VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D323/2004

CATCHWORDS

Proportionate Liability – Wrongs Act 1958 - settlement during the proceeding between some parties only – effect upon application of Part IVAA of Act in regard to remaining parties– when order effecting settlement should be made - appropriate procedure– standard of work – duty of builder – cost of rectification – evidence as to what rectifying builder will charge – how considered – loss and prospective loss of use of building to be constructed – inability to rent other premises – measure of damages

FIRST APPLICANT	Volkmar Vollenbroich
SECOND APPLICANT	Hermine Vollenbroich
RESPONDENT	Krongold Constructions Pty Ltd (ACN 007 117 026)
SECOND RESPONDENT	Joseph Toscano Pty Ltd (ACN 051 493 022)
THIRD RESPONDENT	The O'Neill Group Pty Ltd (ACN 056 479 987)
FOURTH RESPONDENT	Bluvale Pty Ltd (ACN 005 895 287) (t/as "Eckersley Stafford Design")
JOINED PARTY 1	Fitzroy Glass Pty Ltd
JOINED PARTY 2	Tiago Enterprises Pty Ltd t/as Hytex Plasterers
JOINED PARTY 3	MDG Plumbing Contractors Pty Ltd
JOINED PARTY 4	Domus Ceramics (Aus) Pty Ltd
JOINED PARTY 5	Northwest Airconditioning Commercial Pty Ltd
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	1 – 16 May 2006; Submissions 29 May 2006
DATE OF ORDER	23 August 2006
CITATION	Vollenbroich v Krongold Constructions (Domestic Building) [2006] VCAT 1710

ORDER

1. Order that the First Respondent pay to the Applicants the sum of $1,383,508.42.
2. Order that the First Respondent pay the Applicants' costs of this proceeding, including reserved costs, such costs if not agreed to be assessed by the Registrar in accordance with the Supreme Court Scale.
3. Order that the Second Respondent pay to the Applicants the sum of $135,000.00.
4. Order that the Second Respondent pay the Applicants' party-party costs in relation to their claims against the Second Respondent to be calculated on the Supreme Court Scale
5. The Third Respondent's claim against the Fourth respondent is struck out with no order as to costs;
6. Order that the Third Respondent pay to the Applicants the sum of $85,000.00.
7. Order that the Third Respondent pay the Applicants' party-party costs in relation to their claims against the Third Respondent to be calculated on the Supreme Court Scale

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicants	Mr E. Reigler of counsel
For the First Respondent	Mr M. Lapirow of counsel
For the Second Respondent	Mr C. Harrison of counsel
For the Third Respondent	Mr J. Dixon of counsel
For the Fourth Respondent	No appearance
For Joined Party 1	No appearance
For Joined Party 2	Mr Jesus, Director
For Joined Party 3	Mr K. Oliver of counsel
For Joined Party 4	Mr D. Klempfner of counsel
For Joined Party 5	No appearance

REASONS

The proceeding

1. This proceeding concerns the construction of a large dwelling house on land owned by the First Applicant at 6 Berkefeld Court, Templestowe. The Second Applicant is his wife who was involved in the contractual negotiations but was not named as a party to the subsequent building contract. It was intended however that she would occupy the house with her husband and the relief sought in this proceeding is sought by them jointly. No objection was raised at the hearing to her being named as a party. I shall refer to them jointly as "the Owners".

2. The house was constructed by the First Respondent, Krongold Constructions Pty Ltd ("the Builder") in accordance with architectural plans prepared by the Second Respondent ("the Architect") and engineering drawings prepared by the Third Respondent, The O'Neill Group Pty Ltd ("the Engineer"). The Owners also engaged the Fourth Respondent, Bluvale Pty Ltd ("the Landscape Designer") to prepare a design of landscaping works around the property and, after the Builder left the site, landscaping work in accordance with that design was carried out by another entity which is not a party to this proceeding. The Landscape Designer was joined as a Respondent on the application of the Engineer.

3. A number of further parties ("the Joined Parties") were joined to the proceeding on the application of the Builder on 19 July 2005 for the purpose of arguing that it was entitled to take advantage of the provisions of Part IV AA of the *Wrongs Act 1958* to limit its liability to the Owners. Each of the joined parties was a subcontractor to the Builder with respect to its particular area of work. The Builder's Points of Claim against each of the Joined Parties include a claim for damages for breach of contract and also contribution pursuant to s23B of the *Wrongs Act* 1958. The Joined Parties were:

   (a) Fitzroy Glass Pty Ltd (in liquidation) ("the Window Supplier") which supplied the windows for the project;

   (b) Tiago Enterprises Pty Ltd ("the Renderer") which did the rendering work;

   (c) MDG Plumbing Contractors Pty Ltd ("the Plumber") which was the subcontract plumber on the job;

   (d) Domus Ceramics (Aus) Pty Ltd ("the Tile Supplier") which supplied the stone tiles used on both the internal floors and on a balcony. These were special tiles that came from a quarry in Italy;

   (e) Northwest Airconditioning Commercial Pty Ltd ("the Air Conditioning Designer") which designed the air conditioning system which the Builder constructed in the house.

4. There were more than 200 complaints by the Owners about the work which are detailed in appendices to two of the reports prepared by their expert, Mr Browning. A list of these defects generally in the form of a Scott Schedule was prepared and used during the hearing.

The hearing

5. Very shortly before the commencement of the hearing the Owners' claims against the Architect and the Engineer were settled. The Landscape Designer did not appear and since the Engineer which had joined it no longer wished to proceed against it and no claim had been made against it by the Owners, the only active Respondent to the application thereafter was the Builder.

6. The settlement between the Owners, the Architect and the Engineer was announced by counsel for the Owners, Mr Reigler. He and counsel for the Architect, Mr Harrison and counsel for the Engineer Mr Dixon, joined in seeking the following orders:

   a Judgement in favour of the Owners against the Architect "as concurrent wrongdoer" for $135,000.00;

   b Judgement against the Architect for the Owners' party-party costs in relation to their claims against the Architect to be calculated on the Supreme Court Scale;

   c The Points of Claim filed by the Engineer against the Landscape Designer to be struck out with no order as to costs;

   d Judgement in favour of the Owners against the Engineer for $85,000.00 "as concurrent wrongdoer";

   e Judgement against the Engineer for the Owners' party-party costs in relation to their claims against the Engineer to be calculated on the Supreme Court Scale.

7. The matter was stood down to enable the remaining parties to consider this joint application and the potential implications of the orders sought for their respective clients. When the hearing resumed I heard submissions from the Builder's Counsel, Mr Lapirow, the Plumber's Counsel, Mr Oliver and the Tile Supplier's Counsel, Mr Klempfner. In essence, concerns were expressed as to the effect such a judgement would have on the ability to apply the liability limiting provisions to be found in s24AI of the *Wrongs Act* 1958. For the purpose of understanding how this was dealt with, those provisions should be set out in full.

The liability limitation provisions of the Wrongs act 1958

8. The relevant parts of the *Wrongs Act 1958* are as follows:

“PART IVAA PROPORTIONATE LIABILITY
Definitions
24AE. Definitions
In this Part-
"apportionable claim" means a claim to which this Part applies;
"court" includes tribunal and, in relation to a claim for damages, means any court or tribunal by or before which the claim falls to be determined;
"damages" includes any form of monetary compensation;
"defendant" includes any person joined as a defendant or other party in the proceeding (except as a plaintiff) whether joined under this Part, under rules of court or otherwise;
…………………………………………………………………………………
24AF. Application of Part
(1) This Part applies to-
(a) a claim for economic loss or damage to property in an action for damages (whether in tort, in contract, under statute or otherwise) arising from a failure to take reasonable care; and
……………………………………………………………………..
(2) If a proceeding involves 2 or more apportionable claims arising out of different causes of action, liability for the apportionable claims is to be determined in accordance with this Part as if the claims were a single claim.
…………………………………………………………………………………
24AH. Who is a concurrent wrongdoer?
(1) A concurrent wrongdoer, in relation to a claim, is a person who is one of 2 or more persons whose acts or omissions caused, independently of each other or jointly, the loss or damage that is the subject of the claim.
(2) For the purposes of this Part it does not matter that a concurrent wrongdoer is insolvent, is being wound up, has ceased to exist or has died.

24AI. Proportionate liability for apportionable claims
(1) In any proceeding involving an apportionable claim-
(a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the loss or damage claimed that the court considers just having regard to the extent of the defendant's responsibility for the loss or damage; *[my emphasis]* and
(b) judgment must not be given against the defendant for more than that amount in relation to that claim.
(2) If the proceeding involves both an apportionable claim and a claim that is not an apportionable claim-
(a) liability for the apportionable claim is to be determined in accordance with this Part; and
(b) liability for the other claim is to be determined in accordance with the legal rules, if any, that (apart from this Part) are relevant.
(3) In apportioning responsibility between defendants in the proceeding the court must not have regard to the comparative responsibility of any

person who is not a party to the proceeding unless the person is not a party to the proceeding because the person is dead or, if the person is a corporation, the corporation has been wound-up.

24AJ. Contribution not recoverable from defendant

Despite anything to the contrary in Part IV, a defendant against whom judgment is given under this Part as a concurrent wrongdoer in relation to an apportionable claim-

(a) cannot be required to contribute to the damages recovered or recoverable from another concurrent wrongdoer in the same proceeding for the apportionable claim; and

(b) cannot be required to indemnify any such wrongdoer.

24AK. Subsequent actions

(1) In relation to an apportionable claim, nothing in this Part or any other law prevents a plaintiff who has previously recovered judgment against a concurrent wrongdoer for an apportionable part of any loss or damage from bringing another action against any other concurrent wrongdoer for that loss or damage.

(2) However, in any proceeding in respect of any such action the plaintiff cannot recover an amount of damages that, having regard to any damages previously recovered by the plaintiff in respect of the loss or damage, would result in the plaintiff receiving compensation for loss or damage that is greater than the loss or damage actually suffered by the plaintiff."

24AL Joining non-party concurrent wrongdoer in the action

(1) Subject to sub-section (2), the court may give leave for any one or more persons who are concurrent wrongdoers in relation to an apportionable claim to be joined as defendants in a proceeding in relation to that claim.

(2) The court is not to give leave for the joinder of any person who was a party to any previously concluded proceeding in relation to the apportionable claim."

8. The Builder's case was that many of the defects claimed by the Owners were the fault of one or more of the other parties which were, it asserted, concurrent wrongdoers. The claim with respect to the defects were apportionable claims and so the Builder's own liability should, it was argued, be limited to an amount reflecting that proportion of the loss or damage claimed that the Tribunal should consider just having regard to the extent of the Builder's responsibility. The Joined Parties were concerned to ensure that any liability on their own part would be similarly limited. However, if the Architect and the Engineer should cease to be parties to the proceeding then, by the operation of s.24AI(3), their responsibility for the damage could not be taken into account in determining whether and to what extent the liability of the other parties should be limited. Since they were responsible for the design of the building and the drainage system I would not be able to take into account the extent to which any deficiencies of design contributed to the damage in determining the extent to which any other party's liability should be limited.

9. After considering these submissions I concluded that I could not make orders in the terms sought during the running of the proceeding because, in the case of the Second and Third Respondents, the making of the order would determine the claim against them and so remove them as parties. Once that happened, s.24AL(2) would prevent their subsequent re-joinder as parties to the proceeding for the purpose of applying the liability limiting provisions.

10. In the case of the Landscape Designer, all that was sought was the striking out of the Points of Claim against it and since that would not have the effect of removing it as a party there would be no difficulty in doing that. After further discussuion with counsel I indicated that I would pronounce the orders sought against the Second and Third Respondents in favour of the Owners in the agreed terms at the conclusion of the whole proceeding and not before. Points of Claim as between them and the Owners were struck out and I excused counsel for the Second and Third Respondents from further attendance, noting that orders in the agreed terms were to be pronounced at the conclusion of the hearing and that no other party was claiming any relief against their respective clients. I pointed out that they would nonetheless remain parties to the proceeding for the purposes of Part IVAA of the *Wrongs Act* 1958.

Amendment of claim

11. Mr Riegler then applied to amend his Points of Claim to include a claim seeking relief directly from the joined parties to the extent that they might be found liable as concurrent wrongdoers. Mr Riegler conceded that he was not alleging that a duty of care was owed by any of the joined parties directly to the Owners but said that he wished to be able to argue that, in the event there was an apportionment of responsibility, relief could and would be sought directly against the parties responsible with respect to their proportionate responsibility for the loss. The amendment was then allowed without determining that such an order would be able to be made if there were an "apportionment" involving any of the joined parties. I expressed some misgivings as to whether the amendment would be onf any use but as it turned out, it was unnecessary to decide the point

The evidence

12. The matter then proceeded to hearing with the first day being wholly taken up by an on-site inspection attended by the Owners' expert Mr Browning and the Builder's expert Mr Achison. On the second day, Mr Browning was called as the first witness and was cross-examined extensively over the next five hearing days, mainly by Mr Lapirow for the Builder.

The withdrawal of the Builder

13. On 15 May 2006 Counsel for the builder, Mr Lapirow, sought leave to withdraw from the proceeding on his own behalf and on behalf of his instructing solicitor. Leave was granted and Mr Lapirow and his instructor withdrew.

14. On the following day there was no appearance on behalf of the Builder and after hearing further submissions and for the reasons I gave orally at the time, I dismissed its claim against all Joined Parties pursuant to s.78 of the Victorian Civil and Administrative Tribunal Act 1998 and made the following orders:

    1. Order that the proceeding by the First Respondent against the Third Joined Party be dismissed pursuant to s.78 of the Victorian Civil and Administrative Tribunal Act 1998.

    2. Order the First respondent to pay the Third Joined Party's costs of the proceeding, such costs if not agreed to be assessed by the Registrar on the Supreme Court Scale up to and including 10 April 2006 and thereafter on an indemnity basis;

    3. Order that the proceeding by the First Respondent against the Fourth Joined Party be dismissed pursuant to s.78 of the Victorian Civil and Administrative Tribunal Act 1998.

    4. Order the First respondent to pay the Fourth Joined Party's costs of the proceeding, such costs if not agreed to be assessed by the Registrar on the Supreme Court Scale up to and including 7 September 2005 and thereafter on an indemnity basis;

    5. By consent of the Applicants and the Third Joined Party, order that the Applicants' proceeding against the Third Joined Party be dismissed with no order as to costs and that there be no contribution by the Third Joined Party to the costs incurred by the Applicants in the production of the Tribunal Book;

    6. Order that the Applicants' proceeding against the Fourth Joined Party be dismissed with no order as to costs. Further order that there be no contribution by the Fourth Joined Party to the costs incurred by the Applicants in the production of the Tribunal Book;

    7. Leave is granted to the Applicants to withdraw their proceeding against the Second Joined Party with no order as to costs and the said proceeding is considered withdrawn;

    8. The proceeding by the First Respondent against the Second Joined Party is struck out.

    The matter then proceeded in the absence of the Builder. Since it did not appear that the Builder proposed to take any further part in the proceeding and in order to save further costs I directed that any further witnesses to be called give their evidence by means of an affidavit simply verifying the witness statements that had been filed and served. I also gave directions for

the filing of written submissions. Such affidavits were filed and submissions were subsequently received. I now proceed to determine the matter on the evidence so provided.

Background

15. The house was constructed on a large block of land purchased by the First Applicant in the early 1980s. The Applicants lived part of the time in Melbourne and part of the time in Germany. When they were in Melbourne they lived in an apartment they owned in St Kilda Road. They owned a second apartment in the same block which was occupied by their children. From time to time relatives would arrive in Melbourne and the apartments in St Kilda Road were insufficient to accommodate them. In early 1999 the Owners decided to build on the Templestowe land a large house sufficient to accommodate their children, any visitors from Germany and themselves when they were in Australia.

16. The Architect was engaged to prepare designs and, when these were completed, a building contract was entered into with the Builder to build a house for a price of $2,520,652.36. Under the terms of the contract the Architect was to be engaged to carry out certain functions, including issuing instructions to the Builder and giving certificates where required.

17. The work was carried out with a number of variations approved by the Architect which increased the contract price to $2,810.536.47.On 2 June 2003 the architect certified that the work had reached practical completion.

The complaints

18. By this time, there had been a number of complaints about the quality of the work and numerous defects were listed which the Architect directed the Builder to rectify but when the Builder left the site these were still not rectified to the Owners' satisfaction. Extensive landscaping work was then carried out by a landscaping company which has not being joined to the proceeding in accordance with the design prepared by the Landscape Designer.

19. The Owners never moved into the building and I find that this is because the defects were never rectified. By the time of my inspection on 8 May 2006 it was apparent that the main problems were due to water penetration in a number of areas. This had particularly affected the floors, causing floorboards to buckle and the stone tiles in the main living area to whiten and deteriorate.

The defects

20. Before turning to each of the defects I should consider Mr Riegler's submission as to the standard of workmanship required by the contract.

21. Generally, in a contract for work and materials the obligation of the contractor is to carry out the work with all reasonable care and skill using good and sufficient materials. If he does this then the work should be of a reasonable standard. However it is open to parties if they wish to do so to agree that the work will be in accordance with a particular standard and it will then be the responsibility of the contractor to achieve that standard. In the present case Mr Riegler relies upon special condition (iii) of the contract which is in the following terms:

> ***"Building Quality"***
>
> *In keeping with the clear expectation of a high quality building, it is required as an expressed warranty of the proprietor that work will be completed to highest practical standards of finish, and where applicable, minimum tolerances or standards as stipulated by the Australian Standards for the relevant work may be exceeded"*

22. Although acknowledging that it may be difficult to say in any particular case what the highest practical standard of finish would be, Mr Riegler submitted, particularly in regard to the "off the form" cast concrete ceilings, that the standard achieved in one room ought to be able to be achieved in other parts of the house. In general terms, that seems a reasonable proposition but since Mr Browning's evidence as to the quality of the work is uncontested, I do not need to explore it any further.

23. In his final submissions Mr Riegler divided the defects into various categories of related items. This is a convenient and sensible approach and one adopted by Mr Browning in his reports. I will adopt it for the purpose of dealing with the submission. The item numbers referred to are those used in Mr Browning's two reports listing the defects and also accords with the numbering in the Scott Schedule.

Agricultural Drainage

24. There was no general agreement between the witnesses as to the alignment of the property (that is, which direction was North). For the purpose of these reasons I have accepted that the frontage of the property to the street is its western boundary. On that basis, the site slopes from the north west to the south east. The driveway is slightly to the south of the middle of the frontage and descends eastwards towards the front door before turning north to enter the garage. Water travelling down the driveway is intercepted by a grated strip drain. The large paved area where the driveway turns in front of the house is drained by a square grated drain with the paving generally graded towards it. Between this paved area and the house there is a narrow garden. Quite obviously, none of the water that enters this garden area from above could be taken away by the driveway drainage, nor would that drainage take away any water passing underneath the driveway paving. Since the level of the block seems to be lower in this

position the agricultural drain to be installed below the garden was particularly important.

25. On the northern side of the house the site has been substantially excavated with batters sloping from the original ground level in the north descending southwards towards the house but with no appreciable flat area between the foot of the batters and the side of the house. Any water flowing down the batter of the excavation would reach the house unless intercepted by an appropriate storm water system. The same consideration applies to the western side of the manager's flat which is the north western corner of the building.

26. Substantial ingress of water has been experienced from both the western side of the house near the front door and into or under the northern wall. The house is stepped down the hill so that the front of the house is at ground level but with a lower level constructed below that at the rear. During the inspection I noted a substantial quantity of water ponding behind an internal sub-floor wall uphill from the lower section of the house. Immediately to the east of the place where this water was ponding there is a sub floor area called on the plans a "plenum", where the cooling system has been installed. The batter of this area has been paved in shotcrete to provide a sloping concrete floor, the lower end of which extends down to the western wall of the bottom section of the house. Since there are habitable rooms immediately to the east of this wall and in order to avoid water penetration at this point the plans provided for a spoon drain to be constructed, the finished surface of which was to be below the floor level of the floor slab of the lower area. In fact, the spoon drain was constructed above the level of the slab and, although there is an agricultural drain below the concrete floor in this position, a video tape passed through the drain shows it to be partially blocked. This is a replacement drain. During construction the original outlet to this drain was found to be wholly blocked and the present secondary outlet was then constructed.

27. There has been substantial water ingress into the lower area of the house through this western wall, which was not tanked. This has manifested itself in salts leaching into the stone tiles on the inside of the wall, the timber flooring in the passageway expanding, buckling and breaking, floorboards in rooms cupping and a general feeling of dampness.

28. In the upper part of the house there is a similar leaching of salts into the stone tiles in the living area near the door and western window. This is not as noticeable as it is in the lower area but it has caused them to change colour. Tests on the concrete slab have shown it to have excessive water content.

29. Mr Browning attributed the water penetration to the failure of the Builder to grade the surface of the soil away from the building at the foot of the cut on the northern side of the house so as to stop water from flowing up to the house. He also criticised the installation of an agricultural drain by the

Builder extending from a drainage pit to the west along the wall of the manager's flat. He pointed out that this enters the pit at the same level as the inlet and outlet pipes for the stormwater so that, at times of high water flow it would be expected that water would flow out of the pit along the agricultural drain depositing water along the northern side of the house and thereby contributing to the sub-floor water penetration. The significance of the problem derived from the fact that the pit was carrying the whole of the uphill stormwater outflow from the roof of the building.

30. The second problem highlighted by Mr Browning was the failure of the sub-floor drainage system which was intended to be affected by the construction of the spoon drain. Because the level of the spoon drain is higher than the finished wall and the western wall separating the sub floor from the lower section of the house was not tanked, any water that entered the sub floor would pass through the wall and dampen the lower area of the house. He also criticised the construction of the agricultural drain beneath the spoon drain which was, he said, made of different materials, had insufficient fall and, in some areas, negative falls.

31. It was suggested to Mr Browning in cross examination that the problems with the agricultural drainage system were caused or contributed to by the landscape contractor covering some of the pits. The drainage plan required the tops of the pits to be covered by grates but when the Builder left the site it covered them with concrete lids in order to prevent dirt or rubbish entering the stormwater system during landscaping. The suggestion on behalf of the Builder was that these ought to have been removed and replaced by grates after the landscaping was done. However it was for the Builder to construct the pits in the manner required by the drawings. The expressed concern to prevent the stormwater drains from being blocked by soil during landscaping could have been addressed by placing something underneath the grates rather than leaving the system in a condition where, to all appearances, the concrete lids were intended to remain. In any event any failure by the Owners to do this was not shown to be a contributing factor to the ingress of water to the house. Further, from the levels, it does not seem to me that these pits would have been effective to take any surface runoff anyway. What the plans required was for the soil to be graded away from the house, not graded towards these pits. They were certainly not positioned in a way to catch surface runoff before it reached the house even if they had been covered with grates instead of concrete lids.

32. Another aspect of the stormwater drainage lies in the drain intended to be located under the garden and the front door. As stated, because of the lie of the land this was an important potential source of sub floor water ingress and the drainage plan required a stormwater drain to be laid along the eastern side of the house to collect groundwater and direct it to the south in accordance with the design. According to Mr Browning's evidence, excavations on the south western corner of the house failed to find any pipe in this area, indicating that no such pipe had been laid. There is no evidence

that there was any pipe laid in this area so I find on the balance of probabilities that the Builder failed to lay one. This is highly significant because, to the extent that rain water from above the garden or water travelling down from the street under the concrete paving has contributed to the subfloor water penetration problem, it would seem that this has been caused, wholly or in part, by the failure of the Builder to install an agricultural drain in this area as required by the plans to take that water away.

33. There is no evidence before me to establish any fault on the part of any of the other contractors in regard to the agricultural drainage. Evidence was given on behalf of the Owners by Mr John Briggs who undertook the landscaping works around the house. Attached to his witness statement are a number of photographs indicating the condition of the site before the landscaping was commenced. These photographs would not suggest that the landscaping subsequently done had any significant effect on the flow of water towards the house. They show the soil to be graded by the Builder towards the house rather than away from it as the plans required. They also indicate that there was some backfilling of soil against the northern wall of the house by the Builder before the landscaper started work. This looks in the photograph to be uncompacted fill.

34. The only contrary evidence was by Mr Dobson, the site foreman on the project employed by the Builder, who said that he believed the agricultural drainage was done in accordance with the civil engineering plans. However a comparison between the photographs tendered and the plans show that the bottom of the cut along the northern side is too close to the house and the ground has not been graded away from the house as the plans required. In addition, there is the evidence of Mr Browning to the effect that the agricultural drain at the front of the house is missing. I do not think that the general statement of Mr Dobson can stand against this other specific evidence.

35. There is no evidence as to any cause for the entry of water of water to the subfloor area other than the failure of the agricultural drainage system that was intended to carry it away. A video taken of the interior of the various pipes show instances of broken pipes, pipes with negative fall, and, in the case of the pipe under the spoon drain under the house, pipes that are partially obstructed. It was conceded on behalf of the Owners that the landscaping contractor removed a pit below the south eastern corner of the house but that is downhill of where the water was entering the subfloor and cannot have contributed to the problem. In the absence of any other explanation for the presence of water in the subfloor area it must be attributed to the failure of the Builder to grade the ground away from the house and construct the agricultural drainage system in the manner required by the design.

Windows

36. The windows of the house were made from extruded aluminium sections that have been anodised. The design of the windows is such that any water entering the frame or the corners of the windows drains down the mullions to the sub sill and then passes through holes in the sub sill to the exterior over the external masonry sills. For this to work it is necessary that the sub sills, which are also made from an aluminium extrusion, have ends fixed to them so that the water will be directed to the drainage holes and not simply flow out the ends of the sub sills to the interior of the walls. There were a number of instances pointed out by Mr Browning on site where no such ends had been fitted. Indeed, it was not apparent that any ends had been fitted.

37. In the windows in the laundry area, the renderer has rendered over the sub sills covering the drainage holes. Hence, any water entering the windows cannot drain to the exterior and must either remain within the window itself or leak out through the ends or some join in the window components. The effect of this has been to cause some corrosion at the corners of the windows due, Mr Browning says, to the presence of water.

38. For the windows to be water tight it is necessary that the sections fit together well but there were instances on site that Mr Browning pointed out where there are gaps to the components, some quite noticeable.

39. The extrusions from which each window is made are anodised before the sections are cut and assembled into the completed window. At some time after the anodising, numerous sections of window frame have become scratched. The scratching has been covered by paint which is not the same as the anodising material and is quite noticeable, particularly in natural light. It was suggested that at least some of these scratches might have been caused by the renderer but there is no evidence as to how the frames became scratched other than that they were like that when the Builder left the site.

40. There is also some scratching on the glass in many of the windows although in most cases it will be possible to polish that out. Again, there is no evidence as to how that occurred. As with the frames, this scratching was present when the Builder handed possession to the Owners and left the site and so it is the Builder's responsibility.

41. In his first report Mr Browning said that it would be impracticable to attempt to repair the windows because of the number and extent of the defects. He said that the glass could not be re-used because of the silicone on it, that it would not be possible to repair the windows in situ so they would need to be removed. He assessed the cost of replacing the windows and doors at $574,872.00.

42. However, in his report of 19 March 2006 Mr Browning provides an alternative costing with respect to the windows for their repair rather than replacement. On page 5 of his report he said:

> "The clients instructed they are willing to accept touching up of the anodised finish to the frame as an alternative to replacement".

He provided a schedule of works to repair them which he costed at $20,220.

43. Mr Riegler said in opening that it was a combination of all of the problems with the windows that led Mr Browning to form the opinion in his first report that the windows ought to be replaced in order to achieve the desired finish and he submitted that, bearing in mind the finish to be achieved, it was appropriate to allow for replacement.

44. I do not think there is sufficient evidence to establish that the schedule of works that Mr Browning has costed would not produce an acceptable result. Accordingly, I think I ought to allow for the repair of the windows rather than their replacement.

Render

45. The specifications for the render contain the following warranty:

> "Warranty
>
> On completion of the work, provide a warranty through the builder to the proprietor stating that the work is secure against defects including delamination from sub straight, "blowing", "grinning" and "crazing" for a period of 15 years from the date of practical completion".

46. Mr Browning pointed out sections of the render where one could see what appeared to be dampness from the mortar courses and perpends between the underlying bricks showing through the render. He said this was an example of grinning. He pointed to other instances where the render was breaking down and cracking. Mr Browning said that these problems were consistent with incorrect application or inadequate thickness of the render. He said that ideally the affected areas would need to be stripped and recoated although he acknowledged in evidence that it would be cheaper to patch the affected areas and then repaint the whole of the rendered surface. In his report of 19 March 2006 he said that the Owners were willing to accept this solution. His costing for this work is $52,080.00.

Tiles

47. The "tiles" that are in dispute are in fact sections of natural stone cut into the shape of tiles. Some were laid inside the house and some on the outside balconies.

Internal tiles

48. The problem with the internal tiles is that they have changed colour which, according to the evidence, is due to water having leached salts out of the slab, the screed on which the tiles were laid, or the grout. The tiles ought to

have been sealed before laying but if they were (and there is no evidence they were) the sealing was not effective to prevent what occurred.

49. The source of the water that has caused this action is two-fold. Some came from groundwater entering the building due to the deficiencies in the agricultural drainage system and other water came in the form of rain because the tiles were laid before the living area was made weatherproof. Attempts by the Builder to keep out rain by the use of tarpaulins were not successful and the area where the affected tiles are now to be seen was quite wet during construction.

50. In the absence of any contrary expert evidence I accept Mr Browning's evidence that the tiles need to be replaced in order to maintain consistency in colour with the new tiles. Unfortunately, because the tiles are a natural product and it is not possible to find other tiles to match the undamaged tiles, all of the tiles will need to be replaced.

External tiles

51. Tiles of the same stone have been used outside but whereas the internal tiles are smooth, these have been roughened. Again, exposure to moisture has caused salts to leach into the tiles and they are now delaminating. According to Mr Browning this was due to the failure of the Builder to seal the edges of the tiles and also inappropriately laying them directly onto a cementitious screed. Mr Browning says that these tiles will also have to be replaced and I accept that evidence.

Other defects

52. The many smaller defects not caught up in the general descriptions given above were individually assessed by Mr Browning and are listed in the Scott Schedule. During the course of his evidence a number of these were abandoned and some concessions were made. He disagreed with many of the matters put to him by Mr Lapirow and since no evidence was called on behalf of the Builder I must accept Mr Browning's evidence, subject to those concessions and subject to what follows.

53. Mr Browning's initial report on defects is dated August 2004. This was updated in his more recent report dated 19 March 2006 and all of the works were then costed. The current Scott Schedule used at the site inspection listed 205 defects numbered consecutively from 1 to 205 and 19 further defects numbered consecutively "A1" to "A19" both inclusive. For each of these that had not been abandoned by the start of the hearing, Mr Browning provided a detailed costing.

54. During Mr Riegler's opening items 4A, 4B, 24, 30, 116, 117, 131, 201 and 203 were wholly abandoned. Of item 23, which relates to the cooling system, part was abandoned and of item 28 relating to structural movement and cracking, a part of that was abandoned also. I will deal with the apportionment of the assessed amounts in regard to those items below.

55. By the time of the inspection the following further items had been abandoned and were marked as such in the Scott Schedule:19, 40, 49, 54, 56, 58, 60, 62, 64, 73, 85, 90, 94, 100, 115, 128, 136, 139, 143, 147, 156, 165, 171, 194 and 204. During cross examination Mr Browning conceded that items A12 and A19 were also not the Builder's responsibility.

56. In addition to these, from the cross-examination and my inspection on site I am not satisfied that any liability against the Builder has been established in regard to items 7, 45, 51 and 205. Item 7 relates to a possible defect that has not been established, item 45 relates to a wet area to the east of the house which might have been due to defective agricultural drains or (and I think more likely) water that has leaked out of the ornamental pool that was constructed by the landscaper. I noted that there was very little water left in this pool on the day of inspection and there was no evidence that this was caused by anything the Builder had done. I was unable to see the defect alleged in item 51 and I think item 205 is again speculation as to what might be wrong rather than evidence as to what is wrong. Apart from these items I accept Mr Browning's evidence that these are defects and I accept that the work outlined in his Scope of Works will need to be done in order to rectify them.

Quantum

57. Mr Browning's costing of his Scope of Works forms part of his witness statement. Two witness Statements have also been filed and verified by an affidavit by a Mr David McCreadie, a project manager employed by Canny Builders Pty Ltd. Attached to the first witness statement is a lengthy Scope of Works together with a quotation Mr McCready prepared for Canny Builders to carry it out. In general, the amounts quoted by Mr McCready are substantially more than those assessed by Mr Browning. The document does not purport on its face to be an expert report although I note that in it Mr McCready says that he has a Diploma in Building and over 18 years experience in all forms of construction, so he is qualified to give expert evidence in building matters. Mr Riegler submits that, although Mr Browning has assessed what he considers to be a fair and reasonable price for the remedial work to be carried out, the witness statements and assessment by Mr McCready represent the actual cost of engaging a builder to do it.

58. On the one hand one might say that, in costing rectification work, an expert such as Mr Browning is assessing what it should reasonably cost for it to be done. What it ought to cost and what it might actually cost in the marketplace might be two different things and it is on this basis that Mr Riegler seeks the higher sum. However, a quotation by a builder is not an assessment of what it should reasonably cost to carry out work but rather, a statement as to what that particular builder would charge to carry it out. The amount quoted might not be considered by another qualified person to be fair and reasonable but it is open to a builder to quote whatever he likes.

In this instance, Mr McCready has said in paragraphs 3 and 4 of his statement of 22 March 2006:

> "In my opinion, the costing represents a fair and reasonable price that Canny Builders Pty Ltd would charge to undertake the building work described in my report, had the work been carried out within 60 days of the date of my costing.
>
> If the work was not carried out by Canny Builders Pty Ltd within 60 days of the date of this witness statement, I would add a further 15% to make that costing accurate as of the date of this witness statement. I add that percentage because building costs (e.g. quality tradesmen rates have moved 12% over the past year while steel prices have increased over 55%) have increased since the costing was first prepared".

59. The general tenor of these paragraphs is that Mr McCready is saying that Canny Builders would charge the amount he costed on 8 December 2004 provided it got the job within 60 days; otherwise, it would charge an extra 15%. This has more the appearance of a commercial desire to charge a particular sum than an assessment of what a fair rectification price would be. One figure today but an increase of a given percentage in 60 days does not have the appearance of such an assessment.

60. In addition, Mr McCready's Scope of Works, although similar to Mr Browning's, is not identical. It is on Mr Browning's evidence that I have found that the defects exist and it is his evidence as to the Scope of Works that I have accepted. For these reasons, I think I should prefer Mr Browning's figures to those of Mr McCready.

61. Mr Browning's most recent assessment of the rectification costs, prepared on the basis that the windows were to be repaired rather than replaced and allowing for the replacement of all of the tiles, was $1,015,743.00. From this figure there must be deducted the items that I find have not been established and those that were abandoned during the hearing. Those amount to $84,977.10, including the appropriate proportions of items 23 and 28 from the schedule of works. Deducting that figure from the total invoiced cost of the schedule of works of $1,015,743.97, the balance becomes $930,766.87. To that must be added the margin for the rectifying builder, which Mr Browning said would be 20%, which is $186,153.37. When those two figures are added together, the final cost become $1,116,920.24. An amount of $17,611.82 remains to be paid under the building contract which must be deducted, so the net loss suffered by the Owners by reason of the Builder's defective workmanship becomes $1,099,308.42.

Consequential Loss

62. Had the house been suitable for occupation the Owners and their family could have moved in upon completion and rented the two apartments in St

Kilda Road. They have sworn that that was their intention and evidence has been given as to the rental value of the two apartments. In his submission, Mr Riegler has allowed for a lead time of 4 weeks from the date of practical completion to prepare the 2 apartments for rental which I think would be reasonable. That would mean that the Owners ought to be have been in receipt of rental as from 2 July 2003. The property is still uninhabitable and so the loss extends up to the date of judgement. There being no contrary evidence I accept the evidence of the Estate Agent, Mr Felix Zeldin, that the rental value of the apartments of $700.00 a week each. Mr Reigler also seeks loss of rent for a further period of 40 weeks, being the period estimated by Mr Browning as the time required to carry out the schedule of works. This is a prospective loss but it has been proven. Obviously until the work is completed it will not be possible to move into the house and the loss of the rental the Owners would otherwise have been received for the apartments will continue until then. It is not possible to state within any precision when the house will be available for occupation but on the basis of Mr Browning's evidence I will allow 40 weeks' loss of rental from the date of this order. So I will allow 163 weeks loss to rental up to the date of judgement and a further 40 weeks lost rental thereafter. That amounts to a total of 203 weeks of lost rental at $1,400.00 a week, which is $284,200.00.

Costs

63. Mr Riegler submits that costs should be awarded against the Builder on an indemnity basis. The awarding of costs in the Tribunal is governed by s109, which provides as follows (where relevant):

> "(1) Subject to this Division, each party is to bear their own costs in the proceeding.
>
> (2) At any time, the Tribunal may order that a party pay all or a specified part of the costs of another party in a proceeding.
>
> (3) The Tribunal may make an order under sub-section (2) only if satisfied that it is fair to do so, having regard to—
>
> (a) whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding by conduct such as—
>
> (i) failing to comply with an order or direction of the Tribunal without reasonable excuse;
>
> (ii) failing to comply with this Act, the regulations, the rules or an enabling enactment;
>
> (iii) asking for an adjournment as a result of (i) or (ii);
>
> (iv) causing an adjournment;
>
> (v) attempting to deceive another party or the Tribunal;
>
> (vi) vexatiously conducting the proceeding;

(b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding;

(c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law;

(d) the nature and complexity of the proceeding;

(e) any other matter the Tribunal considers relevant."

64. Mr Riegler referred to the unreported decision of Batt J in *Regal Life Insurance Limited v Pacific Financial Services Pty Ltd* (16 November 1994 – unreported) as authority for the proposition that there has to be something special or unusual in order to justify the making of an order for taxation of costs on a solicitor/client basis. I accept the correctness of that proposition.

65. In the case of *Paleka v Suvak* [2000] VCAT 58 I reviewed the authorities in regard to the award of costs and concluded (at paras 29 and-31):

> "29.I think the conclusion to be drawn from all of the authorities cited and the various quotes to be found in the judgements is that costs, where they are awarded, are normally ordered to be taxed on a party-party basis but that they may be awarded on some other basis in an appropriate case. It is in the unfettered discretion of the Tribunal to determine which basis should be adopted. In the exercise of this discretion the Tribunal will take into account the purpose for which provisions such as s. 112 are enacted but more importantly, it will have regard to the circumstances of the particular case. It is well recognised that party-party costs are usually considerably less than the costs that the successful party has actually spent in prosecuting or defending the application. Even solicitor / client costs, although more generous, fall short of a complete indemnity. Indemnity costs purport to provide a full indemnity but may (according to the terms of the order) not include costs that are unreasonably incurred.
>
> 30.Generally, party-party costs should be awarded. Access to Courts and Tribunals is a fundamental right enjoyed by everyone and persons bona fide pursuing that right and not acting improperly should not generally face orders more onerous than party-party costs if they are unsuccessful. Solicitor / client costs are ordered when the party against whom the order for costs has been made has somehow acted improperly in the conduct of the litigation so as to cause the other party unnecessary expense. Indemnity costs are ordered where the party's conduct is particularly blameworthy. That is, the circumstances justify a harsher order than even solicitor / client costs."

66. To those comments I would add that it is important not to lose sight of s.109 of the Act. Prima facie, parties bear their own costs unless the Tribunal thinks it fair to make an order for costs having regard to the matters set out in s.109(3). Those referred to in subsections 109(3)(a) and (b) relate to the manner in which the case is conducted, whereas (c) and (d) relate to the relative strengths and weaknesses of the respective cases and

the nature and complexity of the proceeding. It is because building cases are usually lengthy, expensive and complex that it is usually thought appropriate to order costs in building matters but even then the usual order is for party-party costs.

67. Mr Reigler submitted that the abandonment of the proceeding part of the way through with no explanation amounts to special or unusual circumstances which justify the making of an order on an indemnity or a solicitor/client basis. I do not believe that is sufficient in itself to justify a special order for costs. First, by abandoning the defence of the proceeding the Builder has reduced the costs the Owners would otherwise have incurred in proving their case. Secondly, the Builder might have abandoned the defence of the proceeding because it did not have the means to conduct such expensive litigation. From what I was able to ascertain from the case the Builder intended to put, it did not appear to me that it was entirely lacking in merit but in the end, because I only had the evidence of the Owners, I was unable to ascertain the strengths and weaknesses of the Builder’s case at all. I cannot assume that it was vexatious or so lacking in merit that I should make a special order for costs. However because of the nature and complexity of this proceeding, which involved many parties, difficult issues of fact and a great deal of money, I think it is appropriate that the costs be assessed on the Supreme Court Scale.

Conclusion

68. There will be an order that the Builder pay to the Owners the sum of $1,383,508.42 made up as follows:

Cost of rectification of defects after deducting the balance due under the contract:	$1,099,308.42
Loss of rent on the two units that could not be rented because of the defective state of the house:	$284,200.00
Total	$1,383,508.42

69. There will also be an order that the Builder pay the Owners’ costs of this proceeding, including reserved costs, such costs if not agreed to be assessed by the Registrar in accordance with the Supreme Court Scale.

SENIOR MEMBER R. WALKER