VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST **VCAT Reference: BP311/2014**

CATCHWORDS

DOMESTIC BUILDING DISPUTE – Repudiation of contract – whether combination of delay and words spoken are sufficient to demonstrate an intention to no longer be bound by the terms of the contract; whether wrongful termination and refusal to grant access to building work constitutes a repudiation of the contract. Damages – whether damages occasioned by a breach of contract occurring prior to termination are able to be claimed by the party that subsequently repudiates the contract; whether the cost of repairing defective workmanship is to be assessed on the basis of what it would cost the builder to repair or alternatively what it would cost if repaired by a third party builder. Agency – whether a claim against an agent of an undisclosed principal is maintainable.

APPLICANT:	Versa-Tile Pty Ltd (ACN 000 987 002)
RESPONDENT:	101 Construction Pty Ltd (ACN 124 812 139)

VCAT Reference: BP354/2014

APPLICANT:	101 Construction Pty Ltd (ACN 124 812 139)
RESPONDENT:	Dr Danny Raiz
WHERE HELD:	Melbourne
BEFORE:	Senior Member E Riegler
HEARING TYPE:	Hearing
DATE OF HEARING:	1, 2, 3 and 4 June 2015
LAST FOR WRITTEN SUBMISSIONS	3 July 2015
DATE OF ORDER:	15 September 2015
CITATION	Versa-Tile Pty Ltd v 101 Construction Pty Ltd (Building and Property) [2015] VCAT 1472

ORDERS BP311/2014

1. The Respondent must pay the Applicant $3,933.06

2. Liberty to apply on the question of costs and interest.

ORDERS BP354/2014

1. Having regard to the Tribunal's findings set out its *Reasons* dated 15 September 2015, the claim made by the Applicant in proceeding BP354/14 is set-off against the claim made by the Applicant in proceeding BP311/14, such that the claim in BP354/14 is wholly extinguished and thereby dismissed.

2. Liberty to apply on the question of costs.

SENIOR MEMBER E. RIEGLER

APPEARANCES BP311/14:

For the Applicant	Mr B Ryde, of counsel
For the Respondent	Mr J Daoud, director

APPEARANCES BP354/14:

For the Applicant	Mr J Daoud, director
For the Respondent	Mr B Ryde, of counsel

REASONS

INTRODUCTION

1. The applicant in proceeding BP311/2014, Versa-Tile Pty Ltd (**'Versa-Tile'**), is the registered proprietor of a property located in Fitzroy (**'the Property'**). Dr Danny Raiz, the respondent in proceeding BP354/2014, is the director of that corporate entity.

2. The Property comprises a warehouse which has been converted into a two level residential dwelling, with provision for retail or commercial offices on the ground floor (**'the Premises'**). In 2011, the Premises suffered significant water ingress, causing consequential damage to the ceilings and other parts of the building. As a consequence, Versa-Tile or Dr Raiz made a claim on their building insurance policy. That claim was accepted and a scope of work was approved by the loss adjuster acting on behalf of the relevant insurance company. That scope of work is set out in a report from *Sergon Building Consultants* dated 13 September 2012. It is also set out in a quotation provided by *Built in Style* dated 8 October 2012 for $66,450 plus GST.

3. Prior to the internal remedial work being undertaken, Versa-Tile or Dr Raiz entered into a contract with Darren Hay, a licensed plumber, to undertake remedial work to the roof of the Premises. The purpose of this work was to ensure that water ingress could be arrested before internal remedial work was undertaken. The scope of that roof plumbing work was, to some extent, based upon an earlier quotation obtained by Dr Raiz in late November 2011 from *Elliott Roofing Pty Ltd*, although the scope of work set out in that quotation was far more extensive than the work which Mr Hay was to perform. In particular, the *Elliott Roofing Pty Ltd* quotation contemplated that all of the roof cladding was to be removed and replaced. However, the scope of work to be undertaken by Darren Hay was limited to replacing only some of the rusted roof cladding sheets, some flashings and box gutters, with a view to arrest water ingress at minimal cost.

4. Darren Hay commenced the roof plumbing work but ran into financial difficulties and was unable to complete that work. As a result, a claim was made on Darren Hay's warranty insurer, which was accepted in favour of Dr Raiz or Versa-Tile.

5. Following acceptance of that insurance claim, Versa-Tile or Dr Raiz entered into negotiations with 101 Construction Pty Ltd, the respondent in proceeding BP311/2014 and applicant in proceeding BP354/214, with a view to engaging it to carry out not only the remedial work set out in the *Build in Style* quotation, but also complete the roof plumbing work in order to make the premises 'watertight'.

6. A number of draft building contracts were forwarded by 101 Constructions Pty Ltd (**'the Builder'**) for consideration by Dr Raiz. Eventually, a building

contract dated 20 September 2013 was signed by Dr Raiz and Mr Daoud, the director of the Builder (**'the Contract'**). The Contract price was $130,914.30 and purported to reflect what the parties had, over the preceding months, discussed as being the scope of the work to be undertaken by the Builder.

7. According to Dr Raiz, the written terms of the Contract do not accurately reflect the extent of the work that the Builder had agreed to undertake. In particular, the parties disagree as to the extent of roof plumbing work that was to be undertaken by the Builder. Dr Raiz contends that the roof plumbing work contemplated by the Contract is extensive because the Builder had promised to make the Premises 'watertight'. According to Dr Raiz, that entailed making the whole of the roof compliant with the current *National Building Code* and applicable Australian Standards. By contrast, the Builder contends that the scope of the roof plumbing work was limited to replacing only one section of roof cladding, located above the cathedral ceiling, together with other minor repairs and adjustments, in order to arrest water ingress at minimal cost.

8. The discourse between the parties over this issue created conflict, which was exacerbated when further water ingress occurred during the period that the Builder was performing its internal remedial work. Further conflict also arose in relation to the quality of the internal remedial work undertaken by the Builder and the time taken to complete the works under the Contract. In early February 2014, this conflict culminated in an altercation between the parties and, ultimately, the termination of the Contract between them.

9. Proceedings were subsequently issued by Versa-Tile seeking compensation from the Builder in the amount of $176,446, being the amount assessed by Versa-Tile's building consultant as the reasonable cost of repairing and completing the internal and external works.

10. An application was subsequently filed by the Builder, in which it claimed $129,218.31, which is made up as follows:

    (a) the outstanding amount under the Contract of $65,914.31; and

    (b) liquidated damages for delay of $63,304.

ISSUES

11. The claims made by the parties raise a number of issues; namely:

    (a) Who are the contracting parties?

    (b) How did the Contract come to an end?

    (c) What is the scope of the work under the Contract?

    (d) Are the works defective or incomplete?

WHO ARE THE CONTRACTING PARTIES?

12. The Contract names Dr Raiz, in his personal capacity as the *OWNER* and contracting party. Dr Raiz contends that he is not the contracting party or the owner of the Property. He gave evidence that it was always intended that Versa-Tile be the contracting party because it is the registered proprietor of the Property. Dr Raiz said that he was, at all times, acting on behalf of Versa-Tile as its directing mind and that the express mention of his name in the contract is a mistake. He said that he believed that the Builder understood that he was the director of Versa-Tile and at all times acting in that capacity, rather than in his personal capacity.

13. Mr Daoud, the director of the Builder, gave evidence that he was unaware of the entity, Versa-Tile, at the time when he executed the Contract. He said that he believed that the Property was owned by Dr Raiz, and on that basis inserted his name into the relevant part of the Contract.

14. In my view, it was always the intention of the parties prior to the Contract being executed that the registered proprietor of the Property should be the relevant contracting party. That being the case, the naming of Dr Raiz, as the *OWNER* in the Contract is a mutual mistake. Therefore, I find that the contracting parties were Versa-Tile and the Builder. The involvement of Dr Raiz, was as director, officer and agent of Versa-Tile, rather than being the contracting party.

HOW DID THE CONTRACT COME TO AN END?

15. As is often the case in building disputes, the question of how the building contract came to an end is critical in determining each of the parties' respective claims. In the present case, Versa-Tile contends that the Builder repudiated the Contract and that it then elected to accept that repudiation and determine the Contract at common law. By contrast, the Builder contends that Versa-Tile was not entitled to determine the Contract and that its conduct in denying the Builder access to the Property amounted to repudiation on its part, which the Builder accepted.

16. A large component of Versa-Tile's claim comprises work which the Builder says is incomplete work. Further, the Builder contends that if it is found that Versa-Tile repudiated the Contract, then Versa-Tile is not entitled to claim any compensation in respect of such incomplete work. Its entitlement to damages is limited to compensation for the cost to rectify defective work only. Moreover, the Builder contends that in those circumstances, it is entitled to be paid the balance of the Contract price of $65,914.31 plus damages for delay, which it says was caused by the acts or omissions on the party of Versa-Tile.

17. In *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd*,[1] Dean and Dawson JJ summarised the concept of repudiation as follows:

[1] (1989) 166 CLR 623.

> … repudiation turns upon objective acts and omissions, not on uncommunicated intention, and it is sufficient that, viewed objectively, the conduct of the relevant party has been such as to convey to a reasonable person, in the situation of the other party, repudiation or disavowal either of the contract as a whole or of a fundamental obligation under it.[2]

18. Similarly, in *Kane Constructions Pty Ltd v Sopov*,[3] Warren CJ stated:

> Gibbs CJ in *Sheville & Anor v The Builders Licensing Board* likewise observed that a contract may be repudiated where one party renounces their liabilities under it, evincing any intention to no longer be bound by the contract. His Honour further observed that repudiation may also occur when one party demonstrates an intention to fulfil the contract, but in a manner "substantially inconsistent with his [or her] obligations and not in any other way…"[4]

19. In the present case, Mr Ryde of counsel, who appeared on behalf of Versa-Tile and Dr Raiz, submitted that the Builder repudiated the Contract and this was evidenced by:

    (a) Its conduct during November 2013 through until 3 February 2014, which included:

        (i) significant delays in progressing the building works;

        (ii) the conduct of Mr Daoud and the Builder's subcontractors, including requests made directly to Dr Raiz by the Builder's subcontractors for money and threats by union officials to close the site if those subcontractors were not paid directly by Dr Raiz; and

        (iii) the state of the building works as it was on 4 February 2014. In particular, the degree of building rubble left on site as of that date; and

    (b) Express statements made by Mr Daoud to Dr Raiz on the evening of 3 February 2014.

Delays

20. The Contract specified that the building period was to be 78 calendar days. It further stated that the *Anticipated Commencement Date* was 23 October 2013. According to the Builder, that made the contractual completion date 9 January 2014. On that reckoning, as of 3 February 2014, the works were only 25 days late. Moreover, the Builder contends that there were a number of delays caused by the acts or omissions on the part of Dr Raiz or separate contractors engaged by him, which are the cause of that delay.

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[2] Ibid at at 658.
[3] [2005] VSC 237. See also Supreme Court of Appeal judgment in *Sopov and Anor v Kane* [2007] VSCA 257, which upheld Warren CJ's findings on the question of termination.
[4] Ibid at [795].

21. By contrast. Versa-Tile contends that the works commenced well before 23 October 2013. Dr Raiz gave evidence that the Builder had arranged for a scissor lift to be delivered to the site in early August 2013 and had physically commenced the works by 20 September 2013. According to Versa-Tile the contractual completion date was 7 December 2013, rather than early January 2014.

22. Evidence was given by Mr Williams, the subcontracting roof plumber engaged by the Builder, that the building works were delayed as a result of insulation contractors engaged by Versa-Tile failing to progress their work in a timely manner. In particular, he said that his work was delayed because the new roof sheets, which were to be installed over the cathedral ceiling, could not be installed until the insulation contractors had removed and replaced existing insulation. According to Mr Williams, the delay was approximately 10 days. His evidence conflicts with that of Mr Daoud who said the delay was only 4 days. Dr Raiz conceded that there was some delay in relation to the replacement of insulation but denied that the delay was 10 days. In the circumstances, I find that the delay was no more than four days.

23. Mr Daoud also gave evidence that further delay was caused by electricians engaged by Dr Raiz and by the fact Dr Raiz requested that the works be suspended over the Christmas period. Dr Raiz did not deny that he requested that the work be suspended over the Christmas period.

24. I accept that significant delay on the part of a builder may amount to a repudiation of a contract, especially where time is made of the essence. In the present case, although no extensions of time were sought by the Builder, some explanation was given as to why the works were not completed prior to 7 December 2013 or even early January 2014. In my view, that militates against a finding that the delay in completing the works in the present case constitutes a repudiation of the Contract on the Builder's part.

25. Moreover, there is no evidence that the works were not being progressed during the period November 2013 to February 2014 (apart from when the works were suspended over the Christmas period at the request of Dr Raiz), notwithstanding that progress may have been slow during that period. In my view, the mere fact that the works were late does not amount to a repudiation of the Contract on the part of the Builder. I do not consider that mere delay in progressing the works evinces an intention on the part of the Builder that it no longer intends to be bound by the terms of the Contract or demonstrates that it is only willing to perform the Contract in a manner entirely inconsistent with its terms.

Subcontractors demands for payment

26. Dr Raiz gave evidence that subcontractors or sub-subcontractors of the Builder made demands for payment directly from him. The Builder was unable to confirm or deny whether those demands were made. However, Mr Daoud said that if those demands had been made, they were improper

because the Builder's subcontractors had been paid in respect of the stage of work which they had completed and if there were any further payments to be made to those subcontractors, those payments were not due until completion of the relevant work.

27. I accept that demands for payments were made by subcontractors or sub-subcontractors of the Builder directly to Dr Raiz.[5] I also accept that those demands were improper as there was no lawful basis upon which Versa-Tile or Dr Raiz had any obligation to make payment to the Builder's subcontractors or sub-subcontractors. Even if the Builder had failed to pay its subcontractors, that was a matter as between the Builder and its subcontractors and had nothing to do with Versa-Tile or Dr Raiz.

28. However, the fact that subcontractors or sub-subcontractors of the Builder were making demands for payment upon Dr Raiz does not, in my view, evidence an intention on the part of the Builder not to be bound by the terms of the Contract or evidence that the Builder is only willing to perform its obligations under the Contract in a manner entirely inconsistent with its terms.

29. Mr Ryde submitted that it was reasonable for the Tribunal to infer from the fact that subcontractors or sub-subcontractors were making direct demands for payment upon Dr Raiz that the Builder was insolvent and unable to progress the works. I do not accept that submission. It is speculative and there is no evidence to support a finding that the Builder was insolvent.

State of the building site

30. Mr Lorich, the building consultant engaged by Versa-Tile, gave evidence that he inspected the building site in March 2014 and observed that there was significant building rubbish left on site as of that date. Mr Lorich estimated the cost to remove that rubbish at $4,662, inclusive of *builder's margin* and GST.

31. Mr Daoud gave evidence that although there was builder's rubbish on site in February 2014, it was not significant or more than one would expect on an active building site. In any event, he gave evidence that had the contract not been terminated prematurely, the entire builder's rubbish would have been disposed of prior to handing over the works.

32. In my view, the presence of builder's rubbish on an active building site is not evidence that the Builder has evinced an intention to repudiate the Contract. Simply being messy is insufficient grounds to find that the Builder has repudiated the Contract.

[5] The term sub-subcontractors refers to persons employed by subcontractors of the Builder, rather than by the Builder directly.

Combination of acts

33. Mr Ryde submitted that although the state of the building site, on its own, may not demonstrate that the Builder has repudiated the contract, the combination of that fact coupled with the delay in progressing the works and the unlawful demands for payments made by subcontractors or sub-subcontractors of the Builder taken together evince an intention on the part of the Builder that it was no longer willing to perform its obligations under the Contract or at the very least, in a manner consistent with its terms. He relied upon *Progressive Mailing House* and submitted that repudiatory conduct may be constituted by the accumulation of conduct. I accept as a general proposition that a party may repudiate a contract by conduct comprising a combination of events, which, on their own, may not constitute repudiation but which in the aggregate do.

34. However, in the present case, I do not consider that the combination of delay, untidy building site and demands by subcontractors or sub-subcontractors, taken together, constitute a repudiation on the part of the Builder. Even taking other factors raised by Dr Raiz in his evidence, such as difficulty in making contact with Mr Daoud, leaving the premises unsecured on occasion and failing to use drop sheets over furniture left in the Premises do not, in my view, demonstrate a renunciation or disavowal of the Contract on the part of the Builder. In that regard, I note the comments of Deane and Dawson JJ in *Laurinda Pty Ltd v Capalaba Park Shopping Centre* that *repudiation of the contract is a serious matter, not to be lightly found or inferred.*[6]

Meeting on 3 February 2014

35. Dr Raiz gave evidence that at the conclusion of a meeting on 3 February 2014, and following an altercation between Mr Daoud and Mr Balic, an acquaintance of D Raiz, Mr Daoud said words to the effect:

> *That's it. I'm done. I'm never coming back to this job.*

36. Dr Daiz said that following that statement, he changed the alarm code to the Premises. He recounted that on the following morning of 4 February 2014, he left for work but subsequently received a call from the security company to notify him that the alarm within the Premises had been activated. He then received a call from Mr Daoud who, according to Dr Raiz, said that he had decided to come back and that he was there to finish the job. Dr Raiz gave evidence that he responded with words to the effect:

> *No. Get out of my house. I'm calling the police.*

37. Dr Raiz's evidence of what transpired on the morning of 4 February 2014 is largely corroborated by Mr Daoud. However, his account of what occurred at the meeting on 3 February 2014 differs from Dr Raiz's evidence.

[6] (1989) 166 CLR 623 at 657.

According to Mr Daoud, a meeting had originally been arranged to take place on 4 February 2014. However, on 3 February 2014, Mr Daoud received a call from Dr Raiz requesting that the meeting be brought forward to that evening. Mr Daoud said that he would arrange for the plumbing and plastering subcontractors to also attend the meeting so that all outstanding issues could be discussed. He said that Dr Raiz insisted that he attend the meeting alone. On the evening of 3 February 2014, Mr Daoud entered the Premises through the garage and made his way to the kitchen area on the first level. He was greeted by Dr Raiz and introduced to Dr Raiz's acquaintance, Mr Balic. According to Mr Daoud, Mr Balic soon became confrontational, accusing Mr Daoud of overcharging. He said that Mr Balic interrupted his conversation with Dr Raiz with taunts and accusations that the work was overpriced and had not been properly executed. According to Mr Daoud, the exchange between him and Mr Balic became heated, culminating in Mr Balic pushing Mr Daoud. Mr Daoud then left Premises but was again confronted by Mr Balic on the stairs leading to the garage. According to Mr Daoud, Mr Balic then armed himself with a sheath and was attempting to strike or stab Mr Daoud with that object. Mr Daoud gave evidence that he ran back to his vehicle which was parked some distance away with Mr Balic in pursuit. Once in his vehicle, he said that Mr Balic continued the assault by jabbing the sheath into Mr Daoud's vehicle. Mr Daoud said that he hastily drove away, albeit in the wrong direction down a one-way street, in order to escape from Mr Balic. As he approached the Premises, he said he saw Dr Raiz standing on the curb side. He said that he slowed his vehicle and then shouted to Dr Raiz words to the effect *this is going to get legal*. He said that he then drove to the nearest police station and made a statement.

38. It is not contested that a serious altercation occurred between Mr Daoud and Mr Balic. However, Dr Raiz and Mr Daoud each have differing accounts of what was said by Mr Daoud when he drove past Dr Raiz. Regrettably, Mr Balic did not give evidence, despite a summons being issued by the Principal Registrar that he attend the hearing and give evidence.

39. Mr Daoud vigorously denied having said that he told Dr Raiz that he *was never coming back to this job.* His denial is consistent with the undisputed fact that he did return to the Property on the following morning and also consistent with a written statement made to the police at 7.34 pm on 3 February 2014. That written statement states, in part:

> I ran back to the car park in the car park to the Johnston Street and he proceeded to the driver's door, pushing the shiv [sic.] against the window, it appeared to be spring-loaded. I drove forward out into Young Street the wrong direction towards the property where the doctor Danny RAIZ was standing next to the roller door. I stopped wound down the window and told him this was going to have to become a legal matter and I don't know why you involved anyone else…

40. The written statement is signed by Mr Daoud and states that the statement was taken and witnessed by M Henley C/38907 at 7.34 pm on 3 February 2014 at Fitzroy. It states further that:

> I hereby acknowledge that this statement is true and correct and I make it in the belief that a person making a false statement in the circumstances is liable to the penalties of perjury.

41. It is not suggested that the written statement produced in evidence is not a true copy of the statement made to the police on 3 February 2014.

42. As noted above, the written statement makes no mention of Mr Daoud saying that the Builder was *not coming back to the job*. Although it does state that the dispute was to become a legal matter. The written statement is contemporaneous with the events which occurred on that evening. Therefore, balancing the fact that the Builder did return on the following morning, coupled with the contemporaneous statement and the evidence of Mr Daoud against the evidence of Dr Raiz, I find that the more likely scenario is that Mr Daoud did not say that he or the Builder were *not coming back to the job*.

43. Even if those words were said, I am of the opinion that they must be viewed in context. No doubt, the assault on Mr Daoud was a traumatic experience and words spoken at the heat of the moment do not always reflect the true intentions of the person uttering them. In my view, it is difficult to discern that those words, even if spoken, seriously evinced an intention by the Builder that it no longer intended to be bound by the terms of the Contract. In my view, such words would have more gravitas if supplemented with conduct such as the Builder not returning to the Property. However, that did not occur. The Builder returned on the following morning and there is no evidence to suggest that it was not prepared to continue to perform its obligations under the Contract. In those circumstances, I am not persuaded that the words, even if spoken, evinced an intention on the part of the Builder not to be bound by the terms of the Contract.

44. Therefore, I find that the exchange between Mr Daoud and Dr Raiz, which occurred as Mr Daoud left the Property, does not constitute or evidence repudiation on the part of the Builder.

Did the Owner repudiate the Contract?

45. It is undisputed that the Builder was denied access to the Property from 4 February 2014 onwards, save and except to allow it to collect its tools and equipment.

46. On 5 February 2014, the Builder forwarded email correspondence to Dr Raiz which stated, in part:

> On 4 February 2014 I access the site with multiple trades in order to continue with the works on the roof and complete the plaster to the ceiling on the garage.

> On 5 February 2014 we attempted to access the site with multiple trades in order to continue with the plaster works. The doors to the site were blocked and or barricaded and we could not access the property. We request that you remove these obstacles to access so that we may immediately continue with the work. In addition we put you on notice that we will be planning an extension of time in relation to these actions. If your intent is to no longer provide us with access to the site, please advise so and indicate a suitable time for us to retrieve our tools and equipment from the site [sic].

47. It is common ground that on 7 February 2014, access was provided to the Builder to allow it to retrieve plant and equipment. Despite some discussion between Mr Daoud and Dr Raiz over the possibility of the Builder returning to the Property, no agreement was ever reached.

48. By letter dated 21 February 2014 from Dr Raiz's lawyers to Mr Daoud, the Builder was given notice or confirmation that the Contract had been terminated by Versa-Tile (herein after referred to as **'the Owner'**). That letter stated, in part:

> We refer to the domestic building contract between our client and your company, 101 Constructions Pty Ltd, dated 20 September 2013 for building works at the Premises (the Contract).
>
> We understand that the relationship between the parties has deteriorated recently to such an extent that our client was forced to terminate the Contract. On the evening of Monday 3 February 2014, you verbally notified our client that the Contract was terminated.
>
> Our client considers and accepts your conduct towards him and the Premises to constitute a repudiation of the Contract.
>
> We hereby provide you with a written confirmation of our client's termination of the Contract. For the reasons set out below, it is our position that your conduct absolutely demonstrates your intention that you are no longer bound by your obligations to our client under the Contract…

49. By letter dated 21 March 2014 from the Builder to the Owner, the Builder set out what it considered were fundamental breaches of the Contract on the part of the Owner, which included denying the Builder access to the Property. That letter stated, in part:

> In accordance with the above stated reasons the Owners Notice terminating the Contract is invalid, self-serving, a further breach of the Contract and amounts to a wrongful termination and all repudiation of the Contract. The Builder advises that this wrongful termination is accepted.
>
> Further and/or in the alternative, by having committed the above stated breaches and wrongfully terminated the Contract the Owner has evinced an intention:
>
> (a) to no longer be bound by the Contract; or
>
> (b) to be bound only on materially different terms to those contained within the Contract.

> The above stated breaches, whether viewed in isolation or in conjunction, therefore constitute a repudiation of the Contract ("the Repudiation"). The Builder advises that the Owners repudiation of the Contract is accepted.
>
> Accordingly, the Contract is now at an end.

50. In my view, denying the Builder access to the Property and then purporting to terminate the Contract at common law in circumstances where the Owner did not have a contractual or common law right to do so, constitutes a repudiation of the Contract by the Owner. Further, I find that the Builder's letter dated 21 March 2014 expressly accepts that repudiation and confirms the Builder's election to terminate the Contract at common law. That being the case, I find that the Builder lawfully terminated the Contract in response to the Owners repudiation of the same.

DAMAGES CLAIMED BY THE OWNER

51. My finding that the Contract was lawfully terminated by the Builder upon the Owner's repudiation impacts on the damages claimed in this proceeding. In particular, it is no longer open for the Owner to claim damages in respect of future performance under the Contract. In other words, my finding that the Owner repudiated the Contract means that the Owner is unable to claim for the cost to complete the works under the Contract.

52. However, accrued rights are not lost. Losses which arise from breaches of the Contract prior to termination of the Contract are still recoverable. That proposition is made clear in the majority judgment in *Westralian Farmers Limited v Commonwealth Agricultural Service Engineers Ltd*.[7] In that case, Dixon and Evatt JJ stated:

> In general the termination of an executory agreement out of the performance of which pecuniary demands may arise imports that, just as on the one side no further acts of performance can be required, so, on the other side, no liability can be brought into existence if it depends upon a further act of performance. If the title to rights consists of vestitive facts which would result from the further execution of a contract but which have not been brought about before the agreement terminates, the rights cannot arise. But if all the facts have occurred which entitle one party to such a right as a debt, a distinct chose in action which for many purposes is conceived as possessing proprietary characteristics, the fact that the right to payment is future or contingent upon some event, not involving further performance of the contract, does not prevent it maturing into an immediately enforceable obligation. [8]

53. In the present case, a significant portion of the works were completed or at least substantially completed, In particular, save for the garage area, most of the plastering work has been completed, albeit that preparation and painting is still to be undertaken. Similarly, most of the roof plumbing has been

[7] (1936) 54 CLR 361.
[8] Ibid at pages 379-380.

completed. However, the Owner contends that there are significant defects in the plastering and roof plumbing work which will require demolition and reinstatement. This aspect of the Owner's claim stands independent to its claim for completion of the building works.

54. Clause 10.1 of the Contract states, in part:

> The Builder gives to the Owner of the following warranties contained in Section 8 of the Act:
>
> - the Builder will carry out the Works in a proper and workmanlike manner in accordance with the Plans and Specification set out in the Contract…

55. Therefore, a finding that a portion of completed work is defective will constitute a breach of the contractual warranties given by the Builder entitling the Owner to damages commensurate with the cost to make good that defective work.

56. However, in circumstances where the Builder has been denied access and where the terms of the Contract would have given the Builder an opportunity to make good defects upon completion of the Contract,[9] the cost of remedying defects is the cost to the Builder, rather than what it would cost the Owner to engage a third party builder to carry out remedial works. Clause 19.4 of the Contract states:

> If the Owner without reasonable cause does not allow the Builder the opportunity to return to the Land and make good and rectify any defects or does not provide reasonable access to the Builder to allow the Builder to do so, the builder will only be liable to the Owner for the cost which the Builder would have incurred had the Builder been permitted to rectify the defect.

57. Clause 19.4 of the Contract is consistent with the position at common law. In *Pearce and High Ltd v Baxter*,[10] Evans LJ stated:

> In my judgment, the contractor is not liable for the full cost of repairs in those circumstances. The employer cannot recover more than the amount which it would have cost the contractor himself to remedy the defects. Thus, the employer's failure to comply with clause 2.5, whether by refusing to allow the contractor to carry out the repair or by failing to give notice of the defects, limits the amount of damages which he is entitled to recover.[11]

58. Therefore, any assessment of the cost to make good defects found to exist in the works undertaken by the Builder are to be assessed on the basis of what it would cost the Builder. In my view, the most appropriate way to assess the Builder's cost is to subtract GST and the *builder's margin* or a portion

[9] Clause 19 of the Contract specifies that the Contract is to have a defects liability period of 5 days, following which the Owner may give the Builder a list of all defects.
[10] [1999] BLR 101.
[11] Ibid at 104.

of *builder's margin*,[12] from the aggregate cost in order to arrive at a figure that best represents what it would have cost the Builder.

59. Both parties rely upon the evidence of their respective building consultants in order to prove or disprove whether the works are defective. What follows are my findings as to whether the works undertaken by the Builder are defective or not, having regard to the evidence before me.

Plumbing work

60. A considerable amount of hearing time was occupied with issues concerning the roof plumbing. Much of that time focused on what each of the parties argued was the scope of the roof plumbing work under the Contract. As indicated above, the Owner contends that the scope of roof plumbing was far more extensive than what the Builder conceded. In their *Amended Points of Claim* dated 11 May 2015, the Owner describes the scope of the roof plumbing work to include the following:

> (ii) replace the roof and remediate all associated plumbing and drainage such that the Premises would be watertight (agreed at the September 2013 Meetings); and
>
> (iii) complete the works as set out in the quote by John Ling Pty Limited dated 26 September 2013 which, in summary, consisted of repairs at The Premises caused by water ingress in July 2013 (agreed at the 2013 Meetings).

61. In my view, the scope of the roof plumbing work required under the Contract (or under any collateral contract, as contended by the Owner) was not as extensive as the Owner has pleaded in its *Amended Points of Claim* dated 11 May 2015. Indeed, the only expert evidence going to the issue of what roof plumbing work was incomplete or defective is set out in the expert reports of Mr Lorich and Mr Quick, the building and plumbing consultants engaged by the Owner and the responsive report of Mr Ryan, the building consultant engaged by the Builder.

62. Neither Mr Lorich nor Mr Quick has stated that the whole of the roof is to be replaced, notwithstanding that their recommended scope of work is far more expansive than the work recommended by Mr Ryan. The opinions of Mr Lorich and Mr Ryan were based upon what was written in the Contract and from instructions received from the Owner. Accordingly, I find that the Owner's claim for incomplete roof plumbing work must be defined by the scope of the work set out in their reports, rather than what is pleaded or by general statements made by Dr Raiz during the course of the hearing - that the Builder promised to make the roof *watertight*.

63. Regrettably, the expert reports of Mr Lorich and Mr Quick do not distinguish between incomplete work and defective work. According to Mr

[12] See comments below at paragraphs 102-104 as to how much of the *builder's margin* should be ignored.

Lorich, the cost to rectify and/or complete the roof plumbing is $35,937, inclusive of builder's margin and GST. Mr Lorich's costings were based upon Mr Quick's recommended scope of work, which Mr Lorich adopted as part of his own report. Mr Ryan, on the other hand, gave evidence that the cost to rectify and complete the roof plumbing was $6,403.

64. The major difference between the opinions of the Owner's building consultants and the Builder's building consultant relates to whether or not pre-existing plumbing needs to be replaced or upgraded to conform with current building codes or Australian Standards where new work intersects with old. According to Mr Quick, the requirement to upgrade or replace pre-existing roof plumbing where the new work intersects with the old arises as a result of a direction given by the Plumbing Industry Commission.

65. Mr Williams, the roof plumber engaged by the Builder, disagreed with Mr Quick's evidence on this point. He said that not all pre-existing roof plumbing had to be replaced or upgraded where new intersected with old and that much would depend upon whether the new work was reliant on the old in order to properly service the building. He said that old roof plumbing was able to be isolated from new plumbing work, provided the *Certificate of Compliance* clearly distinguished between old and new.

66. No publications or other documents were adduced in support of the proposition that all pre-existing roof plumbing needed to be upgraded or replaced where it intersected with new. Nothing is mentioned in Mr Quick's expert report to that effect, although the scope of remedial work set out in that report suggests or is consistent with that proposition.

67. I am not persuaded, based on the evidence presented, that there is any regulatory requirement stipulating that pre-existing roof plumbing must be replaced or upgraded to comply with current building codes and Australian Standards where new work is carried out in its vicinity. Nevertheless, I accept Mr Quick's evidence, largely supported by Mr Williams, that where new roof plumbing intersects and relies upon old roof plumbing in order to properly function, it is incumbent to replace or upgrade the old so that the efficacy of the new is not compromised.

68. In Mr Quick's report, he makes reference to 28 items of defective (or incomplete) roof plumbing. What follows are my findings and observations relating to each item (adopting the same numbering). In arriving at those findings, I have had regard to the written terms of the Contract, which spells out with some certainty what work was to be undertaken in relation to the roof plumbing. In my view, the written terms of the Contract together with any regulatory requirements spell out and define the scope of the roof plumbing work. The general statement made by Dr Raiz that the Builder would make the roof *watertight* is too uncertain and ambiguous to define what actual work was to be undertaken, especially in circumstances where a large part of the existing roof was in need of repair or replacement. In other words, given the condition of the existing roof, making the roof watertight

at a particular point in time was likely to only be a temporary measure. In those circumstances, it would seem that the only definitive measure to ensure the future integrity of the roof was to wholly replace the existing roof. However, as I have already found, the Contract makes no mention of replacing the whole of the existing roof. Although the Contract states under Item 22 of the particulars that *Replace roofing from existing insurance claim 1* was to be a provisional sum item, I do not interpret that to mean that the whole of the existing roof was to be replaced.

69. The Special Conditions of the Contract expressly describe the scope of the roof plumbing work as follows:

> The entire North end custom orb older roof at upper level to be replaced [this relates to the roof sheeting above the Cathedral ceiling]
>
> The ridge capping and any associated flashing's for these works will also be replaced.
>
> Small section c/bond adjacent rear section will be replaced also for these works we will fit medium grade roofing foil affixed under the roof.
>
> The lower gutter sections will need to be lowered on the N/E corner which will need remodelling skills in carpentry and are to work with roofers while attending this.
>
> Sections of the over soaker flashing to gutter will need to be either re-folded or sealed or replaced.
>
> Air-con flashing to be repaired to bring it to a sealed state and chimney flashing assessed and repaired.
>
> There are 5 rain water heads to be replaced with standard type design, some of the larger capacity.
>
> Covers to sump are included in our price which will be purpose made mesh infill's.
>
> I will have fitted the supplied insulation on top of the ceiling to the sections of replaced roof.
>
> I will have 5 external d/pipes changed with 100 x 100 c/bond.
>
> The south side sump internal d/pipe will be replaced with 100 mm pvc as per your direction.
>
> We do not include skylight fitting till you work out which manufacturer you wish to use. [sic.]

70. The specificity to which the Contract details the roof plumbing work further reinforces my finding that the Contract did not require the Builder to replace the existing roof. Moreover, I do not accept the Owner's alternative contention that the Builder agreed to replace the roof pursuant to a collateral contract. The evidence simply does not support such a finding. In particular, there is no evidence to show that such a collateral contract was supported by any consideration, as no additional sums were payable over and above that which were due under the Contract.

71. **Item 5.1: Rainhead Junction**

(a) According to Mr Quick, the fascia gutter to the *Colorbond* roof installed by the Builder should not be permitted to drain into existing box gutter because that box gutter is non-compliant.

(b) However, Mr Williams gave evidence that the new fascia gutter does not drain into that box gutter. It falls in the opposite direction and drains into a rainwater head to the north of the new *Colorbond* roof. Mr Williams said that he could easily cap the end of the fascia gutter so that no water could ever run into the existing box gutter but that the better course was to leave it open so that it could act as an overflow in the event that the fascia gutter ever became blocked. He said that it would only take 5 minutes to fit a cap to the end of the fascia gutter, if that was required.

(c) In my view, this item of work is not defective. I accept Mr Williams' evidence that the better course is to leave the end of the fascia gutter open so that it may act as an overflow. In any event, even if there was some regulatory requirement to cap the end of the fascia gutter, the cost to do so is nominal and what I regard as incomplete work.

72. **Item 5.2: UPVC downpipe requires clipping**

(a) Mr Quick opines that the UPVC downpipe which has been installed internally in the south east corner of the Premises requires clipping. According to Mr Ryan the downpipe forms part of the existing roof. His evidence was supported by Mr Williams who said that this item had nothing to do with the scope of work that he was engaged to undertake.

(b) In my view, there is insufficient evidence to satisfy me that this item relates to work undertaken by the Builder or work which could be said to affect the efficacy of new roof plumbing work undertaken by the Builder. Consequently, I dismiss this aspect of the Owner's claim.

73. **Item 5.3: Undersized gutter**

(a) Mr Quick gave evidence that the fascia gutter to the highlight roof was undersized which exposed the ends of the roof cladding ribs to the weather. He opined that rainwater was able to enter the residence through the ends of the uncovered ribs.

(b) Mr Williams gave evidence that no work was carried out to this part of the existing roof. The fascia gutter in question and the roof cladding were pre-existing. None of the work undertaken by the Builder drained into that part of the roof.

(c) I accept Mr Williams' evidence in relation to this item. From my own inspection and having regard to the photograph in Mr Quick's

report, it appears that the roof cladding and fascia gutter were pre-existing. Therefore, I dismiss this aspect of the Owner's claim.

74. **Item 5.4: Downpipe spreader from highlight roof**

(a) Mr Quick states in his report that the downpipes from the highlight roof fascia and gutters do not have spreaders in accordance with applicable standards and that the discharge from those downpipes is rusting the existing corrugated iron roof. He opines that the downpipes should be replaced and extended into the existing gutters.

(b) Mr Williams gave evidence that none of this work related to work which the Builder undertook. All of this roof plumbing was pre-existing.

(c) I accept Mr Williams' evidence on this point. Again, the photographs and inspection of the building site are consistent with Mr William's evidence that this aspect of the roof was pre-existing and of some age. I dismiss this aspect of the Owner's claim.

75. **Item 5.5: Damaged flashing**

(a) Mr Quick states in his report that the flashing to the highlight roof has gaps within it and the adjacent flashing has been damaged. He opines that the gaps in the damaged flashing are required to be rectified. There is no evidence that the Builder damaged the flashing or that the Builder was responsible for installing the highlight roof cladding. Indeed, Mr Williams gave evidence that no work was undertaken in respect of that part of the roof structure. Accordingly, I dismiss this aspect of the Owner's claim.

76. **Item 5.6: Original corrugated iron roof**

(a) Mr Quick states in his report that the original corrugated roof has been damaged and is required to be replaced with new galvanised corrugated iron sheets. There is no evidence that the Builder damaged the original corrugated roof. Moreover, Mr Williams gave evidence that it was not within the scope of his subcontract to replace any of the existing corrugated iron roof sheets, other than those which covered the cathedral ceiling. Accordingly, I dismiss this aspect of the Owner's claim.

77. **Item 5.7: Roof flashings**

(a) Mr Quick states in his report that the roof flashings require additional fixings to ensure that they conform to applicable standards. Mr Williams gave evidence that the roof flashings installed had been properly secured.

(b) It appears from the photographs included in Mr Quick's report that the fixings relate to pre-existing roof cladding, rather than the new

cladding or any flashings installed by the Builder. In the absence of any evidence to establish that the fixings relate to work undertaken by the Builder, I dismiss the aspect of the Owner's claim.

78. **Item 5.8: Existing roof box gutters**

(a) Mr Quick states in his report that most of the existing roof gutters are rusting and require renewal. He recommends that all gutters be replaced with *Colorbond* gutters. Mr Williams gave evidence that it was not within the scope of his subcontract to replace the existing roof gutters. Nevertheless, he gave evidence that some work was done to the box gutter on the west side of the Premises in order to improve its fall.

(b) In my view, the problem with the existing roof gutters is that they have reached the extent of their lifespan. I do not, however, find that the failure to replace existing roof gutters constitutes a defect in the building work undertaken by the Builder. Although there is some controversy as to whether the Builder was required to replace some of the box gutters as part of its scope of work, that issue would, if proven in favour of the Owner, relate to incomplete rather than defective work. Accordingly, I dismiss this aspect of the Owner's claim.

79. **Item 5.9: Fascia gutters rusting**

(a) Mr Quick states in his report that the fascia gutters are also rusting and require renewal. For the same reasons as I have determined in relation to the box gutters (Item 5.8), I do not find that this aspect of the roof plumbing relates to any defective work on the part of the Builder. Accordingly, I dismiss this aspect of the Owner's claim.

80. **Item 5.10: Brick parapets cracked**

(a) Mr Quick states in his report that the brick parapets have cracks and allow water to intrude into the residence. He suggests that the parapets should be covered with *Colorbond* cladding.

(b) It is not suggested that the cracks in the brick parapets were caused by any act or omission on the part of the Builder. Indeed, given the age of the building, it is not surprising that there are cracks in the brickwork. Although there is some controversy as to the scope of the work required by the Builder, insofar as it relates to making good cracks in the brick parapets and external walls, I do not regard this item as constituting defective work. At best, it may constitute incomplete work. Therefore, I dismiss this aspect of the Owner's claim.

81. **Item 5.11: Kitchen exhaust flue**

(a) Mr Quick states in his report that the kitchen exhaust flue has been installed through the box gutter. In so doing, no allowance has been

made for the gutter to expand and contract. Mr Quick opines that the junction of the gutter and the flue will eventually crack. He recommends that the flue should be removed and offset around the gutter.

(b) Mr Williams gave evidence that the installation of the kitchen exhaust flue was not part of his subcontract. It was pre-existing. In my view, it cannot be said that the installation of the kitchen flue, undertaken by others unrelated to the Builder and at some earlier point in time, albeit incorrectly, constitutes a defect in the Builder's work.

(c) Moreover, I do not regard this aspect of work as requiring remediation by reason of other work undertaken on the roof. Accordingly, I dismiss this aspect of the Owner's claim.

82. **Item 5.12: Existing rain heads**

(a) Mr Quick states in his report that the existing rain heads do not conform to applicable standards and need to be replaced. During cross-examination, Mr Williams was shown a number of photographs set out in Mr Quick's report depicting the existing rain heads. His evidence was that he did not install those rain heads and that they were pre-existing. He said they were not part of the scope of work required under his subcontract with the Builder. Although the scope of work to be undertaken by the Builder included the replacement of some rain heads, it appears that the rain heads referred to in Mr Quick's report under this item relate to other pre-existing rain heads.

(b) In my view, unless it can be shown that the existing rain heads are integral to the new roof plumbing work undertaken by the Builder, there is no obligation on the Builder to replace or upgrade those rain heads.

(c) In the present case, it is unclear on the evidence presented whether the rain heads referred to in Mr Quick's report are used to discharge stormwater from any of the roof plumbing installed by the Builder. In the absence of that evidence, I find this aspect of the Owner's claim unproven.

83. **Item 5.13: Exhaust fan flashings rusting**

(a) Mr Quick states in his report that in the centre of the existing roof, there is an existing exhaust fan. This fan has been poorly flashed and part of the flashing is rusting. He recommends that the fan should be re-flashed. Mr Williams gave evidence that this part of the existing roof was not work within the scope of work of his subcontract. It was pre-existing and there is no evidence to suggest

that the Builder had any involvement in its construction. Therefore, I find this aspect of the Owner's claim unproven.

84. **Item 5.14: Existing chimney flashing**

(a) Mr Quick states in his report that the existing chimney flashing on the chimney on the western boundary has been poorly installed and is required to be re-flashed. He further states that as lead has been used for this flashing, corrosive run-off would affect the *Colorbond* gutter. Although Mr Williams gave evidence that the existing chimney flashing is not part of any work which he undertook, it appears that the Builder had agreed to undertake some remedial work to this area of the existing roof. In particular, the Appendix to the Contract provided a brief description of the remedial work to be undertaken by the Builder to the existing roof. It includes the following:

> Air-con flashing to be repaired to bring it to a sealed state and chimney flashing assessed and repaired.

(b) Mr Ryan opined that this work was incomplete. I do not accept that proposition. Evidence was given by Mr Williams that some work was done to the box gutter on that western boundary to improve fall and to make minor repairs to the chimney flashing. In any event, the chimney flashing intersects with that box gutter. In my view, it was incumbent upon the Builder to properly repair that flashing as part of the work it completed on the western boundary box gutter. The failure to do so is a defect in the work undertaken by the Builder.

(c) Mr Quick estimated the cost to repair this element of work at $2,235, which includes $1,600 for labour, being 16 hours at $100 per hour and $685 for materials. Mr Ryan has estimated the cost to remove and replace the existing lead chimney flashing at $310, which comprises an allowance for 3 hours labour and $70 for materials.

(d) Given the divergence of opinion between the two consultants, I have difficulty in accepting the evidence of one over the other. In my view, two days to replace a lead flashing around an accessible chimney is excessive. However, I do not accept that this work can be undertaken and completed within three hours. Doing the best I can with the evidence before me, I will allow one day (eight hours) at the lower rate of $80 per hour. I have allowed the lower rate of $80 per hour because I have assessed the reasonable cost of remedial work by reference to what it would cost the Builder, rather than the cost of engaging another third party contractor.

(e) In relation to the materials, Mr Quick has allowed for a safety rail at $450 (plus 4 hours labour to erect and dismantle the safety rail). It is not clear to me why a safety rail is required. The chimney

flashing is on the inside face of the chimney. The western parapet wall, which is approximately 500 mm in height, abuts the two sides of the chimney. Therefore, work on the chimney flashing would be on the inside of the parapet wall which would, of itself, act as a safety barrier to prevent anyone from falling from the roof. Mr Ryan has not made any allowance for a safety rail. Consequently, I do not accept that allowance should be made for a safety rail in the present circumstance. Therefore, I will allow $710 in respect of this item of defective work.

85. **Item 5.15: Security system conduits**

(a) Mr Quick states in his report that the conduits carrying the security system wiring had not been installed correctly. He states that they are affecting the flow of rainwater within the gutters and also the flow of rainwater into the sumps. He recommends that the conduits should be repositioned above the gutters.

(b) Mr Williams gave evidence that he had nothing to do with the security system conduits. He said they were pre-existing and had been installed at some earlier time prior to the Builder commencing work. There is nothing in the Contract to indicate that the Builder was responsible to reposition the security system conduits or that the roof plumbing work itself necessitated those conduits having to be re-positioned.

(c) Consequently, I find that the Builder was not contractually responsible to re-position the conduits. This aspect of the Owner's claim is dismissed.

86. **Item 5.16: Ridge capping**

(a) Mr Quick states in his report that part of the existing ridge capping has been damaged and is allowing rainwater to enter into the residence. He recommends that the ridge capping be replaced.

(b) Mr Williams gave evidence that he was not contracted to undertake any work in relation to the existing ridge capping. There is no evidence that the ridge capping was damaged by the Builder or that the ridge capping and the existing roof was work related to the scope of the work under the Contract.

(c) Consequently, I find that the Builder was not contractually responsible to replace the existing ridge capping. This aspect of the Owner's claim is dismissed.

87. **Item 5.17: Existing ridge junctions**

(a) Mr Quick states in his report that the junctions of the existing ridge capping have opened up and are also allowing water to enter the Premises. He recommends that these junctions are required to be re-fabricated to ensure that they are properly sealed and secured. As I

have already stated, Mr Williams said that his subcontract did not extend to replace any of the existing ridge capping. Moreover, the Contract does not state that any of the existing ridge capping, apart from the *Colorbond* roof over the cathedral ceiling, is to be replaced or repaired. Accordingly, this aspect of the Owner's claim is dismissed.

88. **Item 5.18: Existing rusting valley gutters**

(a) Mr Quick states in his report that the existing valley gutters are badly rusted and require renewal. Mr Williams gave evidence that he was not contracted to renew or replace any of the valley gutters, save and except to undertake some remedial work to be air-conditioning flashing.

(b) The Contract does not specify that the valley gutters are to be replaced or renewed. Therefore, I find that this work was not part of the scope of work under the Contract. Accordingly, this aspect of the Owner's claim is dismissed.

89. **Item 5.19: Existing rusting roof screws**

(a) Mr Quick states in his report that some of the roof screws in the existing galvanised roof are badly rusted and are required to be replaced. Mr Williams gave evidence that he was not contracted to replace any of the roof screws in the existing roof. Similarly, the Contract does not mention replacing any of the roof screws in the existing roof. Accordingly, I find this work was not part of the scope of work under the Contract. This aspect of the Owner's claim is therefore dismissed.

90. **Item 5.20: Central gutter sump**

(a) Mr Quick states in his report that the area adjacent to the existing centre gutter sump on the southern boundary is allowing water to ingress the residence. He recommends that when associated works are renewed, the sump and downpipe should also be replaced.

(b) Mr Ryan's evidence in relation to the central gutter sump and the southern boundary box gutter was limited to a note in his report that the work was not part of the scope of work under the Contract, apart from replacing the downpipe only.

(c) The Contract is unclear as to the scope of the work to be undertaken at the southern boundary of the Property. However, it does state that the south side sump internal downpipe would be replaced with a 100 mm PVC pipe. The Builder contends that the Contract was confined to merely replacing the downpipe and did not require the south side sump to also be replaced.

(d) In my view, it was incumbent upon the Builder, when replacing the downpipe to also ensure that the sump, to which it connected,

functioned properly because the two components of the roof were integral to each other.

(e) However, there are no costings provided for the replacement of the sump or even the box gutter on the southern boundary. Mr Quick's cost estimates do not mention this work.

(f) Therefore, in the absence of any evidence going to quantum, I am unable to make any determination as to what loss or damage has been suffered by the Owner. In that sense, this aspect of the Owner's claim is unproven.

91. **Item 5.21: Central rainhead on existing roof**

(a) Mr Quick stated in his report that the rainhead in the central light shaft did not have an overflow. Mr Ryan gave evidence that the rain head was not installed by the Builder and is pre-existing. Mr Williams confirmed that the supply and installation of this rain head was not part of his subcontract.

(b) Although the Contract specifies that a number of rain heads were to be replaced by the Builder, it is not clear whether this particular rain head was supplied or installed by the Builder. There is nothing in Mr Quick's report or by way of oral evidence which indicates that to be the case.

(c) In the absence of such evidence, I find this aspect of the Owner's claim unproven.

92. **Item 5.22: Builders surplus roof sheets and rubbish have been left on the roof**

(a) As I observed during the course of my view of the Premises, a number of roof sheets were left on the existing roof. They appear to be surplus. Mr Quick has estimated that the cost to clean up the Builder's surplus roof sheets and rubbish and then dispose of that material is $898.

(b) Mr Daoud gave evidence that all surplus roof sheets and building materials would have been disposed of had the Builder not being denied access to the site. Although that might be true in the case of general building rubble, I am of the opinion that there is an inherent danger in leaving loose roof sheeting on the roof. In my view, those sheets and all other builder's rubble left on the roof should have been disposed of immediately after each component of the roof work had been completed. Therefore, I regard this omission as a defective, rather than incomplete work.

(c) There is no contrary cost estimate to remove and dispose of the loose roof sheets and rubble. Therefore I accept the cost estimate of Mr Quick, less his allowance for GST and margin. Consequently, I will allow $550 in respect of this item of defective work.

93. **Item 6: New Corrugated Roof**

(a) As part of the contracted works, the Builder was required to replace the original corrugated iron roof cladding over the cathedral ceiling with a new *Colorbond* roof and associated works. Mr Quick and Mr Ryan accept that there are shortcomings in the work completed by the Builder. According to Mr Quick, the cost to make good those shortcomings is $15,967, which includes 10 percent for *contingencies* and 35 percent for *margin*. According to Mr Ryan, the cost to complete and rectify the work associated with the new corrugated roof is $3,971. This amount excludes *contingencies* and *margin*.

(b) Mr Daoud and Mr Williams both gave evidence that the work to the new corrugated roof was incomplete and had the Builder not been denied access, that work would have been completed in the ordinary course of construction. In my view, not all of the work set out in the report of Mr Quick can be said to be incomplete work. In particular, some of the flashings used in the construction of the *Colorbond* roof are made from material that should not be used in conjunction with *Colorbond* roofing due to their corrosive effects. Moreover, some of the work has already been covered over and in those circumstances, I find it unlikely that the Builder intended to revisit that work. What follows are my observations and findings related to the new corrugated roof installed over the cathedral ceiling.

94. **Item 6.1: Allowance to complete the framing and cladding of the south end cable**

(a) In his report, Mr Quick states that the gable end has not been completed. The timber lining and the cement sheet lining have not been installed. The ends of the corrugated iron *Colorbond* have not been turned up and some of the flashing has not been installed. Mr Ryan concedes that the work is incomplete.

(b) The experts' evidence is consistent with the evidence of Mr Daoud and Mr Williams. Therefore, I consider this aspect of the Owner's claim to fall within incomplete work rather than defective work. For the reasons set out above, this aspect of the Owner's claim is dismissed.

95. **Item 6.2: East side skylight flashing**

(a) Mr Quick states in his report that the lower soaker flashing to the skylight has not been installed in a proper and workmanlike manner. He claims that second-hand material has been used, which needs to be replaced with new material. Mr Williams gave evidence that the flashing is pre-existing and forms part of the skylight itself. He said that he had previously discussed this element of work with

Dr Raiz and was informed that the Owner intended to replace the skylight through separate contractors.

(b) Mr Williams said that in those circumstances, the *Colorbond* roof sheets were lapped over and under the existing skylight flashing on a temporary basis until such time as the new skylight was supplied by the Owner. As at the date that the Contract was terminated, that had not occurred.

(c) Mr Williams' evidence was not contradicted by Dr Raiz. In those circumstances, I consider that it was reasonable to fix the *Colorbond* roofing sheets in the way that has been undertaken, subject to any further work to be undertaken following the supply of new skylight by the Owner. Therefore, I consider this item to fall within incomplete work or within a category of work that, in all likelihood, was implicitly taken out of the Contract, as the obligation to flash the new skylight would ultimately rest with the contractor who installed the new skylight. Therefore, this aspect of the Owner's claim is dismissed.

96. **Item 6.3: North-east corner gutter**

(a) Mr Quick states that in the north east corner, the lead over-flashing should be replaced with synthetic lead flashing, given the incompatibility between lead and the *Colorbond* roofing. In addition, he opines that the existing fascia gutter, which drains stormwater off that section of *Colorbond* roof also needs to be replaced. Mr Quick has estimated the cost to undertake this work at $1,898, excluding *contingencies, margin* and GST. Mr Ryan has estimated the cost of undertaking this work at $790, excluding *contingencies, margin* and GST.

(b) The difference between the two cost estimates is in the scope of work which each of the experts has proposed. In particular, Mr Ryan does not include the cost of replacing the fascia gutter, which means that the roof sheets do not need to be lifted. By contrast, Mr Ryan has included the cost of replacing the existing gutter.

(c) There seems to be common ground between the experts that the existing fascia gutter needs to be re-graded to achieve better fall. However, there is no evidence that the existing fascia gutter requires replacement, either because it does not comply with current standards or because it is no longer serviceable. Therefore, it is not clear to me why Mr Quick has recommended that the existing fascia gutter be replaced, rather than simply adjusted to achieve better fall.

(d) Therefore, I accept the evidence of Mr Ryan in relation to this aspect of the Owner's claim. In so doing, I find that it was incumbent upon the Builder to have replaced the lead flashing with an appropriate material, once it was known that *Colorbond* roof

cladding was to be used. The two elements of work are too interrelated to be able to do one without having to do the other. I note that Mr Williams gave evidence that an easier solution was to simply paint the *Colorbond* roof with a product that would provide a barrier against the corrosive effects of lead on *Colorbond*. I do not accept that as being reasonable. Neither of the experts recommended this type of solution. Moreover, the end result would be something different to that which was agreed.

(e) Therefore I accept the evidence of Mr Ryan and will order that the Builder pay the Owner $790 in respect of this item.

97. **Item 6.4: North end gable flashing**

(a) Mr Quick states that at the northern gable end, lead flashing has again been used against *Colorbond* cladding. He further states that one of the timber members forming part of that gable frame has been left exposed and should have been replaced as part of the re-cladding of that part of the roof.

(b) As is the case with the lead flashing discussed under Item 6.3 above, I accept that the lead flashing needs to be replaced with synthetic lead or some other material that is compatible with *Colorbond* sheeting. I further accept that it was incumbent upon the Builder to have also replaced framing timber where that is required in order to ensure that the re-cladding of that part of the roof is effective, given that the supporting frame is an integral component of that work.

(c) There is a significant difference between the cost estimates provided by each expert. Mr Quick estimated the cost to undertake this remedial work at $2,980, excluding *margin, contingencies* and GST, while Mr Ryan `has estimated the cost to undertake this work at $420, excluding *margin, contingencies* and GST. Much of the difference in cost estimates is due to the fact that Mr Quick has allowed for scaffolding at a cost of $1,800. In my view, it is reasonable to make allowance for scaffolding. Accordingly, I will allow $2,980 in respect of this element of the Owner's claim.

98. **Item 6.5 Fascia Gutter missing on south side of new roof and re-grade gutter on north side of new roof**

(a) Mr Quick observed that on the southern face of the new roof, there was a fascia gutter missing. He also observed that the balance of the fascia and gutters on the new roof were holding water and were required to be re-graded. In my view, the installation of the fascia gutter on the south side of the *Colorbond* roof is incomplete work. Therefore, this aspect of the Owner's claim is dismissed.

(b) However, the work involved in re-grading the fascia gutters which carry stormwater from the *Colorbond* roof in order to ensure that they do not hold water is work that I regard as falling within the scope of the Contract, irrespective of whether those fascia gutters were installed by the Builder or are pre-existing. In other words, if pre-existing fascia gutters are to be utilised to discharge stormwater from the *Colorbond* roof, then it was incumbent on the Builder to ensure that they were operating efficiently. Mr Quick has estimated the cost of re-grading the fascia gutters at $7,600, excluding *contingencies, margin* and GST. $3,500 of that amount relates to the hire and erection of a scaffold on the north side of the Premises. Mr Ryan does not comment on or give any evidence in relation to whether the fascia gutters require re-grading.

(c) According to Mr Daoud, the Builder was not responsible to re-grade existing fascia gutters. However, for the reasons which I have set out above, I do not accept that contention. I accept Mr Quick's evidence in relation to this item, save that I consider his cost estimate to be too high. In particular, the hire of scaffold has already been incorporated into his costing of Item 6.4 - which relates to the northern end of that section of roof. In my view, there is some duplication in this quantity of work and I consider that the amount allowed for scaffolding should be reduced from $3,500 to the same cost that has been allocated in Item 6.4, namely $1,800. In my view, that amount reasonably reflects the work of erecting additional scaffolding to this part of the Premises. Therefore, I find in favour of the Owner in the amount of $5,900 in respect of this element of work.

99. **Item 6.6: New ridge cappings and turn up ends of corrugated sheets**

(a) Mr Quick states in his report that the flashings, including the ridge capping, have not been fixed in accordance with SAA BB39:1997. He states that the ridge capping is required to be fixed at every fourth corrugation and the end cappings are required to be fixed at a maximum of 500 mm spacing. Mr Ryan concedes that further work is required to fix the cappings.

(b) In my view, the shortcomings in the fixing of the flashings and capping are properly to be categorised as a defect. It was not suggested during the course of Mr Williams' evidence that any of the flashings had been temporarily fixed. Accordingly, I find that the method used to fix the flashings and cappings were defective and require additional fixing to remedy.

(c) Mr Quick gave further evidence that the end of the corrugated *Colorbond* sheets need to be turned up in order to prevent rainwater running back under the flashing. Mr Williams gave evidence that this was not required where the pitch of the corrugated roof

exceeded 25°. It is common ground that the *Colorbond* roof exceeds 25° in pitch.

(d) Mr Quick accepted that it was unnecessary to turn up corrugated sheets where the pitch of the roof exceeded 25° but said that in those circumstances, it was still a requirement to crimp the end of each sheet. He said that the cost to crimp the end of each sheet was likely to be more expensive than turning up the sheets. He allowed $1,075 to undertake the work. That amount includes installing additional fixings.

(e) Mr Williams gave evidence that he was confident that each sheet had been turned up. However, from what was observable, both experts conceded that the sheets had not been turned up. In my view, it is more probable that the sheets have not been turned up. Having regard to Mr Quick's evidence, I consider it appropriate that this work should be undertaken, together with the additional fixings. Given that Mr Quick has provided the only costing to undertake the work, his evidence is accepted. Therefore, will allow $1,075 to undertake the work.

100. **Item 6.7: Rusty roof flashing**

(a) Mr Quick observed that in the south-west corner of the *Colorbond* roof, a flashing has been installed against the brick wall which appears to be pre-existing and rusty. He suggested that it should have been replaced in *Colorbond* to match the new roof. Mr Williams said that replacement of that flashing was outside the scope of the work required under his subcontract.

(b) In my view, replacing that small piece of flashing with *Colorbond* flashing is integral to the re-cladding of the Cathedral ceiling roof. Accordingly, I consider this work should have been done as part of the scope of the agreed work and that the utilisation of an existing, rusted flashing was inappropriate. I find this to be a defect in the work performed by the Builder.

(c) However, none of the experts have provided any opinion as to what the cost to replace that small piece of flashing is. Accordingly, doing the best I can with the evidence before me, I will allow $200 for labour and materials to replace this flashing..

101. In conclusion, I find that the costs to repair or make good roof plumbing or associated work excluding contingencies, margin and GST is $12,553, made up as follows:

ITEM NO	DESCRIPTION	AMOUNT
5.14	Chimney flashing	$710
5.22	Removal of surplus roof sheets other rubble	$898
6.3	North-east Corner gutter	$790
6.4	North-east Gable flashing	$2,980
6.5	Fascia gutters	$5,900
6.6	Flashing and capping fixings	$1,075
6.7	Rusty roof flashing	$200
Total		**$12,553**

102. As I have already indicated, given my finding that the Contract was lawfully terminated by the Builder, the cost to repair is to be calculated by reference to what it would cost the Builder, rather than a third party engaged by the Owner. In order to arrive at that figure, I have adopted the raw costings of the experts, without adding an amount in relation to *contingency or margin* as the risks (contingencies) and profit are not added as a cost to the Builder to rectify its own work. Similarly, I have not added GST, given that there is no transaction which attracts GST. It is simply the Builder carrying out work at its own cost.

103. However, simply disregarding *builder's margin* ignores the cost of fixed expenses, such as administration and supervision. In his report, Mr Ryan describes the various components of *builder's margin*, which make up the 35 per cent uplift on the raw cost of building, as comprising *preliminaries, permit fees, warranties, overheads, supervision and profit*. Therefore, I am of the opinion that some allowance should be made for those fixed costs, even if the Builder is merely repairing its own work. Regrettably, neither of the experts has said how the *builder's margin* of 35% is calculated, in the sense of describing what percentage has been allocated to each of the various components that collectively make up the *builder's margin*.

104. Doing the best that I can with the evidence before me, I consider that 15 per cent should be allocated to fixed overheads and supervision.

105. Therefore, I find that 15% should be added to the raw cost of rectification work, making a total figure of $14,205.95. This amount represents what I consider to be the Builder's cost to repair the roof plumbing defects found proven.

Plastering work

106. As indicated above, the scope of the work under the Contract required the Builder to undertake considerable re-plastering of ceilings previously damaged by water ingress. Apart from the garage area, this work has been substantially carried out, although not yet painted. The complaint made by the Owner is that the work has not been carried out properly, in that the ceilings are not level. The Builder admits that the ceilings are not level; albeit that it does not accept that they are out of level to the extent alleged by the Owner. Nevertheless, the Builder contends that there were construction elements within the existing building which made it impossible to create a perfectly level ceiling.

107. Mr Lorich gave evidence on behalf of the Owner in relation to the plastering work undertaken by the Builder. In his opinion, there were significant defects in that work, which will require substantial demolition and rebuilding. Mr Lorich's evidence is largely set out in his building inspection report dated 12 August 2014 and undated supplementary report. Mr Ryan gave evidence on behalf of the Builder, as did Mr Daoud. Mr Ryan's evidence is also largely set out in building inspection report. Both experts elaborated on what they had written in their reports when giving oral evidence. In addition, I have had the benefit of viewing the various ceilings which are said to be out of level.

108. It is to be noted that the defects raised in relation to the plastering work concern the finished level of the ceilings. However, both consultants concede that there are no Australian Standards or published tolerances which deal specifically with the finished level of plasterboard ceilings. Nevertheless, Mr Lorich contends that AS NZS 2589.1 (*Gypsum linings in residential and light commercial construction - Gypsum plasterboard*) is applicable by analogy because it relates to the ceiling substrate. Therefore, if the tolerance of the substrate allows a deviance from level of 4 mm over a 1.8 m span, the same should apply to the finished ceiling level. Mr Ryan disagrees with that proposition. He said that AS NZS 2589.1 was concerned with the movement and stress on plasterboard sheets, rather than the aesthetic finish of the ceiling. The *Guide to Standards and Tolerances 2007*, published by the Victorian Building Authority also does not deal specifically with the finished level of plasterboard ceilings. The Guide simply states that the installation and jointing of plasterboard sheeting systems is defective if it does not conform to AS NZS 2589.1, although Clause 9.18 of that publication does state:

> **Straightness and alignment of plaster cornices**
>
> Plaster cornices are defective if they deviate from a straight line greater than 4 mm over a length of up to 2 m.

109. However, there are no cornices in the plasterwork undertaken by the Builder. All corners are square set. Nevertheless, Clause 9.18 provides some

guidance in order to ascertain an acceptable maximum deviance in the ceiling level. Having said that, I do not consider that the tolerance described in Clause 9.18 of the Guide is prescriptive in identifying whether the finished level of a plasterboard ceiling is defective or not. Much will depend upon the visual aesthetics of the particular installation. For example, it is likely that a deviance in finished ceiling level would be less noticeable in residences with high ceiling heights compared to residences with low ceiling heights. Similarly, where there are no comparators, such as architraves, a deviation which exceeds 4 mm over a length of 2 m may not be noticeable.

110. The fact that the Guide does not prescribe a tolerance for finished plasterboard ceilings leaves open the question whether a finished ceiling level can be said to be defective, even where it deviates more than 4 mm over a span of 2 metres. Expert opinion will differ as to whether a ceiling is so out of level that it constitutes bad workmanship, contrary to the warranties given under s 8 of the *Domestic Building Contracts Act 1995* and the corresponding clauses in the Contract. In the present case, the experts not only differ on what they say is the measured deviance in level, but they also disagree as to whether the deviance constitutes bad workmanship.

111. As is the case with the claim relating to the roof plumbing defects, it is necessary to comment on each particular area of plastering work, as each room differs from the other.

112. **Kitchen, Bedroom 1 and Bedroom 2**

(a) According to Mr Lorich, these rooms are out of level but can be rectified by skim coating the ceiling in order to make good. In addition, Mr Lorich notes that there are small cracks in the ceiling in Bedroom 2 which require rectification. Mr Ryan agreed that skim coating to the kitchen area would ensure an acceptable finish. He stated in his report he had not taken levels in either Bedroom 1 or Bedroom 2. Nevertheless, he said that Bedroom 1 had a coffered ceiling and in those circumstances, it was difficult if not impossible to discern whether the ceiling was out of level.

(b) Mr Daoud gave evidence that the ceilings had not been properly prepared and that this would have occurred during the painting stage, had the Contract not been prematurely terminated. I accept that some further preparation work is required by painters in order to make the ceilings ready for painting, However, I am of the view that further work should have been undertaken at the plastering stage. Therefore, I accept Mr Lorich's evidence that some skim coating is required to make good the ceiling surfaces prior to painting preparation. However, I do not accept Mr Lorich's estimate that this would take 40 hours (plus an additional 20 hours for sanding). In that regard, I note that Mr Ryan has only allowed one

hour to undertake all of the work that he considers necessary to achieve an acceptable finish in those areas of the premises.

(c) Doing the best I can on the evidence before me, I will allow two full days at the rate adopted by Mr Lorich of $80 per hour, which I consider adequate time in which to bring the Kitchen, Bedroom 1 and Bedroom 2 ceilings to an acceptable standard. This amounts to $1,280. I will allow this amount in respect of the Owner's claim.

113. **Bedroom 3**

(a) Mr Lorich gave evidence that the ceiling in Bedroom 3 is too far out of level to be acceptable. He recommended that the ceiling be demolished and rebuilt at a cost of $5,160, excluding margin and GST. Mr Daoud gave evidence that it was impossible to construct a level ceiling in that room because a pre-existing girder truss ran across the width of the room at approximately mid way, which created an obstruction. He said that he had discussed this with Dr Raiz, when the levels were being set. He said that Dr Raiz wanted the ceiling to start 25mm above the window architraves at the southern end of the room. However, with that measurement set as the datum point, he could not clear the girder truss. This created a dip in the ceiling levels.

(b) Mr Lorich disagreed. He said that the ceiling could not have been constructed level, even if the ceiling finished 25 mm above the window architraves at the southern end of the room. According to Mr Lorich, the ceiling battens should have been positioned lower at the northern end of the room. If that had been done, there would have been sufficient clearance to clear the girder truss and still finish 25 mm above the window architraves at the southern end of the room. His measurements confirm this to be the case. I accept Mr Lorich's evidence on this issue. It seems that the mistake made by the Builder was to set the battens too high at the northern end of the room, which then created a dip as the plaster sheet cleared the girder truss.

(c) I also accept Mr Lorich's evidence that the difference in level is too great to remedy by skim coating and that demolition and reconstruction of the ceiling is required to achieve an acceptable finish. This will require altering the battens which had previously been installed by the Builder. As Mr Ryan has not provided an alternative costing for this work, I am left with Mr Lorich's costing only. Therefore, I will allow $5,160 to undertake the work.

114. **Lower level plaster**

(a) The plastering work undertaken by the Builder to the lower level of the Premises is a variation to what the parties had discussed prior to executing the Contract. The work is the subject of a separate

quotation for $33,332.64, and was eventually incorporated into the final version of the Contract that was executed by the parties. It included mounting the plasterboard grid to the underside of the separating floor with resilient mounts and installing two layers of *Fyrecheck* 13mm plasterboard.

(b) According to Mr Daoud, the purpose of using resilient mounts and two layers of 13 mm plasterboard was to reduce the transmission of noise from the downstairs area to the upstairs living space. Indeed, both Mr Daoud and Dr Raiz confirmed that the intention of the Owner was to let all or some of downstairs area as offices.

(c) Mr Lorich gave evidence that the new ceilings were visibly out of level to the naked eye and would require extensive work, including demolition and reconstruction in order to make good. Again, the levels taken by each of the experts of the ceilings in each room diverge considerably.

(d) During the course of the hearing, Dr Raiz gave evidence that the agreement to install two layers of 13 mm *Fyrecheck* plasterboard was not merely for acoustic insulation but also to create a two hour fire resistant area. He said that the quotation specifically stated *two hour fire resistant*, and this reflected his desire to possibly operate a dental operating theatre downstairs. He said that he was aware of Australian Standards, which stipulated that there needed to be a two hour fire rating between the operating theatre and the area outside of the theatre.

(e) Mr Daoud denied any conversation relating to the construction or operation of a dental operating theatre downstairs. He said this was never mentioned during his discussions with Dr Raiz and raised for the first time when Dr Raiz gave his oral evidence during the hearing. He said that if such a discussion had ever taken place, he would not have agreed to the variation because he was unsure of what other requirements would have been necessary in order to make that downstairs area acceptable for use as an operating theatre. Mr Daoud said that fire resistant plasterboard was utilised for the sole purpose that it had superior acoustic properties over non-fire resistant plasterboard.

(f) There is no expert evidence corroborating Dr Raiz's suggestion that the downstairs areas could be used as a dental operating theatre. Mr Lorich makes no mention of this in his report. Moreover, the Owner's *Amended Points of Claim* dated 11 May 2015 do not mention any breach by the Builder in failing to provide a fire rated downstairs area. Of the folders of Tribunal documents filed in the proceeding, not one document makes mention of the possibility of creating a dental operating theatre.

(g) I do not accept Dr Raiz's evidence on this issue. In my view, it appears that Dr Raiz has exploited the use of the words *fire rated* in the description of the type of plasterboard, in an attempt to belatedly create a further ground upon which to support a finding that the whole of the downstairs ceiling areas should be demolished. By contrast, I accept Mr Daoud's evidence that this issue was never discussed between them. Therefore, I find that it was not a term of the Contract to make the downstairs areas fireproof.

(h) A further issue arose during the course of the hearing, which related to the use of noise resilient mounts. According to Mr Lorich, he suspected that noise resilient mounts might not have been used to support the suspended ceiling downstairs. Mr Lorich formed this view after inspecting the ceiling cavity through a small manhole cut in the plasterboard sheet. He said that he saw a piece of timber, which appeared to be supporting the suspended ceiling. A photo of the timber was tendered in evidence.

(i) Mr Daoud disputed that noise resilient mounts had not been used. He produced documentation showing the type of noise resilient mounts used. He said the Builder purchased those noise resilient mounts and that they were installed in accordance with what had been agreed. He said that the timber shown in the photograph was a spacing timber, used to set the levels. It was not holding any of the suspended ceiling.

(j) I accept the evidence of Mr Daoud on this issue. The photograph tendered in evidence supports his evidence that the timber has simply been used as an aid to set the levels of the ceiling grid. It does not appear to be attached to the ceiling grid. Moreover, the documentation produced by the Builder corroborates Mr Daoud's evidence.

(k) The downstairs area comprises predominantly office space, with two large offices occupying the western side of the Premises and three small offices on the east side of the Premises. Another office is located centrally. At the rear of the Premises is a tandem garage. It is common ground that the plastering work in the tandem garage was not completed.

115. **Office 1**

(a) Mr Lorich has recorded that the Office 1 ceiling is 40 mm out of level in the centre of the room. Although Mr Ryan did not take a measurement in the centre of the room, he recorded a deviance of 11 mm on the west side of the room compared with 13 mm on the east side. According to Mr Ryan, given the extent of exposed galvanised ducting installed below the ceiling in that office, he does not consider that the ceiling being out of level was particularly

observable. He comments that to the extent that there is any observable out of level, this would be mitigated after the ceiling and ductwork had been painted.

(b) If I accept the measurements taken by Mr Ryan, the greatest deviance in ceiling height is 19 mm, when comparing the northern end of the room with the southern end. If I accept Mr Lorich's measurements and the greatest deviance from north to south is 30 mm. However, that span is significant. According to a floor plan handed to me during the course of the proceeding, the length of Office 1 is 14 m. In my view, a deviance of somewhere between 19 mm and 30 mm over a span of 14 m is difficult to discern with the naked eye.

(c) In my view, the extent of ceiling height deviance in Office 1 is not so great so as to justify demolition and reconstruction of that ceiling. I have formed this view bearing in mind that there are assets and structures appended from the ceiling which also detract from its aesthetic qualities and certainly militate the visual effects of the ceiling being out of level. Therefore, I find that the appropriate course in order to humor any appearance of the ceiling being out of level is to allow a sum for skim coating only. Mr Ryan has provided a cost estimate to skim coat Office 1 ceiling at $1,040. I will allow that amount.

116. **Office 2**

(a) Mr Lorich gave evidence that the Office 2 ceiling is out of level by 25 mm. Mr Ryan gave evidence that he recorded levels which indicated a maximum deviance from the centre to the west side of Office 2 of 20 mm. According to Mr Ryan, given that the length of the room exceeded 14 m and exposed steel ductwork was appended from the ceiling on both the west and east side of the room, the out of level ceiling was not readily observable. He said that while there was variance in the levels, he did not consider the variance to be excessive to the extent that the entire ceiling required demolition and replacement.

(b) I accept Mr Ryan's evidence on this issue. The length of a room coupled with the fact that there are steel ducts appended from the ceiling militates against the appearance of the ceiling being out of level. Therefore, I am of the opinion that the reasonable course is to skim coat Office 2 in order to humor the effects of the out of level ceiling. Mr Ryan has priced this work at $1,760. Mr Lorich has not provided any costing to skim coat this room. Therefore, I accept this amount as being the reasonable cost of making good the out of level ceiling. I will award $1,760 in favour of the Owner in respect of this item.

117. **Office 3**

(a) According to Mr Lorich, there is a deviance in the Office 3 ceiling from west to east of 8 mm and a deviance of up to 20 mm along its length. Mr Ryan has recorded measurements less than that recorded by Mr Lorich.

(b) In my view, the variance in level from east to west is noticeable. This is partly because the width of Office 3 is only 4 m and there are windows and architraves on its southern side which provide a comparator and accentuate even small variances in level. Accordingly, I accept Mr Lorich's evidence that it is reasonable to demolish and rebuild the ceiling in Office 3. However, no separate costing has been provided for the demolition and rebuilding of the ceilings in each of the office rooms. The cost estimate provided by Mr Lorich relates to demolition of the whole of the lower floor suspended ceilings at a cost of $59,360, excluding margin and GST. It is based on an area of 440 m². That equates to approximately $135 per square metre. Given that Office 3 measures 44 m². I will allow $5,940 to demolish and rebuild the suspended ceiling in that Office 3.

118. **Offices A, B and C**

(a) Offices A, B and C are smaller offices which occupy a combined floor area of 14.1 m in length and 5.9 m in width. Office B (referred to as *Office 2 on east side* in Mr Lorich's report) is the largest of the three offices.

(b) Despite what Mr Lorich states in his supplementary report, both experts conceded during their concurrent evidence that it is unnecessary to demolish and rebuild the Office C ceiling (referred to as *Office 3 on east side* in Mr Lorich's report), notwithstanding that the deviance in ceiling level is 12 mm. Accordingly, I accept Mr Ryan's evidence that skim coating that ceiling in order to humor the level deviance is a reasonable course to adopt.

(c) Similarly, Mr Lorich conceded that Office A (referred to as *Office 1 on east side* in Mr Lorich's report) was relatively acceptable, notwithstanding that the deviance in level was 10 mm. Therefore, I accept Mr Ryan's evidence that skim coating that ceiling in order to humor the deviance would be a reasonable course to adopt.

(d) Both experts agree that Office B is out of level by 20 mm. Mr Ryan gave evidence that it was not reasonable to demolish and rebuild that ceiling because exposed ducting hid the deviance in ceiling level, so that it was not materially noticeable. Mr Lorich disagreed.

(e) I accept Mr Ryan's evidence in relation to this aspect of the Owner's claim. In my view, although the deviance is greater than

Office A and Office C, it is not readily apparent and much of that can be humored with skim coating in order to create an acceptable finish.

(f) Therefore, I will allow the cost estimate provided by Mr Ryan to skim coat all three east side offices at a cost of $1,600.

119. **Lunchroom, Amenities Area and Store Rooms**

(a) There are three small rooms to the north of the east side offices in which the ceilings are also out level by varying degrees. According to Mr Lorich, the Lunchroom ceiling is out of level by 20 mm. Mr Ryan contends that it is only 14 mm out of level. Mr Ryan further contends that the out of level ceiling is not noticeable because of exposed ducting in that area.

(b) Mr Lorich gave evidence that the Amenities Room was out of level by 20 mm. Mr Ryan did not take any measurements of that ceiling.

(c) The three rooms comprising the Lunchroom, Amenities Area and the adjacent Store Rooms comprise a very small floor area. In my view, given the size of these rooms, skim coating the ceiling would easily humor any noticeable ceiling level deviance. Therefore, I will allow a sum to skim coat these areas.

(d) Neither of the experts has provided any cost estimate to skim coat those ceilings. Nevertheless, looking at the floor plan provided to me, the floor area of those rooms is approximately the same floor area as the offices on the east side of the building, which Mr Ryan estimated would cost $1,600 to skim coat. Therefore, I will allow $1,600 to skim coat the ceilings in those rooms.

120. **Garage**

(a) As I have already indicated, the ceiling in the garage was not completed. Only part of the suspended ceiling frame was constructed with minimal plastering sheets fixed. I regard this work is incomplete. Therefore, I dismiss this aspect of the Owner's claim.

Conclusion on plastering defects

121. Having regard to my findings set out above, I conclude that the raw cost to the Builder of rectifying the items referred to under section 2.2 of Mr Lorich's report dated 12 August 2014 is $18,380, calculated as follows:

Area	**Amount**
Bedroom 1 and 2 ceilings	$1,280
Bedroom 3 ceiling	$5,160

Office 1 ceiling	$1,040
Office 2 ceiling	$1,760
Office 3 ceiling	$5,940
Offices A, B and C ceilings	$1,600
Other lower level areas	$1,600
Total	**$18,380.00**

122. As is the case with the plumbing defects, the raw cost of rectification work does not incorporate fixed costs and supervision, which will be incurred by the Builder in rectifying its own work. I have previously found that 15% is an appropriate sum to be added to the raw costs of rectification work. Therefore, I find that the cost to repair the plastering defects is $21,137.

Other alleged defects

123. **Windows**

(a) According to Mr Lorich, several panels of glass have been cracked by the Builder on the east wall of the lower level office area, including a double hung window panel. According to Mr Ryan, the Builder agrees that the wire cast glass window panels were damaged during construction. Mr Lorich has estimated the cost to make good that work, including painting, at $840 excluding margin and GST. Mr Ryan has estimated the cost to make good that work, including painting, at $760, excluding margin GST. In my view, Mr Lorich's costing provides a greater breakdown and is to be preferred. I will allow $840 in respect of this aspect of the Owner's claim.

124. **External patching of brickwork**

(a) Mr Lorich states in his report that the external patching of cracked brickwork, mainly on the south facing walls, has been poorly carried out as the mortar does not match the original. He further states that the work has been roughly done, especially on the top surfaces of the parapet walls. He recommends rectification of the external brickwork by raking out the mortar and re-pointing the mortar joints with a colour matched mortar. He further recommends that the parapet cappings be rectified and a membrane applied to the top in order to provide a waterproof barrier.

(b) Although Mr Ryan conceded that the mortar was not properly matched where the brickwork had been repaired, he said that not all this patchwork was work under the Contract.

(c) Mr Daoud said that the patchwork at the lower level of the building was not undertaken by the Builder. The only patchwork related to repairs undertaken above the first level. In relation to the repair of the parapet wall capping, Mr Daoud said that was not within the contractual scope of work. Mr Daoud's evidence is consistent with what is in the Contract; namely:

	Description of Provisional Sum Item	**Builders Allowance…**
8	Repair cracks in the brickwork courses to second level south and west elevation	$2,800

(d) The Contract does not specify any repair to the existing parapet wall cappings. Accordingly, I do not accept that this aspect of the claim falls within the scope of the work to be undertaken by the Builder. In relation to the patching of the external brickwork, the Builder conceded that at least some of that work was undertaken by it or its subcontractor. In my view, the patchwork is unsightly and obvious. I accept Mr Lorich's evidence that this work will need to be redone. Mr Lorich has estimated the cost to repair the external brickwork and parapet cappings at $6,040, excluding scaffolding, builder's margin and GST. During his oral evidence, Mr Lorich conceded that half that amount related to repair of the parapet cappings.

(e) Therefore, I find that the reasonable cost of making good the brickwork repairs is $3,020. I further accept that the Builder is not responsible for the repairs to the lower level. Therefore I find that the Builder is only liable for half of the total repair cost in the amount of $1,510. In addition, to the above amount, Mr Lorich has opined that scaffolding will be required for a two week period at $800 per week. I will allow one week hire of scaffold in the amount of $800, such that the total amount which I find in favour of the Owner's claim is $2,310 in respect of this item.

125. **Fireplace and steel column**

(a) Mr Lorich gave evidence that the upper level fireplace in the living room was not properly supported and is out of level. He further stated that a new steel column installed by the Builder to support the load was poorly supported off the brickwork with no dedicated footing. Mr Lorich estimated that the cost to make good this item of work was $2,280, excluding margin and GST. That amount included obtaining an engineer's report at $500 to ascertain how the footing should be designed.

(b) Mr Daoud gave evidence that no footing had been constructed, nor was there a need to do so because the steel column was wholly supported off the brickwork. He said that the excavation below the bottom of the steel column was merely to facilitate installation of that steel column and not for the construction of any footing.

(c) It was clear from my view of the fireplace, that it was not secure. It was easily moved with very little force. It is difficult to ascertain whether the insecure fireplace was related to the fixing of the steel column or whether there were other separate issues. In any event, I am of the opinion that engineering design should be obtained in order to justify fixing the steel column to the brick wall. In addition, further work will need to be done in order to properly secure the fireplace. I do not accept that this work is incomplete, as categorised by Mr Ryan. In my view, the work is defective and requires rectification.

(d) Mr Ryan estimated the cost to make good the fireplace, including obtaining an engineer's report at $1,410. The difference between Mr Ryan's cost estimate and Mr Lorich's costing is largely due to the fact that Mr Lorich allowed $500 for materials, whereas Mr Ryan only allowed for labour. In my view, it is unrealistic to ignore material costs. Therefore I accept Mr Lorich's costing that the reasonable cost to make good the fireplace and the steel column is $2,280. I will allow this amount of the Owner's claim.

126. **Rectify beam**

(a) Mr Lorich gave evidence that a central beam in the living area, which had a pre-existing crack, had been poorly repaired by the Builder and would require additional work to make good that repair. Although the crack was not caused by any work undertaken by the Builder, the Contract specified that the Builder would repair it. Mr Ryan agreed that further work was required to make good that crack. According to Mr Lorich, the cost of repair was $660, excluding margin and GST. According to Mr Ryan, the cost to make good was $540. The difference between the two costings arises because Mr Lorich has included the cost of hiring a scaffold for one day. In my view, it is appropriate that scaffolding be used to undertake this work. Therefore, I will allow Mr Lorich's costing and find in favour of the Owner's claim in respect of $660 for this item.

127. **Painting**

(a) Mr Lorich gave evidence that extensive painting preparation was required before the painter could commence and complete painting works to all areas on the ground and first floor levels. He estimated the cost of this would be $12,000, with $2,400 of that amount

allocated to *extra preparation*. Mr Ryan made no allowance for this work on the basis that he considered it to be incomplete work.

(b) It is common ground that the painting work was not commenced prior to the Contract being terminated. Although I accept that the finish of the plasterboard ceiling, in its current state, would require additional preparation work by the painting contractors that would otherwise be the case, much of that additional preparation work will be absorbed through the skim coating and replacement of ceilings which I have previously found necessary. Therefore, I consider that only a part of this aspect of the Owner's claim for defective work is maintainable. In that respect, I will allow half of the extra preparation costs in the amount of $1,200. The balance of this claim item; namely, painting of the works, relates to the cost of completing the building works rather than rectification work to be undertaken by the Builder. For that reason, the remaining aspects of this claim item is dismissed.

128. **Cleaning damaged areas**

(a) Mr Lorich gave evidence that the floor coverings and floors had not been properly protected by the Builder's subcontractors and will require extensive cleaning and replacement. He gave further evidence that some of the antique furnishings were damaged and would need restoration.

(b) Dr Raiz gave evidence that the floor coverings and floors had been cleaned by him at his own cost following termination of the Contract. In addition, the damaged antique furniture had been repaired after his insurer had accepted liability to indemnify him for that repair. Dr Raiz said that the only item that still required repair was the kitchen bench, which contained a stain which he said was caused by the Builder or its subcontractors.

(c) Mr Daoud said that the Builder had always intended to clean the building site after the works were completed but that the premature termination of the Contract prevented it from doing so. He denied that the building work was undertaken without appropriate protective covers.

(d) I accept Dr Raiz's evidence that the building site was not kept tidy or clean during the period that the Contract was on foot. However, even if it could be said that this constitutes defective workmanship, the evidence given by Mr Lorich appears to be a global estimate for the cost to clean the site after the building works have been completed. His costing comprises 80 hours of labour at $45 per hour plus bin hire of $800. I do not accept that this work can be attributable to a breach of the terms of the Contract. Moreover, there is no evidence dealing with the specific cost to repair any

particular items said to have been damaged by the Builder. In my view, the evidence given in support of this aspect of the Owner's claim is insufficiently detailed in order for me to find, on the balance of probabilities, that the Builder is responsible for the amount claimed.

(e) Having said that, I accept that the building site should have been kept reasonably tidy, having regard to the fact that it was always intended that Dr Raiz was to continue to occupy part of the Premises during construction. I consider that the failure to keep the building site tidy and to protect existing furniture constitutes a breach of the terms of the Contract. Mr Ryan has allowed $660 in respect of this item claimed by the Owner. In my view, that evidence is to be accepted over the global costing provided by Mr Lorich. Therefore, I will allow $660 in respect of this item of the Owner's claim.

129. **Clean stairs**

(a) Both Dr Raiz and Mr Lorich gave evidence that the main central staircase timber treads and handrails had been damaged by the Builder and will require total restoration by refinishing to make good. He estimated that the cost to undertake this work is $2,000. No details were given as to how he arrived at that figure.

(b) I accept that the main central staircase had been damaged during the course of the building works. However, I do not accept that the reasonable cost to repair the staircase is $2,000.

(c) At the time of my view of the Premises, the staircase had already been repaired. However, no evidence was adduced as to what amount was expended in the repair of that staircase. In my view, it was incumbent upon the Owner to have provided some evidence of the actual cost of repair.

(d) Mr Ryan has allowed $900 for the repair of the staircase. Doing the best I can with the evidence before me, I will allow $1,450 for the repair of the stairs, being the midway point between what each of the experts has assessed.

130. **Repair window leaks**

(a) Mr Lorich gave evidence that window leaks were apparent to the north wall of the living room. Mr Daoud gave evidence that the Builder had nothing to do with the construction of those windows or undertook any work relating to those windows.

(b) The Contract does not specify any work to be undertaken to the windows on the north wall of the living room. In my view, it is not work required under the Contract and in those circumstances; I do

not find the Builder liable for this aspect of the Owner's claim. Accordingly, this aspect of the Owner's claim is dismissed.

131. **Electrical cables left in an unsafe manner near switchboard**

(a) Mr Lorich gave evidence that an allowance should be made to tidy electrical cables above the main meter box. Mr Daoud said that the Builder was not responsible for any electrical work. He said that the Owner had engaged a separate contractor to undertake the electrical work. He further stated that the Builder was not responsible for any of the electrical wires or the state of the main switchboard.

(b) The Contract does not mention any electrical work to be undertaken by the Builder. Accordingly, I am not satisfied, on the balance of probabilities, that the condition of the electrical switchboard or the wires left hanging, are the responsibility of the Builder. Therefore, this aspect of the Owner's claim is dismissed.

132. **Builder's rubbish left on site**

(a) It is common ground that the building site was left untidy at the time the Contract was terminated. Dr Raiz said that he hired numerous bins in order to dispose of building rubble.

(b) Mr Daoud said that it was always intended that the Builder would complete a final clean upon completion of the works but that did not occur given the premature termination of the Contract.

(c) In my view, much of this aspect of the Owner's claim relates to final clean up, which did not occur given the premature termination of the Contract. To the extent that the building site was unduly messy - constituting a breach of the terms of the Contract, that complaint has already been considered above. In particular, I have found in favour of the Owner in the amount of $660 for what I consider to have been a failure to keep the building site reasonably tidy during the course of the building project. This particular item falls within that ambit of work and for that reason, I dismiss this aspect of the Owner's claim.

Conclusion on *Other Defects*

133. Having regard to my findings set out above, I conclude that the raw cost to the Builder of rectifying the items referred to under Section 2.3 of Mr Lorich's report dated 12 August 2014 is $7,120, calculated as follows:

Description	Amount
Window repair	$840
Patching of external brickwork	$2,310

Description	Amount
Rectify beam	$660
Painting – extra preparation	$1,200
Clean damaged areas	$660
Staircase	$1,450
Window leaks	$0
Electrical cables	$0
Builder's rubble	$0
Total	**$7,120**

134. As is the case with the claim relating to plumbing defects and plastering defects, the raw cost of rectification work does not incorporate fixed costs and supervision, which will be incurred by the Builder in rectifying its own work. I have previously found that 15% is an appropriate sum to be added to the raw costs of rectification work. Therefore, I find that the cost to repair the *other defects* is $8,188.

Conclusion on Owner's claim for defective works

135. Having regard to my findings set out above, I find that the Owner's loss and damage resulting from the Builder's breach of the contractual warranties set out under s 8 of the *Domestic Building Contracts Act 1995* and mirrored in the express terms of the Contract amounts to $42,898.45 excluding GST, and calculated as follows:

Description	Amount
Plumbing defects	$14,205.95
Plastering defects	$21,137
Other defects	$8,188
Total	**$43,530.95**

BUILDER'S CLAIM

136. The Builder claims the balance of the Contract price in the amount of $65,914.30 plus damages because of delay caused to the building work in the amount of $63,304.

Delay claim

137. Dealing first with the claim for damages for delay. As I understand this claim, the claim is made pursuant to Clause 15.4 of the Contract. That clause states, in part:

> Whenever the progress of the **Works** is delayed by any act or omission of the **Owner** or of any person or persons for whom the Owner is responsible [including, without limitation, the owner's partners, officers, contractors, suppliers, agents, employees, consultants, related persons and related entities] the **Builder** is, in addition to the appropriate extension of time, entitled to recover the amount included in item 17a of the Appendix in respect of each week of delay, or one seventh ($1/7^{th}$) of the said amount for each day of delay.

138. The amount stated in item 17a of the Contract was $2,300 per week. Therefore, the Builder's claim for $63,304 equates to approximately 27.5 weeks of delay.

139. Some evidence was given that the building work was delayed due the acts or omissions on the part of separate contractors engaged by the Owner and also by reason of the Owner requesting that the works be suspended over the Christmas period. However, no extension of time has ever been claimed by the Builder.

140. In my view, the entitlement to claim for delay damages under the Contract is conditional upon the Builder first establishing that time under the Contract was extended. In particular, Clause 15.1 of the Contract requires the Builder to give the Owner notice of any delay or potential delay. Clause 15.2 then states, in part:

> If the **Owner** does not notify the **Builder** in writing and reject or dispute the cause of the delay and/or the estimated length of the delay within fourteen (14) **Days** after receipt of the **Builder's** notice under Clause 15.1, the **Completion Date** under the **Contract** will be automatically extended by the delay period stated in the said notice… [emphasis added]

141. In my opinion, the express words: *stated in the notice* in Clause 5.2, clearly indicate that the Contract requires that written notice be served on the Owner before time under the Contract can be extended. A failure to do so is fatal to any extension of time claim made under the Contract.

142. Accordingly, I find the time was not extended under the Contract, notwithstanding that in all likelihood; there was disruption or delay caused by reason of the acts or omissions on the part of the Owner or their separate

contractors. Therefore, the Builder's claim for delay damages under the Contract fails.

143. Even if there was no requirement to first establish that time under the Contract had been extended in order to claim delay damages, insufficient evidence has been adduced as to how the Builder's construction program was critically affected by delay. Although disruption to the roof caused by the insulation contractors most likely delayed or disrupted the roof plumbing work, I have no way of knowing whether that delay was critical to the building works at large. Similarly, although the Builder was requested to suspend work during the Christmas period, I have no way of knowing whether that suspension occurred concurrently with the Builder's intended Christmas shutdown period or was additional to it. In those circumstances, it is impossible for me to calculate the precise extent of delay, in any event.

144. Therefore, the claim for delay damages is dismissed.

Claim for work completed

145. The *Points of Claim* filed by the Builder have not been prepared by a legal practitioner. Regrettably, those *Points of Claim* fail to clearly set out how the Builder contends that it is entitled to the balance of the Contract price. In other words, it is unclear whether the amount of $65,914.30 is a claim for loss and damage suffered; or whether the claim is simply grounded upon a contractual entitlement to recover that amount, such as the payment of a staged progress claim.

146. In my view, the claim cannot be founded on the basis that the $65,914.30 is an amount that is due and payable under the Contract. This is because the terms of the Contract and the evidence before the Tribunal make it clear that the time for paying any of the outstanding progress claims had not crystallized as at the date when the Contract came to an end.

147. The Contract provided for staged progress claims as follows:

(a) $6,545.72 for the *Deposit* progress claim;

(b) $58,911.44 for the *Payment on initial ordering* progress claim;

(c) $52,365.72 for the *Payment on completion* progress claim; and

(d) $13,091.42 for the *Handover* progress claim.

148. It is common ground that the works had not reached *Completion* stage. Indeed, that was the basis upon which the Builder argued that it was not liable for many of the items in Mr Lorich's report.

149. Accordingly, and having regard to s 53 of the *Domestic Building Contracts Act 1995*, which states that *the Tribunal may make any order it considers fair to resolve the domestic building dispute*, I will proceed to determine the Builder's claim on the basis that it constitutes a claim for damages at common law for breach of contract.

150. In *Gates v City Mutual Life Assurance Society Limited*,[13] the High Court observed that:

> In contract, damages are awarded with the object of placing the plaintiff in the position in which he would have been had the contract being performed - he is entitled to damages for loss of bargain (expectation loss) and damages suffered including expenditure incurred in reliance upon the contract (reliance interest).[14]

151. That said, I am of the opinion that the amount of $65,914.30 claimed by the Builder cannot constitute the Builder's actual loss and damage consequent upon the Owner's breach. This is because that amount would have been received by the Builder only when the works had been completed and handed over. Moreover, that amount is inclusive of GST, which means that the actual amount in the hand of the Builder is $59,922.09, after remittance of GST to the Australian Taxation Office. However, the Builder would have still had to expend its own money in order to achieve the stages of *Completion* and *Hand-over*. That expenditure needs to be taken into account and deducted from the $59,922.09 in order to arrive at a net figure that the Builder would have had in hand.

152. It is not entirely clear how the experts have distinguished between the cost of rectification and the cost of completion. According to Mr Lorich, the aggregate cost to rectify and complete is $104,263.55, excluding margin and GST. Although Mr Lorich has not specifically distinguished between completion costs and rectification costs, I have made findings to that effect. In particular, I found that some work was still required to complete the roof plumbing, further work was required to complete the plastering in the garage area, painting was required and final cleanup was also to be done. Doing the best I can with the evidence before me, I assess the Builder's cost to complete the Works, based on Mr Lorich's and Mr Quick's costings to be as follows:

153. **Cap the end of the fascia gutter**

(a) Although no specific costing was provided for this work, Mr Williams indicated that it would take approximately 10 minutes to do this work. Allowing for set up costs, I will allow $100 to undertake this work

154. **Complete the cable end (Item 6.1)**

(a) This work has been assessed by Mr Quick at $2,790, excluding margin and GST. I accept that costing.

155. **Missing fascia gutter on south side of new roof (Item 6.5)**

(a) As I have already stated in paragraph 98 above, this aspect of the Owner's claim is incomplete work. Mr Ryan has estimated the cost

[13] (1986) 160 CLR 1.
[14] Ibid at 11-12.

to supply and fit a short piece of fascia gutter and downpipe at $240, excluding margin and GST. Mr Quick has estimated the cost of this work at $1,100, excluding margin and GST. Mr Quick's estimate includes the provision of a safety rail or other protection works at a cost of $450. He has also allowed five hours for labour compared with Mr Ryan's estimate of only one hour.

(b) It is unclear to me why a safety rail would be needed when installing a fascia gutter and downpipe. Mr Ryan did not mention the need for this equipment in his report or in oral evidence. Similarly, Mr Quick did not expand on this issue when he gave oral evidence. In my view, the installation of a fascia gutter and downpipe would be undertaken either from a ladder or scaffold facing the gutter but not from the roof itself. Therefore, I cannot understand how the installation of a safety rail would provide any protective measure. Without further explanation as to the need for a safety rail, I find that this element of Mr Quick's costing to be unsubstantiated.

(c) Having said that, I do not accept that the installation of the fascia gutter and downpipe would only take one hour. I accept Mr Quick's estimate that the work would take five hours. Accordingly, allowing for material and labour, I find that this component of work would cost the Builder $651, excluding margin and GST.

156. **Completing plastering in garage**

(a) There is no specific costing provided by the experts to undertake this work. Nevertheless, Mr Lorich has estimated that the cost to demolish and re-plaster all of the downstairs area at $59,360, excluding margin and GST. The experts have indicated that the downstairs area is 440 m². Therefore, the cost to demolish and re-plaster the downstairs areas equates to $135 per square metre. According to the floor plan tendered in evidence, the garage area occupies approximately 50 m². Therefore, the cost to demolish and re-plaster that area would be $6,750 - adopting the rate of $135 per square metre.

(b) Having regard to the fact that the garage plastering is partially completed and will not require complete demolition, I assess the cost to complete the garage plastering at two thirds of the cost that would otherwise be the case if it were demolished and rebuilt from afresh. Accordingly, I find that the cost to complete the garage is $4,522.50, excluding builder's margin and GST.

157. **Painting**

(a) Mr Lorich has assessed the cost to undertake this work at $12,000, exclusive of margin and GST. However, the amount also included $2,400 for what he describes as *extra preparation*. As I have

already indicated, given the extensive re-plastering and skim coating required as part of the rectification works, I do not accept that the full amount of $2,400 should be added to the cost of painting. As I have already allowed $1,200 for *extra preparation* as a defective works item, the balance of $9,600, excluding margin and GST is to be allowed in respect of the reasonable cost of completing the painting.

158. **Final cleanup**

(a) Mr Lorich has assessed the cost to undertake this work at $3,140, exclusive of margin and GST. Having regard to Dr Raiz's evidence as to the state of the building site at the date of termination, I accept Mr Lorich's evidence and find that this represents the reasonable cost of the final clean-up.

159. Therefore, I find that the reasonable cost of completion is $19,005, made up as follows:

Description	**Amount**
Fascia gutter cap	$100
Complete gable end	$2,790
Fascia gutter on south side of new roof	$651
Complete plastering of garage	$4,522.50
Painting	$9,600
Final cleanup	$3,140
Total	**$20,803.50**

160. The amount of $20,803.50 excludes any margin and GST. It represents the raw cost to the Builder but does not include any allowance for fixed overheads or supervision. As I have already indicated some allowance should be made for those costs as a failure to do so would result in a figure which would not incorporate those expenses. I have previously determined that the appropriate amount to be added to the raw costs of the Builder for supervision and administration is 15%. Therefore, I find that the cost to the Builder to complete the Works is $23,924.03, excluding GST.[15]

161. The cost to complete is then to be deducted from the balance of the Contract sum. In that respect, I note that the amount of $65,914.30 represents the

[15] This amount does not include the cost to repair defective work.

balance of the contract sum inclusive of GST. In my view, the GST component is to be subtracted from that figure in order to calculate the net amount that the Builder would have received had the Contract been performed. GST is then added to the net amount in order to arrive at a final figure payable to the Builder.

162. Therefore, $23,924.03 is to be deducted from $59,922.10 to arrive at a net figure of $35,998.07, exclusive of GST. To this amount, GST is re-added to arrive at a final figure of $39,597.89. I find this amount to represent the Builder's claim for loss and damage, ignoring any cross-claim against the Builder.

CONCLUSION ON CLAIMS

163. In proceeding BP311/2014 I found that Versa-Tile's loss and damage is $43,530.95. In proceeding BP354/2014, I found that the Builder's loss and damage to be $39,597.89.

164. However, the Builder's claim is made directly against Dr Raiz in his personal capacity, rather than against Versa-Tile, notwithstanding that I have found Versa-Tile to be the actual contracting party. As previously indicated, Mr Daoud was not aware of Versa-Tile at the time when the Contract was entered into. Nevertheless, I found that the intention of the parties prior to the Contract being executed was that the actual registered proprietor of the Property was to be the contracting party. That was not Dr Raiz. Indeed, Dr Raiz contended that he was, at all relevant times, merely acting as an agent of Versa-Tile.

165. That being the case, I find that Versa-Tile was the undisclosed principal of Dr Raiz. In *Maynegrain Pty v Compafina Bank*,[16] Hope JA explained the doctrine of undisclosed principal in the following terms:

> A person may sue or be sued upon a contract although the other party to the contract did not know that the person with whom he was contracting was acting as an agent, if in fact that person was acting as agent for an undisclosed principal, unless the terms of the contract are inconsistent with the known person being an agent. Either principal or agent may sue or be sued … The rights and obligations of principal and agent are not joint, but, subject to the superior right of the principal, alternative.[17]

166. The corollary of the above dicta is that any defence which a third party may have against an agent is available against that agent's principal.[18] Therefore, to the extent that the Builder claims against Dr Raiz, that claim may also be set off by way of defence against the claim made by Dr Raiz's principal; namely Versa-Tile, in proceeding BP311/2014. Having regard to s 53 of the *Domestic Building Contracts Act 1995*, I consider that the fairest way to resolve the domestic building dispute between all parties is to treat the claim

[16] [1982] 2 NSWLR 141.
[17] Ibid at 149-50.
[18] *Sin Yin Kwan v Eastern Insurance Co Ltd* [1994] 2 AC 199 at 207.

made by the Builder against Dr Raiz as a claim made against Versa-Tile and then to set one claim off against the other.

167. As I have already indicated, the Owner's rights in relation to breaches of the Contract which existed prior to termination survive termination, such that the cost of repairing defects, based on what it would have cost the Builder, is to be balanced against the Builder's claim for loss and damage. That being the case, I find that the Builder's loss and damage of $39,597.89 is deducted from what I have determined to be the cost of rectification of $43,530.95, such that the net outcome is that the Builder is to pay the Owner $3,933.06.

15 September 2015

SENIOR MEMBER E. RIEGLER