1
8	18 July 2014	3
9	18 July 2014	1
10	20 July 2014	3
11	28 July 2014	1
12	28 July 2014	1
13	28 July 2014	1
14	28 July 2014	1
15	28 July 2014	1
16	5 August 2014	7
TOTAL		**31**

206. The Builder's claim states that there are 34 days claimed under the various variation notices. Having considered the variation notices produced by the Builder, I have calculated the total days to be 31, as set out in the above table. Each of those variation notices have been signed by the Owners. There is no evidence to suggest that the time claimed in those variation notices was ever in dispute. Consequently, I find, that under Clause 34 of the Contract, the completion date was extended by those 31 days. Therefore, I find that the date for completion has been extended by reason of variations to 17 July 2014.

Hydronic heating delay claim

207. Mr Bass gave evidence that the rough-in of the hydronic heating delayed the critical path of the Works by eight weeks. In particular, he said that it caused delay to the installation of the plaster sheets, which had flow-on effects. No extension of time claim was submitted in respect of this delay event. Mr Richards, the electrical contractor engaged by the Builder, gave evidence that he was required to return to the Property to alter the position of electrical outlets, as a result of the original position being obscured by hydronic heating panels. He said it took approximately one half of a day to undertake that work.

208. Mr Richards also gave evidence that the scope of his work changed which resulted in him taking longer to complete what had originally been envisaged. However, the Builder makes no additional claim for an extension of time in respect of electrical work, other than what is claimed in Variation 16 (seven days). Therefore, to the extent that Mr Richards has given evidence regarding any delay caused by additional electrical work, that delay has already been comprised in the Builder's extension of time claim set out above.

209. The Owners each gave evidence that the contractor engaged by them did not cause any delay to the Works. Mr James Clark, the plumber who installed or managed the installation of hydronic heating to the Property, also gave evidence corroborating the Owners' evidence. He said that he first met the Owners on site in March 2014. At that stage, the building work had progressed to a point where the upper level was just being constructed. Mr Clark said he met Mr Bass and was told that the rough-in for the hydronic heating could be installed once the roof of the new dwelling had been installed.

210. He said he received a telephone call from Mr Kaye on 24 July 2014 advising him that he could commence installation of the hydronic heating rough-in. Mr Clark recalled that he attempted to commence work after receiving Mr Kaye's telephone call but was unable to get access to the building site at that time. This was because Mr Clark wanted to undertake the work over the weekend, which was not convenient for the Builder. After receiving another phone call in early August 2014, he returned to the building site on 12 and 13 August 2014 and roughed-in the hydronic pipework to the interior of the dwelling.

211. Mr Clark recalled that on 19 August 2014 he returned to the Property and undertook work in the basement/garage area, although that could not be completed because there was an issue with the concrete slab. He said that he could not pressure test the system on that day but did so when he returned again on 21 August 2014. He recalled that he did not see any plasterboard sheeting having been installed as of that date.

212. Mr Clark said that he was never made aware that his work was holding up progress of the Works, despite having a number of conversations with Mr Bass.

213. I am not satisfied that the work of installing the hydronic heating delayed the Works. In forming that view, I accept the evidence of Mr Clark that he and his workers were able to install the hydronic heating rough-in prior to any of the plasterboard sheeting being ready to be installed. This is evidenced by the fact that no plasterboard sheeting had been installed 10 days after the hydronic heating rough-in had been installed to the interior of the dwelling. In those circumstances, I find that it is reasonable to infer that the plastering contractors were not waiting for the installation of the hydronic heating rough-in.

214. My finding is reinforced by the fact that Mr Bass forwarded an email to the Owners on 22 July 2014 which stated:

> Hello John & Yvonne
>
> I requested last week you arrange the rough in for the heater system as you selected.
>
> Can you ask them to contact myself for confirmation for rough in of your Hydronic heating system.

215. As mentioned above, Mr Kaye contacted Mr Clark to commence the rough-in of the hydronic plumbing on 24 July 2014, two days after receiving that email. The work to the interior of the dwelling was completed on 12 and 13 August 2014. In my view, it is unlikely that the Works were delayed by eight weeks, as claimed by the Builder, if the Builder first notified the Owners to arrange for the installation of the hydronic heating on 22 July 2014, being three weeks prior to that work actually being completed.

216. Moreover, the Contract provides that a particular regime is to be followed by the Builder in circumstances where the Works are delayed. Clause 34 of the Contract states in part:

> 34.0 The date for Commencement is put back or the Building Period is extended if the carrying out of the Building works is delayed due to:
>
> - …
> - Any other cause that is beyond the Builder's direct control,
>
> 34.1 The Builder is to give the Owner a written notice informing the Owner of the extension of time. The written notice must state that cause and the extent of the delay.
>
> 34.2 To dispute the extension of time the Owner must give the Builder a written notice, including detailed reasons why the Owner disputes the claim, within seven Days of receiving the Builder's notice.

217. In my view, the requirement to serve the Owners with a written extension of time notice is a precondition to being granted an extension of time under Clause 34.0. I have formed this view because Clause 34.2 deems any extension of time approved, if an owner does not object to a written notice for an extension of time within seven days after receipt of such a notice. Both Clause 34.1 and 34.2 impose onerous conditions on the parties. This is to ensure that there is certainty in the way in which the Contract is administered, both from the Builder's perspective and from the Owners. In particular, it allows the Builder to know whether delays are agreed to or deemed to be agreed to so that it is better able to manage programming of the work. For example, if the extension of time is not

agreed to, then the Builder may choose to accelerate Works in an attempt to mitigate any loss caused by delay. By the same token, the procedural regime allows an owner an opportunity to plan ahead in the event that the Works are delayed. This is particularly important in circumstances where an owner might be renting alternate accommodation during the construction period.

218. In my view, the utility and purpose of Clause 34 would be rendered meaningless if extensions of time could be made outside the procedural requirements set out under that clause. Clearly, this could have been the intention of Clause 34 and for that reason, I find that the clause imposes a mandatory requirement on a builder to serve a written extension of time notice, if an extension of time is sought under that clause.

219. Consequently, I find that the date for completion of the Works was not extended by reason of any delay caused by installation of the hydronic heating.

Gas meter delay

220. The Builder contends that the Owners failed to organise for the installation of the service line to enable the gas meter to be installed. This is said to have delayed the issuance of the occupancy permit. Very little evidence was given in relation to this aspect of the Builder's claim.

221. Mr Kaye gave evidence that the Builder failed to provide instructions to the Owners in relation to what they were required to do, if anything, in order to facilitate the installation of the gas meter. Mr Kaye further said that, in any event, it was the Builder which had control over the Works and the obligation to organise the installation of the gas meter.

222. I am unable to say who was ultimately responsible for the installation of the gas meter. Nevertheless, that question is of little relevance in circumstances where there is little or no evidence demonstrating that any delay in installing the gas meter critically affected the construction program for the Works. In that respect, I am unable to make any finding that a delay occurred.

223. Moreover, no extension of time claim was produced during the course of the hearing in respect of this particular extension of time claim. For the reasons which I have set out above, I consider this to be fatal to any extension of time claim. Therefore, I find that the construction period for completion of the Works was not extended by reason of any delay associated with the installation of the gas meter.

Delay damages

224. Having regard to my finding set out above, I conclude that the construction period was extended by a period of 31 calendar days. Therefore, the date for completion of the Works is 17 July 2014. As indicated above, the Owners claim damages by reference to rental

receipts. However, the Contract provides a dispositive remedial code covering the remedies available to the Owners for delay. In particular, the Contract states:

> 40.0 If the Building Works have not reached Completion by the end of the Building Period the Owner is entitled to agreed damages in the sum set out in Item 9 of Schedule 1 for each week after the end of the Building Period to and including the earlier of:
>
> - the date the Building Works breach Completion;
> - the date this Contract is ended; and
> - the date the Owner takes Possession of the Land or any part of the Land.
>
> 40.1 The Owner may deduct the amount of any such damages from the Final Payment.

225. In my view, Clause 40.0 limits or caps what the Owners may claim as a result of any damages suffered by them by reason of delay. Item 9 of Schedule 1 of the Contract fixes those damages to an amount not exceeding $250 per week, which equates to $35.62 per day. I find this is the upper limit of what the Owners may claim in respect of delay.

226. I further find that the Works were 152 days late at the time the Owners took possession on 16 December 2014. Therefore, I find that the Owners are entitled to $5,414.24, which represents liquidated damages recoverable under the Contract. Under the Contract. The Owners may claim this amount from the Builder or deduct this sum from the final claim under the Contract. I will allow this amount in my final calculation of each party's respective claim.

HOT WATER SERVICE CLAIM

227. The Owners also claim the cost of arranging for a plumber to supply and fit a hot water service to the Property. This work was undertaken after the Owners took possession of the Property.

228. On the day of the final inspection, the Builder's sub-contracting plumber was installing the external hot water service, which Mr Bass said would have been completed on that day but for the fact that the parties fell into dispute. Mr Bass said that after the Owners had refused to make final payment under the Contract, he instructed his plumber to remove the external hot water service, pending resolution of the dispute between the Builder and the Owners. Mr Bass said this was necessary because he was concerned that if the dispute became protracted and the site remained unoccupied, there was a risk that the external hot water service would be stolen.

229. However, on the following day, the Owners took possession of the Property. Given the dispute between the parties, the Builder was not

willing to complete installation of the hot water service until that dispute had been resolved. However, the Owners required hot water in order to comfortably use the Property and for that reason, decided to engage their own plumber to supply and install the hot water service. Therefore, the Owners paid $5,530 for that work to be completed. They claim that amount from the Builder.

230. The Builder disputes liability in respect of this aspect of the Owners' counterclaim. Mr Bass submitted that the Builder was willing to supply and fit the hot water service if the Owners were willing to make payment of the final claim under the Contract.

231. Clearly, the parties were at an impasse as each believed that they were legally in the right.

232. In my view, taking of possession without the Builder's consent and before making payment of the final claim constitutes a breach of the Contract by the Owners. This is so even in circumstances where the parties dispute the amount which has been claimed. As I have already found, the final claim, absent any deduction for liquidated damages for delay, should have been $19,207.50. Taking into consideration the Owners' entitlement to deduct liquidated damages from that sum, $13,793.26 was still payable. However, the position taken by the Owners was that no amount was payable. In my view, that position was untenable in circumstances where allegations of defective work had not yet surfaced.

233. However, the attitude of the Builder also carries some blame. In particular, the amount sought in the *Invoice for Final Claim* was significantly more than what the Builder was entitled to, even ignoring any deduction for liquidated damages. The Builder has maintained that position throughout the proceeding. Therefore, it is questionable whether the Builder would have handed over possession of the Property even if the Owners had offered to pay $11,893.26.

234. In my view, the fairest outcome in respect of this item of the Owners' counterclaim is for the cost of the replacement hot water service to be borne equally between the parties. In forming that view, I am mindful of s 53(1) of the *Domestic Building Contracts Act 1995*, which permits the Tribunal to make any order it considers fair to resolve a domestic building dispute. As I have indicated, I consider that the fairest outcome in relation to this aspect of the Owners' counterclaim is for each party to pay half the cost of that replacement hot water service. Accordingly, I find that $2,765 is payable by the Builder in respect of this aspect of the Owners' counterclaim.

OTHER ITEMS CLAIMS

Rekeying of locks

235. The Owners further claim for the cost of re-keying locks. This arises after they took possession of the Property. As I have already indicated, the

Owners took possession of the Property without the consent of the Builder and without prior notice. In my view, it would not be fair, nor is there any legal basis, to order that the Builder bear the cost of re-keying the locks to the Property in those circumstances.

236. Consequently, this aspect of the Owners' claim is dismissed.

Rear steps

237. The Owners allege that the bottom step at the northern end of the dwelling has a 3 mm crack. They estimate that the cost to make good that step is $148. No expert evidence was given in relation to this aspect of the Owners' claim. In those circumstances, I am not persuaded that a 3mm crack constitutes a defect in the Works. In particular, there may be many factors which have led to the step cracking. Without expert evidence to support the allegation, it is impossible to determine whether the crack arises because of an act or omission on the part of the Builder or because of some other factor, for which the Builder has no responsibility.

238. Consequently, this aspect of the Owners' claim is dismissed.

Roof window resealing

239. The Owners contend that the external sealant around the skylight north facing windows, which are located on the roof, have opened up and require resealing. They have estimated that the cost of undertaking this work is $292. Again, no expert opinion evidence was given in support of this allegation. For the reasons outlined in relation to the rear step claim, I find that the claim is unsustainable. In particular, there may be many factors which have led to the external sealant "opening up" which may or may not be the result of faulty workmanship on the part of the Builder. For example, the item may relate to a maintenance issue. It is impossible to know without expert opinion evidence supporting the claim.

240. Consequently, this aspect of the Owners' claim is dismissed.

CONCLUSION ON OWNERS' CLAIM

241. Having regard to my finding set out above, I find in favour of the Owners counterclaim in the amount of $64,980.30, calculated as follows:

Description	Amount
Defective work	
• Based block work	3,863.16
• Garage lintel	0
• East side balcony	4,305.55
• Self side porch	571
• Agricultural pits	986.46
• Facade cladding	11,554.60
• Side cladding	14,517.66
• East and West balconies	8,791.28

• Rust spots	1,022.16
• Timber flooring	5,379
• East side entry door gap	90.19
• Paintwork	5016
• Bath	0
• Staircase	704
• Water tank	0
Delay damages	5,414.24
Hot water service claim	2,765
Rekeying of locks	0
Rear steps	0
Roof window re-sealing	0
TOTAL	**$64,980.30**

CONCLUSION

242. Having regard to the Builder's claim found to be proven ($19,207.50) and the Owners' counterclaim found to be proven (64,980.30), I find that the Owners are entitled to be paid $45,772.80.

SENIOR MEMBER E. RIEGLER