

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D44/2007

**CATCHWORDS**

Contract, defective work, damages.

<b>APPLICANT</b>	Greg Woodward
<b>RESPONDENTS</b>	Kirsten Begley, Michael Davies
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member R. Young
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	2-6, 9, 10 February; 17, 18, 23-25 March; 2 April; 11, 12, 19, 20 May 2009
<b>DATE OF ORDER</b>	20 August 2010
<b>CITATION</b>	Woodward v Begley & Anor (Domestic Building) [2010] VCAT 1378

**ORDER**

- 1 The applicant will pay the respondents \$43,289.22 on the counterclaim.
- 2 **The counterclaim is set down for a hearing at 2.15 p.m. on Thursday, 26 August 2010 at 55 King Street, Melbourne before Senior Member Young, with an estimated duration of 2 hours for the purposes of making any final orders including any orders as to costs.**
- 3 Costs reserved.

**SENIOR MEMBER R.YOUNG**

**APPEARANCES:**

For the Applicant	In person
For the Respondents	Mr D. Pumpa of Counsel

## REASONS

### INTRODUCTION

- 1 This proceeding has had a complex history. This determination only involves the hearing and decision in relation to the respondents' counterclaim. The hearing of the claim proceeded in 2008 and a determination was delivered on 15 April 2008 awarding the applicant builder a sum of money for work done under an agreement between the respondents and the applicant. The only term of the agreement that I was required to determine in the hearing of the claim was that the parties agreed that the applicant would provide his labour at \$270.00 per day.
- 2 The reason that the hearing of the claim and counterclaim was split was that the respondent owners, after being given a number of opportunities, did not have their completed witness statements, regarding their evidence as to their counterclaim, completed prior to the hearing date of 10 April 2008. An order was made on 27 March 2008 by Deputy President Aird that unless the respondents filed their complete witness statements by 7 April 2008, the hearing of the counterclaim would be stayed and the hearing of 10 April 2008 would be confined to the applicant's claim.
- 3 The major allegation in the respondents' counterclaim, as set out in their Further Amended Points of Counterclaim dated 8 May 2009, is that the applicant represented himself to the respondents as a registered and licensed builder and that he undertook the role of a domestic builder under a major domestic building contract he entered into with the respondents to renovate and extend the respondents' existing house at 46-48 Wolseley Parade, Kensington.
- 4 In carrying out those works the respondents allege that he failed to do many aspects of the work in a satisfactory and competent manner so that he breached their contract. These allegations of incomplete and defective works are claimed under various categories. These categories tend to be defined as to whether or not the alleged breaches have been rectified. The first category is defective or incomplete works which have been rectified or completed and which are set out in paragraph 6 of the counterclaim.
- 5 The second category is for reimbursement to the respondents of money paid to the applicant for work done by him, for which work the respondents claim that they should not be liable as the applicant spent this time rectifying his own unsatisfactory work or he spent time in excess of times set out on his works programme to carry out specific tasks; so that this category is in the nature of an overpayment. The allegations for this category of claim are set out in paragraph 7 of the counterclaim. The third category is incomplete works that have not been rectified and the respondents are seeking the estimated costs of carrying out such works. The allegations for this category of claim are set out at paragraph 8 of the counterclaim.

- 6 The respondents also claim that in relation to the work carried out at the subject property there were separate contracts between themselves and the applicant. The first additional contract that the respondents claim is that they agreed with the applicant that he would build the boundary fence between their property and 44 Worcester Street, Kensington for a fixed price of \$5,932.00. The cost of the fence was to be shared equally with the adjoining owner. However, the applicant did not charge the respondents separately for the time he spent on the boundary fence; but, charged for this time within his charges for the renovation and extension contract. He has spent more time building the fence than was allowed for in the estimate and for which he charged the respondents. They now seek, as an overpayment, the difference between what they paid for the fence and the fixed price.
- 7 The respondents also claim that the applicant resided at the Wolseley Parade premises from about 30 September 2005 for a period of approximately 17 weeks and that they had agreed to allow him to do this upon him paying \$140 per week rent. The respondents allege that the applicant has refused or failed to pay the rent due in the sum of \$2,380.
- 8 The applicant in his defence to counterclaim denies entering a contract with the respondents as the builder under a major domestic building contract to carry out all of the renovation and extension works. He alleges that the work was carried out by the owners as an owner builder and he worked for them as a tradesman carpenter at \$270.00 per day. In relation to the allegations of incomplete and defective work, the applicant denies that he carried out any such work; alternatively, he alleges that he left the site at the end of August 2006 and many of the allegations are in respect of incomplete work for which he is not responsible. If there are any defective works, the applicant alleges that it was work done by tradesmen who carried out the work after he left.
- 9 Given that this hearing and the determination is solely in relation to the respondents' counterclaim I will put their evidence first and follow that with the defence of the applicant. The evidence of the items of defective and incomplete work and the estimated costs of rectifying or completing such items of work are set out in the reports of Mr Croucher, Mr R. Paul and Mr Cochrane for the respondents. In relation to the defence of the applicant, he did not call any expert witnesses but relied upon his own evidence to refute the allegations of defective and incomplete work and also to show that the amounts claimed for rectification and completion of work were not fair and reasonable.
- 10 This determination sets out a summary of the evidence of the parties followed by my analysis and findings on each category of allegation, dealing with each allegation in turn. To keep the size of this determination to a minimum and for ease of understanding it, I will not include the evidence for and against each specific allegation of default against the applicant. I will include that evidence when I analyse and consider each allegation. When addressing a specific allegation I will, first, state the

allegation as set out in the counterclaim, followed by the evidence in relation to that allegation and then my analysis, ending with my finding in relation to that allegation. The subparagraph numbers at the end of each specific allegation in the assessment of quantum refers to the subparagraph number of the allegation in the counterclaim.

## **RESPONDENTS' EVIDENCE**

- 11 The first respondent submitted a witness statement of 122 pages comprising 606 paragraphs, with a witness statement in reply of 128 pages and 591 paragraphs. The second respondent, Mr Michael Davies, provided a witness statement of 114 pages and 547 paragraphs. He provided two witness statements in reply, one being received at the Tribunal on 23 December 2008 and the second being received on 14 January 2009; however, these are both 110 pages long with 554 paragraphs and they are a copy of each other. Mr Davies also provided a supplementary witness statement dated 5 March 2009 which was prepared to provide evidence substantiating allegations of incorrect footing installations in the living and meals area. I consider that these witness statement were unnecessarily long and would have benefitted greatly from editing. Also the order of the matters addressed in the witness statements did not follow the set out of the counterclaim. It was a major task taking a significant number of days to correlate the relevant paragraphs in the witness statements with an issue raised in the counterclaim. Further, the experts used different numbering systems and significant time had spent in correlating their reports.
- 12 The respondents called a carpenter, Mr J. Smith, who carried out work on the renovation and extension after the applicant left the site. They also relied on witness statement of Mr J Aldabel, who fabricated the structural steelwork and operates a business named "The Metal Guy Co".
- 13 The three experts that appeared for the applicants also provided a number of reports. The earliest report was prepared by Mr Robert Paul on 6 October 2006 and was headed "2<sup>nd</sup>. Draft Building Inspection Report". Mr Paul does not identify his profession in the report but identifies his profession in the final report as municipal building inspector. The second report filed by Mr Paul which was titled "The 3<sup>rd</sup>. Draft Building Inspection Report" dated 1 June 2007 and the last report filed by Mr Paul on 17 October 2007 is titled "Final Building Inspection Report". During the hearing the initial draft of Mr. Paul's report titled the "1<sup>st</sup>. Draft Building Inspection Report".
- 14 The estimated cost of rectifying the defective works identified by Mr Robert Paul was carried out by Mr Roger Cochrane, quantity surveyor of Roger J. Cochrane and Associates Pty Ltd. Mr Cochrane's first report is dated 6 June 2007 and related to his estimate of the costs of rectifying the defects identified in Mr Paul's third draft report. Mr Cochrane's second report is dated 11 October 2007 and contains the estimated costs of rectifying the defective work identified in what Mr Cochrane entitles the fourth draft report. It was accepted that this report referred to as the fourth draft was in

fact the report headed final report prepared by Mr Paul of 11 October 2007. The last expert called to prepare a report for the applicants was Mr A. Croucher, a building consultant, who prepared two reports, the first being his report of 29 July 2008. He produced a supplementary report on 16 March 2009 in relation to floors not being level in relation to Bedroom 1 and the meals area.

- 15 Rather than being prepared in narrative form, the respondent's witness statement are set out in sections that are delineated by the interaction of the parties in relation to a specific activity; such as pre contract negotiations, first variation agreement terms and conditions, etc.; and, to what the respondents considered to be important under such as headings such as "The Applicant's Role as Builder at the Property" with sub headings of "Roles Performed", "Purchasing of Materials", "Particulars of Defects" etc. The respondents' witness statements are set out in the form of a pleading. This made extracting a continuous narrative with which to assess the respondents' allegations difficult as the witness statements moved forward and back in time and suddenly changed from one subject to another.

#### **Witness Statement of the First Respondent, Kirsten Begley**

- 16 Between the respondents, the first respondent had most to do with the work at the property and the respondents' dealings with the applicant. She says that she and her husband, the second respondent, purchased the subject property at 48 Wolseley Parade, Kensington on 12 April 2003. They wished to move to Melbourne for the second respondents' work. The property was largely derelict at the time of purchase.
- 17 Whilst living in Sydney the first respondent had been introduced to the applicant by a neighbour as the builder who was constructing an attic conversion at the neighbour's adjoining property. The first respondent had a number of conversations with the applicant; in some of which he told her that he was a registered builder in New South Wales.
- 18 The respondents engaged the applicant to rehang the side gate to their Sydney property and also to hang a bathroom door in their house. The first respondent informed the applicant that the respondents would be shifting to Melbourne and they had purchased a house and that it needed extensive renovation. She says the applicant informed her that he had Victorian builder's registration and would move to Melbourne. Further discussions took place between the first respondent and the applicant as to carrying out repair work on the derelict property.
- 19 The respondents at their expense flew the applicant from Sydney to Melbourne to inspect their property. The applicant carried out some patching of the slate roof with tin panels.
- 20 The respondents had already engaged a heritage architect to prepare plans for the renovation and extension of the subject dwelling. The respondents paid for the applicant to fly to Melbourne a second time on 20 December

2003 to meet the architect. The first respondent maintains that the applicant represented himself to the meeting as a registered builder. At the conclusion of the meeting the first respondent says the applicant gave instructions to the respondents as to what works he wanted performed prior to his relocating to Melbourne. This consisted mainly of the removal of plaster walls and ceilings and floorboards and other works.

- 21 At the end of 2003 the respondents relocated to Melbourne. In the following two years the first respondent had many conversations with the applicant in relation to the carrying out of the renovation and extension works to the subject property.
- 22 The applicant requested that the first respondent check with the Building Practitioners' Board of the Building Commission what he needed to do to be registered in Victoria as a domestic builder. She was informed that the applicant's domestic registration had lapsed and that it would be necessary for him to reapply if he was to be the builder noted on the building permit. On 8 April 2005 the first respondent met and engaged a building surveyor, Theo Theodorou, as the registered building surveyor for the work.
- 23 The first respondent says that she and the second respondent always introduced the applicant to tradesmen attending the site or other people as "the Builder" and the applicant never contradicted them. The first respondent says she never heard the applicant refer to himself as a carpenter. The applicant arrived in Melbourne on 14 August 2005 and lodged his application forms for builder registration on 16 August 2005. He commenced work at the property on 17 August 2005, starting with the renovation of the existing house.
- 24 In support of their contention that the parties had agreed that the applicant would be the builder, the first respondent says that she had a number of conversations with the applicant as to carrying out the building work and the respondents paying him his builder's fee, which she suggested would be approximately 10% of the calculated cost clear after tax. This proposal was not proceeded with and the parties agreed that the respondents would pay the applicant \$270 per day. The first respondent says that the applicant had estimated that the renovation extension would take approximately 20 weeks which would give a total builder's fee in the vicinity of \$27,000. Under this arrangement the applicant started work on the property on 17 August 2005.
- 25 The first respondent says that the applicant's fee of \$270 per day was an increase from \$240 per day which had been previously agreed. Later the respondents agreed to a fee of \$270 per day in recognition that at the time of their agreement they considered the applicant would be a fully registered and insured builder on the job with warranty insurance and named on the building permit.
- 26 The payment of \$270 per day to the applicant represented the costs of the applicant per day to the respondents and did not include the cost of any

materials. The first respondent says in her witness statement that the applicant informed her that they should only make payments to him after a stage of the work was completed.

- 27 The first respondent says there were variations to this agreement in late August 2005. The first respondent requested the applicant to provide an all inclusive quote for the respondents to alter the stables into a studio. The applicant provided this quote in early September in the sum of approximately \$111,941.00. The first respondent says that about mid-September 2005 the respondents accepted this quotation for the applicant to construct the stables/studio with a 20 week construction period.
- 28 The first respondent says that on or around 14 September 2005 the applicant received a letter from the Building Commission requesting his insurance details. The applicant then informed the first respondent that he would not be able to obtain insurance as he had just discovered he was bankrupt with a debt of \$25,000 resulting from his wife's financial problems. The applicant refused the respondents' offer to provide him with a loan for him to discharge his bankruptcy. The respondents say that it was only at this time that they became aware that the applicant would not be able to carry out the work as the licensed builder. The first respondent says that the respondents discussed between themselves and agreed to go and get prices from other builders; however, upon being informed the applicant became very angry about this. (No prices from other builders were produced).
- 29 The respondents maintain that the applicant suggested that the respondents become owner builders. The applicant says he had sufficient skill and ability to manage all aspects of the construction. The applicant says that he would provide three quotes for each trade that would be required and select the best ones for the job. The applicant informed the first respondent that his daily rate would remain the same as he would be using the same skill and care as if he was the builder. The first respondent says that it was their impression at all times that the applicant maintained that he possessed the qualifications, knowledge and experience to ensure all works would comply with the building standards, laws and legal requirements and would be carried out in a "proper and workmanlike manner".
- 30 On or about 19 September 2005 the respondents agreed that they would become owner builders and they applied for a building permit on 19 September 2005. The building permit was issued on 3 February 2006 with the respondents as owner builders.
- 31 In the last week of September the respondents decided to change their plans from altering the existing stables to a studio and to renovate and extend the main house. In the first week of October 2005 they requested the applicant to prepare a quote for the renovation and extension of the main house. The applicant provided the quote in late October 2005 with

two costings. The first to do the work to completion was \$274,526.00 and to do the work to the completion of the lockup stage was \$138,392.00. The applicant says that the work on the main house would take him 20 weeks. Later, the first respondent at paragraph 104 says that the applicant estimated that it would take 10 weeks to complete the framing stage from the commencement of work. At the request of the respondents the applicant provided a detailed construction programme which set out each task to be carried out in the renovation and extension of the dwelling and the times to complete each task in a chronological sequence.

- 32 During the works the respondents requested a number of amendments to the works by the applicant as detailed at paragraph 91 of the first respondents' witness statement. The first respondent says that the applicant agreed to carry out these amendments to the plans. The first respondent in the witness statement disagrees with the applicant's points of defence to counterclaim of 28 July 2008 that these directions were given to him orally.
- 33 After setting out that there was no specification or details, other than those on the approved plans, accompanying the planning permit at paragraph 94 of her witness statement, the first respondent says it was the applicant's contractual responsibility to finish the restoration and extension of the existing house and this required him to provide all that was required to be done, how it was to be done and who was to do it.
- 34 The first respondent says that the applicant made changes to the approved plans and specifications without any instructions from them and some of which he did not bring to their attention. Many of these changes gave rise to the current allegations of defective work. The first respondent says that she often raised what she considered to be defective work with the applicant and he informed her that he would fix it up at the end of the job and this led to the generation of a defects list.
- 35 At paragraph 106 the first respondent says that excavation for the footings commenced on 13 February 2006. The mandatory inspection of the footing trenches and the reinforcing steel by the building inspector took place on 16 February 2006. Towards the end of April 2006 the respondents became concerned that the applicant was not achieving sufficient progress on the works and they discussed their concerns with him. From this time the first respondent started to take more attention to the progress of the works. She denies that the applicant was requested to stop work due to a lack of money on behalf of the respondents. She says at paragraph 117 of her witness statement that the applicant stopped work on the first occasion because of a lack of structural steel; which, the first respondent says was due to the applicant's delay in the ordering of the structural steel. Secondly, in the mid to late April 2006 he was working on the boundary fence for approximately 1 week. There were other periods when the applicant was away for approximately a week at a time.

- 36 At paragraph 120 the first respondent says that from August 2005 to February 2006 the applicant took a number of breaks. She alleges he took a week in September 2005, starting in October 2005 there were 7 weeks and 2 weeks in January 2006. All of these absences were prior to the issue of the building permit.
- 37 The second respondent says that the applicant kept getting further behind on the construction programme and his assurances that he would catch up did not materialise. By late May 2006 the respondents came to the conclusion that they should terminate the applicant's service upon completion of the framing stage to be identified by the framing inspection. The framing inspection took place on 22 August 2006 and the notice of inspection identified four failings of the frame to meet the requirements for satisfactory workmanship. The applicant did not attend the next day to rectify these deficiencies. The second respondent had then gathered the applicant's tools and belongings and stacked them together to be removed from the site.
- 38 At paragraph 139 and 140 of the witness statement the first respondent says that the applicant did not attend the property until 30 August 2006 when she informed him that the respondents were terminating his services. Her witness statement is not clear as to what took place in detail between the first respondent and the applicant but it appears that the applicant attended the site on 1 September 2006 to complete or rectify some of the works that were considered defective and unfinished; however he had not completed these by the time the respondents returned home at the end of the working day, other than the leaking flue to the solid fuel heater and the side steps outside the kitchen area. The witness statement does not make any further reference to the applicant being on site or as to when he completed the removal of his materials and tools.
- 39 In September 2007 the respondents learnt that a special condition had been placed on the applicant's New South Wales builder's registration from April 2001 that he was not to undertake any building work requiring home warranty insurance. The first respondent says that the applicant had never made this condition known to either of the respondents.
- 40 The first respondent says that it was the applicant's responsibility to obtain quotation from specialist trades and to select who he considered to be best both in terms of performance and cost. The applicant also selected all materials. The first respondent says that the respondents did as the applicant requested.
- 41 The first respondent says that the applicant advised them when an inspection by the building surveyor was required and that the respondents should contact the building surveyor to make such appointments. The first respondent says that the applicant directly contacted and dealt with the draftsman of the approved plans and also the structural engineer, Andrew Daly.

- 42 In relation to the purchasing of materials she disagreed with the applicant's statement in his defence that the materials were supplied by the respondents. She submits that the applicant purchased the materials himself or instructed the respondents to do so. Where the applicant purchased the materials he supplied receipts to the respondents who would reimburse him. She says that the materials selected by the applicant were paid for by the respondents.
- 43 On occasions the applicant would write out a list of particular materials he required to continue with the construction and give it to the respondents for them to attend the supplier and purchase the necessary materials. On other occasions the applicant would deliver the materials lists to the suppliers. At paragraph 155 the first respondent submits that it was a stated term of their agreement that the applicant determine which materials were required and it was a further stated term that the respondents would pay for all materials.
- 44 To check on the extent of the applicant defective and unsatisfactory work, at the time of termination the second respondent engaged a building inspector, Robert Paul, to report on the defects. The respondents also engaged a further expert to inspect for defects, Mr. A. Croucher, a building consultant.

**Witness statement of Second Respondent, Michael Davies, dated 27 October 2008**

- 45 The second respondent says that he commenced work in Melbourne in 2001 and was living in Sydney. He and his wife, the first respondent, decided to relocate to Melbourne in early 2003 and thereby purchased the subject property at 38 Wolseley Parade, Kensington. From paragraph 5 onwards to approximately paragraph 11 he gives evidence similar to the first respondent, of meeting the applicant via the neighbours. It was the first respondent that advised him the applicant was registered as a builder in Victoria and that he was interested in relocating to Melbourne.
- 46 He gives evidence that after purchasing the property they engaged Geoffrey Woodstock as an architect to advise them on the renovation of the property. At paragraph 12 he says that he and the respondents decided not to proceed with Mr Woodstock as they were not happy with his proposed plans and in late 2004 they approached a draftsman, Mr T. Burns, to prepare plans for them.
- 47 At paragraph 13 he says that during the period between when they first flew the applicant down to Melbourne to inspect the property until he arrived and relocated to Melbourne on 14 August 2005 a number of works were carried out on the property, these included; arranging to have the electricity disconnected, a new tap was installed in the garden by a licensed plumber, installation of a new roof by a licensed roofing contractor and that under the applicant's instruction, the second

respondent removed water damaged plaster on existing walls and reduced the soil beside the house.

- 48 The second respondent says that the planning permit application was for the renovation and extension of the original existing house and the alteration and renovation of the stables into a studio, guest accommodation and the building permit also covered both structures. He gave the similar evidence as the first respondent in relation to the attempts to obtain registration in Victoria for the applicant.
- 49 He says in around 20 August he requested his wife to ask the applicant to prepare a quote for the alteration of the existing stables into a studio. He requested his wife to instruct the applicant to prepare a fully inclusive cost to build the stables as a registered and insured builder on the basis that he would be performing the works. The quotation for the stables/studio was provided in early September 2005.
- 50 He says at paragraph 26 that the applicant confirmed to him that the prepared quotation was an all inclusive cost, with himself as the registered and insured builder with his services at a rate of \$270 per day factored into each area of the quotation. He says that the applicant claimed the cost of preparing quotations in his claim heard in April 2008.
- 51 In early September 2005 the applicant showed the second respondent documents that he had been declared bankrupt and requesting a statement of affairs from him. On the applicant's behalf the second respondent contacted the applicant's trustee in bankruptcy requesting an extension of time on behalf of the applicant. The trustee could not advise of the position of the applicant until a statement of affairs had been provided. An extension of approximately two weeks was granted. In middle September 2005 he was informed by his wife that the applicant could not obtain warranty insurance in Victoria and therefore would not get registration as a domestic builder. He acknowledges that the respondents offered to pay the applicant's debt and have him work it off but the applicant refused this offer. In discussions as to whether the respondents should become owner/builders the second respondent says he informed the applicant that he did not have the time or the expertise to run the project, the applicant stated categorically that if the respondents became owner/builders then the applicant could still perform all of the functions and undertake all of the responsibilities as if he was the registered builder. He says that the applicant informed him it would be much cheaper for the respondents if the respondents became the owner/builders and the applicant ran all aspects of the construction. He says that other builders and tradespeople would likely "rip me off", meaning to overcharge the respondents.
- 52 The second respondent says that the applicant undertook to carry out all of this work as the builder and if he hadn't made this undertaking the second respondent would not have become an owner builder. He says at no time

during the applicant's period of working on the site did he ever give the second respondent any indication that he was not performing the role of builder. The second respondent says he was not required to direct the applicant's work in any way. At paragraph 51 the second respondent sets out in detail the tasks he says indicate that the applicant was performing the role as a builder. The first time the second respondent heard the applicant refer to himself as a carpenter was a statement on the VCAT notice of application that his status was "carpenter".

- 53 He agrees that he requested the first respondent on 3 October 2005 to ask the applicant to provide a quote for the main house extension. The applicant provided this quotation in late October 2005.
- 54 He agrees that he later requested a construction programme from the applicant to show the scheduling of the time over which the works and their description would be carried out. (I understand that to be a description of the elements of the work and the time over which they would be carried out.) At paragraph 88 the second respondent says that the respondents provided the applicant with the approved plans and specifications for the subject property.
- 55 There were some variations to the work from the approved plan; however, the applicant had done this without informing the respondents. The only amendments to the approved plans requested by the respondents were:-
- (a) Construct a window in the western wall of the en suite shower for ventilation;
  - (b) Leave an opening in the southern wall of the landing;
  - (c) Raise the fireplace hearth to seat level from floor level; and,
  - (d) Construct a timber boundary fence on the rear boundary of the property.
- 56 The respondents disagree with the applicant's contention that wherever the work carried out by him diverged from the approved drawings that it was at the oral direction of the respondents.
- 57 The renovation work carried out to the existing dwelling on the ground floor had no plans and specifications. They were only oral instructions given to the applicant by the respondents. The applicant made many construction changes to the approved plans and many of these are now complained of as defective works. The applicant informed the respondents that any defective work would be addressed at the end of the project as in a standard building contract.
- 58 The respondents maintain that it was a term of the agreement that the building works be carried out expeditiously. This was denied by the applicant. The applicant had previously given an estimate of 10 weeks to framing and 20 weeks to finish the extension and renovation of the premises. The applicant held himself out as having significant knowledge

and qualification in building in general. At the second respondent's request the applicant had provided a detailed construction schedule pursuant to the main house extension. The second respondent maintains that the work commenced as denoted as Week 1 on the construction schedule and this work started on 13 February 2006, when the excavation of the footings commenced. The applicant quickly dropped behind in the construction schedule. The second respondent says the only delays were a 10 day period until the structural steel was available from the date of the order and the 5 days it took to construct the boundary fence. When the respondents raised their concerns with the progress of the works with the applicant he assured them that he would catch up to the schedule by working weekends. The applicant failed to be ready for a number of trades at the time at which he had booked them.

- 59 The respondents were also concerned that the cost of materials and labour was exceeding those given in the main house quotation. The applicant reassured both respondents that the main house extension would be completed by August 2006 for a planned function. The second respondent denies the applicant's allegation that he stopped work on two occasions for one month. The only time the applicant stopped work was until the structural steel was delivered after it had been ordered and for the construction of the rear fence.
- 60 From his arrival in August 2005 to February 2006 the applicant worked on the original front house and on items specified in the building permit. During this period he stopped work on three occasions; in late September 2005, for 5 days, in October 2005 for 7 weeks and for 3 weeks on another occasion. He also stopped work for two weeks in January 2006.
- 61 The applicant was usually paid in cash an amount that he requested, so that the amounts were not normally in multiples of \$270. He was also reimbursed for the purchase of materials upon the production of a receipt. The applicant did not provide time sheets but noted his times and deliveries in the site diary, a small purple book.
- 62 As 2006 progressed the applicant slipped further and further behind the construction programme. The respondents sought a meeting with the applicant but he failed to attend scheduled meetings to discuss increasing the rate of progress. By late May 2006 the respondents had grave concerns regard his performance and came to a decision to terminate his services upon completion of frame stage. However, the applicant did not have the frame ready for inspection until towards the end of August 2006. The framing inspection took place on 22 August 2006 and there were a number of outstanding items set down on the inspection report. The applicant failed to attend the site for work on 23 August 2006, in the days thereafter the applicant did not return to work. He removed approximately half his tools and belongings. On or around 10 September he left a final invoice at the property for his services. The applicant came

to the respondents' resident on 16 October 2006 seeking payment of his final invoice.

- 63 The second respondent says that the applicant determined the sequence of work carried out on the property from demolition through to construction.

**Witness Statement of Joshua Smith dated 23 September 2008**

64 Mr Smith says he had been a qualified carpenter for 3 ½ years since completing his apprentice in early 2005. He was engaged from 23 September 2006 to do carpentry work for the respondents at their property. He was paid \$25 per hour cash for his services as a carpenter. He worked for them for approximately 21 days as taken from the diary entries of the first respondent.

65 The respondents told him that the framing stage had been inspected and passed by the building surveyor. However, he identified that there were numerous defects to the frame. In summary these were:-

- (i) A sub floor joist in front of the fireplace was not properly supported;
- (ii) On the first floor all internal and external walls had been erected directly onto the floor trusses without prior installation of the required 19mm particle board flooring;
- (iii) The first floor east west walls had been installed without any floor truss directly underneath them;
- (iv) On the first floor there were no floor trimmers in place at the ends of the floor truss joists for the attachment of the floor boards;
- (v) The opening for the kitchen side door was not plumb and square with the blue board cladding overhanging all sides of the door opening and the door sills and joists required rebating in order for the door sill to be installed flush with the internal floors;
- (vi) The living/dining room French doors, two sets, could not be properly installed as the base brickwork on the external wall was approximately 20mm higher than the sub floor joists, this prevented the installation of the door frames sill without first removing the brickwork. The termite barrier which also performed as the damp proof course was situated on top of the base brickwork; there were also other defects which created problems in the doors installation;
- (vii) The difference in height between the existing floor and the new lower storey floor was too great for the approved two steps between the levels; this was due to a set out error. To rectify the defect he planed the two most southern joists in the extension and slightly extended the floor into the adjacent hall and room on the

original house to achieve the approved two steps. The difference in height between the two levels as shown on the approved plans was 360mm; however, the set out error resulted in a 394mm difference and the maximum permissible rise in two steps is 380mm, as The Building Code of Australia (“BCA”) forbids risers to have a vertical rise in excess of 190mm. Therefore, Mr Smith had to plane 14mm off the two joists.

- (viii) The eastern wall adjacent to the stair between the ground and first floor was incorrectly aligned; to create a straight wall for the installation staircase flush to the wall the misaligned stud wall required graduated packing;
- (ix) There was a defectively installed double joist running between the original house and a new extension adjacent to the stair void, it had been positioned 50mm out of square with the walls either side of it. To rectify this Mr Smith removed the truss joists of incorrect length and replaced them with the truss joists of the correct length;
- (x) Mr Smith says that some newly constructed walls were out of plumb and out of square and that he spent many hours packing and planing the walls, which amount of time he considered far outside normally accepted building tolerances and were in fact defective; he considered that for an extension of this size it normally would have taken approximately 8 hours to pack and plane the walls to plumb for plastering; and, he had spent a total of 20 hours planing and plumbing;
- (xi) It was a similar story for the walls on the upper storey. There were also doors jamming because of being hung on badly plumbed walls and tiling would be fixed to out of square walls.
- (xii) Speed bracing had not been installed at the site and he checked with the first respondent who checked with the draftsman who confirmed that speed bracing was required and he installed this bracing;
- (xii) There was insufficient plywood installed for bracing, as identified by the building surveyor’s comment on the frame inspection report. He rectified these defects. He says that he spent a total of 6 hours installing bracing in order to comply with the approved plans and the frame inspection report.

66 Mr Smith gave the following evidence in cross examination:-

- (a) The first respondent instructed him to make the door sill level with the floor for the French doors in the living/dining area as there was no detail of this on the drawings and they were a non standard door frame.
- (b) he worked at the respondents’ direction.

- (c) he said that the walls were up to 20mm out of plumb;
- (d) he said that at the continuation of the existing eastern wall of the house the new stud wall did not line up with the existing wall of the house; there was a large kink in the wall at the junction of old and new and this was in the middle of the staircase; he agrees that there was a 20mm bow in the existing wall. He said that the brickwork was not quite straight but there was a small vertical bow. The cause of the problem was that the existing and new walls were not in a straight line.
- (e) In relation to the kitchen wall he agreed that it was not a lot of packing but he thought that they reset the wall by moving the bottom of the wall across.

67 Also in cross examination Mr Smith said that in relation to Item 15 in the Paul report on 11 October 2007 it says that this defect has been remedied; whereas, the Croucher report of 19 July 2008 at Item 9 says the wall is out of plumb 15mm over 2 metres and defective, Mr Smith says he could not comment on this. Mr Smith says that he straightened many walls and did not pack them.

68 In cross examination Mr Smith conceded that in the photographs of the walls in the upstairs hall and main bathroom, it did not appear as though much packing had taken place and he couldn't justify the 8 ½ hours claimed for rectifying the walls.

69 Mr Smith cannot recall whether time it took him to build two stud walls to conceal the flue to the heater as if came through the upper storey in the ensuite/robe area has been included in the time he claimed for packing the walls in this vicinity.

70 He agreed in cross examination that he did not keep his own time sheets but he relied on the first respondent's diary for his work time.

#### **Expert Reports of Mr. R. Paul, Building Inspector.**

71 Mr Paul produced three reports, that being, starting with the earliest being:-

*VCAT 1<sup>st</sup> Draft Building Inspection Report;*

*VCAT 2<sup>nd</sup> Draft Building Inspection Report, dated 6 October 2006,*

*VCAT 3<sup>rd</sup> Draft Building Inspection Report, dated 31 June 2007; and,*

*VCAT Final Building Inspection Report dated 10 October 2007.*

72 In the report summary of the Final Report Mr Paul says that of the 19 items originally listed only items 7, 12, 15, 16, 17 and 19 appear to be remedied. He added a number of new defects when compared to the original report, being Items 6.1, 9.1 and 18-25 inclusive. In a major difference from his earlier drafts he submitted in his Final Report a report summary that stated:-

- (a) *That the exterior brickwork to the lower storey would have to be removed because:-*
  - (i) *the damp proof course was not at the correct level;*
  - (ii) *there was inadequate sub floor ventilation;*
  - (iii) *wall insulation was required to be installed;*
  - (iv) *the rear double doors needed to be reinstalled; and*
  - (v) *the flooring in the meals area was not level; and*
- (b) *The upper storey will have to be demolished and rebuilt because:-*
  - (i) *there were walls without floor joists under them;*
  - (ii) *the floor joists had to be realigned;*
  - (iii) *floor joists suitable for strip flooring needed to be reused;*
  - (iv) *the floors on the first floor were not level.*

In cross examination Mr Paul agreed that this report summary set out at page 2 of his final report had been prepared at the request of the respondents.

- 73 Mr Paul did not agree that the damp proof course (“DPC”) complied with the BCA. He disagreed that particleboard could be used to support the gutter as he considered it would rot out. In relation to the upper storey floor joists he considered that the work was unacceptable and he had asked for an engineering certificate but hadn’t received one and he considered that rectification work was needed to be carried out. He disagreed in relation to the kitchen that all of the necessary bearers were in place. He disagreed that the bearer could have a continuous span of 1900, stating that it depends on the size and wood strength.
- 74 Item 9 the clearance between stump and bearer is located in the meals area. In relation to item 9.1, Mr Paul agreed that a carpenter working for a specialised floor laying company would check that the subfloor floor frame was level before commencing to lay the floorboards. To a question that if the floor layer found the floor out of level he would pack the stumps to level the floor joists; Mr Paul replied that he could not really say. In relation to Item 10, Mr Paul said that windows were normally delivered with flashings attached by the manufacturer. In relation to Item 14 he had observed that the draftsman had designed a 450 sump but it had been installed too high; and, consequently, the water level in the sump became too high and was almost flooding the cellar floor.
- 75 In relation to Item 15 which he considered had been remedied, at his final inspection the wall was still the out of plumb wall by more than 5mm over 2 metres to the western kitchen and dining room. The Croucher report says this wall is still 15mm out of plumb over 2 metres. His answer to this

inconsistency was that he considered the Croucher report just repeated the items in his report.

- 76 In relation to Item 23 the large gap between the door and the adjacent brickwork at the rear double doors Mr Paul did not concede that it is possible could install storm moulds to cover the gap. In re-examination Mr Paul says that the flashings necessary for doors and windows should be installed when the doors and windows are installed otherwise it is difficult to do. If it is done after the brickwork the wall ties get in the way.

#### **Expert reports of Mr. R. Cochrane, Quantity Surveyor**

- 77 Mr. Cochrane reports provide estimates of the cost of rectifying the items of alleged defective work identified in the Paul reports.

#### **Reports of Mr. A. Croucher, Building Consultant**

- 78 Mr Croucher provided two reports, the first being a report of 29 July 2008, which comments on the Paul report of 11 October 2007 and the Cochrane of 11 October 2007; as well as drawing attention to what further work Mr Croucher considers defective and he has provided costings for the rectification of those further items. The Supplementary Report of 16 March 2009 is the second Croucher report and it addresses two matters that were raised during the hearing; specifically the costs to rectify the floor of the main bedroom on the first floor so that it is level and to level the floor in the meals area on the ground floor.

- 79 In relation to the western kitchen and dining room wall that Mr Paul had initially noted as being out of plumb and then in his report of 11 October 2007 that it had been rectified; Mr Croucher confirmed that he measured it as being 15mm out of plumb in a 1.8 metre distance and that the tolerance on that measurement would be plus or minus 2mm.

- 80 In the report of 29 July 2008 at the commencement Mr Croucher says that the purpose of his inspection and preparation of the report was to examine the defective items of work as set out in the reports of Mr Paul, to look at possible defective items of works as identified by the respondents and to review the costings for the defective work set out in the Paul reports, as prepared by Cochrane and Associates. He had also been requested by Counsel for the respondents to provide any additional items of defective work that he identified.

- 81 In relation to the applicant, he noted at paragraph 5 of his report that:-

*“According to the owners, it was Mr Woodward’s role to work as a tradesman (primarily carpentry), order materials and to organise and co-ordinate other contractors and subcontractors involved in the construction process”.*

- 82 He also noted that any work over \$5,000 must under the *Domestic Building Contracts Act 1995* be carried out by a registered building practitioner, unless it is exempt under the regulations. As such it would

also mean that under the Act the work would be regarded as a major building domestic contract and the requirements of the Act in terms of writing and notification to the owner and the provision of copies would all apply.

- 83 In the first section of his report he commented on each of the items of defective work identified in the Paul final building inspection report. At paragraph 7 he says that he had reviewed Mr Cochrane's costings and was satisfied the allowances were fair and reasonable for the scope of works. He says that Mr Cochrane says that an allowance for contingencies had not been included consequently an additional 10% should be added to these costs. I note that Mr Cochrane claimed a margin of 35% on the actual cost of the works as assessed by him together with 10% for GST.
- 84 Mr Croucher at paragraph 8 of his first report identified additional items that he considered to be defective. The first of these at subparagraph 8.13 was structural steel work which Mr Croucher says the respondents had advised him of a number of connections and details that were not as per the structural drawings; that some base plates had been altered and connections welded and bolted and not bolted in a number of instances. He considered that welding was a more secure method of connecting steelwork than bolting; however, the respondents had told him that the applicant had used a small domestic welder rather than a powerful commercial welder. He recommended the structural integrity of the connections could have been compromised and should be checked by a structural engineer. He says that the respondents also advised him that post P1 and lintel L2 had not been installed correctly. The owners advised that post P1 had not been carried to full height. Mr Croucher commented that in his opinion the engineering drawings are vague in regard to this detail and he also recommended that this aspect be referred to a structural engineer. He says that as this area had been covered the claims of the respondents could not be verified but that he had costed the work necessary to rectify such defects attachment A of his report.
- 85 He had identified that there was a deficiency in the fire rated wall required on the western external wall of the laundry/pantry adjoining the abutting property. This meant that this wall required rectification. He also identified that there were deficiencies in the articulation joints as they were not in compliance with the BCA.
- 86 He identified further defects as:-
- (i) The lounge room floor was out of level, subparagraph 8.20;
  - (ii) The plaster ceiling in bedroom 2 of the existing home has not been back blocked, subparagraph 8.21;
  - (iii) The locking pins for the dead bolts to the windows in the front of the house have been defectively installed and require rectification for security purposes, subparagraph 8.22;

(iv) The concrete sill of the box bay window in the passageway of the existing residence was cast out of level and as a consequence the butt jointed glass to the window is out of plumb, subparagraph 8.23.

- 87 In cross examination he said that he considered that the cellar backfill was crushed rock with a lot of very fine particles; he agreed that it did not have bound lumps. He understands fines as soil particles. In re-examination Mr Croucher submitted that the fines in the cellar backfill would wash into the agricultural drain and block it.
- 88 Mr Croucher was of the opinion that the permit issued to the respondents as owner builders was issued incorrectly as he considered that the applicant by co-ordinating two or more trades and ordering materials was acting as a builder in his own right under the *Domestic Building Contracts Act*. This situation was explained to him by the respondents.
- 89 Mr Croucher says that if you were a competent floor layer who finds the floor levels (of the subfloor frame, i.e. the plane of the top surface of the floor joists) are out of level by more than 10mm across the room, you would stop work and you arranged for the bricklayer to rectify to make it within the allowable tolerance; as he considers the bricklayer would have to adjust the height of the brick piers. He says that if, as a tradesman, you are ever going to build on someone else's work you always check before starting that the work is level. He says that if the brickwork had been constructed prior to the windows being installed it was difficult to get the flashings in and get a proper fix. In relation to the lack of fire rating this was over an area slightly less than 300mm vertically. He was of the opinion that the whole wall had to be demolished and rebuilt.

### **The Applicant's evidence**

- 90 The applicant was the only witness for his case. He had previously served and relied upon a witness statement of September 2008, a witness statement in reply to the respondents' witness statements of late 2008 and a supplementary witness statement of 20 March 2009. I will give a summary of the evidence from those witness statements.
- 91 The applicant is a carpenter and joiner of many decades experience. He agreed he undertook work for the respondents in Sydney. He worked principally in New South Wales up until 2005 and he had let his Victorian building registration lapse. He says that he had told the second respondent of this fact and the second respondent had responded that the respondents would be owner builders. He relocated to Melbourne in August 2005. He disagrees that he informed the applicants that he was a registered building practitioner in Victoria.
- 92 It was agreed between the applicant and the respondents that he would undertake the carpentry work for the sum of \$270 per day and he started work almost immediately upon arriving in Melbourne. The existing house was constructed on bluestone footings and wooden stumps with solid

masonry walls which were rendered internally, a slate roof, the ceilings were lathe and plaster and the floors were timber.

- 93 When he arrived the respondents had already carried out some demolition work; for example, the removal of the ceiling to the downstairs hall, removal of render to the walls in the downstairs hall, the replacement of the existing roof slate with a new slate, etc. The front of the house is still in an old and dilapidated condition.
- 94 Upon the issue of the building permit the respondents provided the applicant with a set of approved plans prepared by their consultant engineer and architect. The applicant says that he undertook the work in accordance with the approved plans and where they were deficient as to details or there were omissions he carried out the work as variations. He says that the respondents liaised with all the authorities necessary for approvals.
- 95 In giving oral evidence as he went through his report the applicant says that he was not really consulted in regards to the carrying out of the works. He was just working there as a carpenter. He disagrees that he produced quotations to do the building work at the respondents' request. What he produced were estimates at the respondents' request. He did do the set out for the footings and the new brickwork. He did provide the construction programme.
- 96 Various subcontractors were engaged to do the work. He never agreed to do the work on the rear stables/studio. The respondents had arranged for a sewer connection to the stables/studio and he had nothing to do with this work. He also had no dealings with the electrician. He says that for the electrical, plumbing, timber truss and structural steel work the respondents obtained quotes and directly engaged the tradesmen.
- 97 The applicant says that he prepared the shop drawings for the structural steel fabrication, he prepared the plans for the layout of water, gas, sewerage and stormwater drains, he provided a slab designed for the fireplace, the Bill sheets and the estimate of costs for the works for a total fee of \$9,850.00; this amount was dealt with in the earlier hearing in relation to the applicant's claim.
- 98 The applicant says that the respondents instructed him on a number of occasions to cease work as they had insufficient money to pay his wages, the longest being 3 weeks in March 2006. He says the respondents failed to keep up with all of their payments. However, he kept working because he liked and trusted the respondents and they kept reassuring him that money was coming. In August 2006 the first respondent advised him that the building works were a distraction to her university studies and she wished to cease work until the completion of her studies, so he stopped work.
- 99 He disagrees with the respondents and submits that he never agreed to nor was requested to do any work on the stables/studio. There were some discussions but it was never agreed that he do this work. He disagrees that he supervised demolition.

- 100 In relation to the alleged boundary fencing contract he agrees that he constructed the fence. He says that he was asked to provide an estimate of the cost of the boundary fence, including materials. It was his understanding that the adjoining neighbour paid half the sum of the estimate to the respondents as the neighbour's consideration for the fence.
- 101 He disagrees that the renovation and extension work was to be done expeditiously under the contract as he submits that he stopped work on several occasions at the request of the respondents and this is indicated by the days he worked. In his oral evidence in chief the applicant says that when he came down to Melbourne in August 2005 he found that his bank account was frozen and he could not withdraw any money. He says that the first respondent organised the trades and when they were to turn up. The trades asked him questions and he responded if he could.
- 102 The work proceeded and he says there were many changes as set out in the last page of his witness statements, which sets out 29 variations. The largest of these in terms of time was for Variation No. 5, which involved 3 changes to the skylight in the laundry, which he submits took 7 days. In total he submits that the variations took an additional 48 days. He submitted there were many omissions and lack of detail on the approved drawings.
- 103 In cross examination he says that the respondents had flown him to Melbourne as they had told him of the tarpaulin over the holes in the roof and they requested him to check it out. He agreed that he did take off the tarp and repair some of the slates to the roof. He had no answer to the question that such work was not carpentry work. He disagreed that he was the builder on the job. He disagreed that he gave people advice on matters that were beyond carpentry work. To the question that he had told the first respondent that he had worked as a registered builder he says that this was only in general conversation. He disagreed that he told the first respondent that he was registered as a domestic builder in Victoria. He disagreed that he was interested in returning to Melbourne.
- 104 In cross examination in response to a letter produced by the first applicant in which Sydney friends refer to the applicant as a licensed builder the applicant submitted that all the work that he did for those friends was in cases where they were owner builders. The applicant says that he only did one attic roof conversion for these friends; although he had done another one for other people who had lived close to them.
- 105 The applicant agrees that he did not limit himself to carpentry work only on the work he did on the subject property. He says he did more work than solely carpentry in relation to other trades. The applicant denies that he told the respondents that he was licensed as a builder in New South Wales and Victoria.
- 106 The applicant denies that he gave specific directions to start the renovation works by the demolition of the internal finishes of the existing house. He says that his appraisal when he came to Melbourne was to decide whether

the house could be renovated and to give general design information as to how that could be done, but he did not give a specific list of work. When requested to look at the specific tasks set out in paragraph 22 of the first respondent's witness statement the applicant says that at the time he moved to Melbourne the first task of stripping the plaster off the walls of the existing house back to bare brickwork was not done and neither was the second task of removing the upstairs plaster ceilings. The applicant says that the first time he was flown down to Melbourne was mainly to assess the condition of the stables and to see whether they could be saved and renovated.

- 107 The applicant disagrees that he had many discussions with the first respondent over 2004 and 2005, but there were a number of discussions. The applicant agrees when he arrived in Melbourne to start work on the renovation he had a discussion with the respondents regarding him becoming a registered builder in Victoria to do the work. He started work after he had come down by cleaning and removing rubbish from under the building.
- 108 To the question that he applied for registration as a domestic builder so he could be a builder for this project he responded not necessarily if he was registered as a builder then he could expect a schedule of works with a contract document and a stated price.
- 109 The applicant denied that he had a discussion with the respondents in relation to them providing funds so that he could satisfy the debt for which he was declared bankrupt. On 11 October 2006 the Building Commission refused his application for registration as a domestic building insurer as according to the applicant he could not get domestic building insurance because of his bankruptcy. The applicant denies that he assured the respondents that he could do the building works. He says that he informed them that if they wanted the applicant as the contractor then he would need a contract; either he ran the job or he worked for whoever did. He disagreed that he could be the contractor without registration. He was ambivalent as to whether he was involved in the selection of materials. He agreed that at times he did prepare timber orders.
- 110 The applicant agreed that the builder is the person who receives the invoices for materials delivered and that the invoice from Julius Plant Hire was made out to the applicant. The applicant agreed with this but says that the previous orders notes from Julius Plant Hire were addressed to the first respondent and that this was not an invoice but only a site document regarding times. The customer signature on this document is the first respondent's.
- 111 The Able truss quote cited the applicant as the customer; the applicant responded that he had dropped the drawings of the truss order off to the quoting truss manufacturer. The applicant agreed that he ordered the first floor trusses 290mm deep instead of the truss depth of 250mm deep as

shown on the approved drawing No. S3, November 2005. The reason the applicant gave was that it enabled him to make the ceiling flush with the underside of the universal beam. To the allegation that he had not allowed for double trusses under each wall, where there was a fitted floor in accordance with the requirements of page 10 of the "*Pryda Floor Truss Systems Guide*", the applicant responded that he had done it in accordance with the requirements of approved drawing S3 and that was all of the trusses that had arrived on site.

- 112 The applicant agreed that the truss layout plan that came with the delivery of the trusses being drawing Job Ref: L11435, page 1 of 1 specified that the flooring was to be 19mm particle board. The applicant also agreed he did not provide trusses underneath walls. Nor did he provide supplementary ledger plates; his response was that is for the respondents to do.
- 113 The applicant denied that he took the role and responsibility of the builder. He agreed he did roofing work which requires a qualified plumber in Victoria; but the applicant says that under the building regulations in New South Wales a carpenter could do this roofing work. In relation to the allegation that the applicant had forgotten to order the windows at the appropriate time his response was no, it was the first respondent's responsibility to order the windows.
- 114 The applicant denies that he took on the responsibility of obtaining the quotations from the other tradesmen. He says that he had nothing to do with the electrician who was solely under the control of the first respondent. Also, when other trades were attending to inspect the works to draw up quotations the first respondent was also present. The applicant says that the first respondent selected the bricklayer. The applicant agrees he did the set out the line for the bricklayers. The applicant has been told that the height difference between the existing floor and the new floor at the hallway junction of the old and the new was not 360mm and he considers that the existing hallway was probably too low. The applicant said that he had fixed the new lower floor level from the dining room door rather than the hallway as this allowed the beams across the doorstep of the dining room and the hallway to be raised and provide flexibility.
- 115 In relation to the problems with the concrete slab at the rear of the property which forms the floor of the verandah, the applicant says that the problems that existed on drawing No.S1 were discussed between the first respondent and the building surveyor and he was informed of the changes. The applicant says it was not possible to set out the design of this slab as shown on drawing No. S1 in relation to the F72 mesh as there was no support for the southern end of the slab, that is the edge of the slab adjoining the existing building. The applicant denies that he changed the height of the slab and he says the change in the height of the slab was due to the first respondent. He says there were two reasons why he wouldn't change it. Firstly, the change was aesthetic and not something he would

do; and, secondly, he wouldn't have changed the design as shown on the drawing unless he was given instructions.

- 116 In relation to the alleged fence agreement, the applicant agreed that he provided an estimate and that the neighbour would pay half. In response to a question that this would require a fixed price for the fence he disagreed submitting that the neighbour required an estimate and a sketch. He says a final price could not be given at that stage due to the poor state of the existing fence.
- 117 The applicant agreed that he wrote a letter to the Worksafe inspector on 21 September 2007 pointing out to the inspector that the work he had done to date had been inspected by Robert Paul in October 2006 before the floor was laid and that Mr Paul had advised that the trusses were not designed for strip footing. In effect the applicant said he was complaining that this defect had not been rectified before strip footing was put down.

### **ANALYSIS: FIRST ISSUE**

- 118 The major issue in relation to the applicant's liability is whether, under his agreement with the respondents the applicant acted as the "builder" on the project; that is, in the normal role of a builder, who has the sole contractual obligation to the respondents, who engaged him, to produce a finished product that is in accordance with the approved plans, and specification if any, and such work has been carried in compliance with the building regulations and is work of a satisfactory standard. In response, the applicant says that he acted only as a tradesman on the job, as a carpenter. Under the principles of the law of contract, the question of what was the applicant's role in fact is an objective one: *Taylor v Johnson* (1983) 151 CLR 422; it does not depend on the subjective intentions of the parties; The majority observed at page 428:

*"The law is not concerned with the intentions of the parties but with the outward manifestations of these intentions."*

Therefore, it is necessary to look at the facts pertaining to the parties interactions as the contract was set up and that the external factors that influenced those interactions; to ascertain objectively what is the nature and the terms of the agreement between the parties.

- 119 The respondents submitted that the applicant was the builder on the basis:-
- (a) that at their request he had provided them with a firm and fixed price quotation for the renovation of the stables to a guest room or studio;
  - (b) that at their request he had given them a firm quotation for a total price for the renovation of the existing house and its extension according to prepared plans;
  - (c) that he had informed them from the start of their acquaintance with them that he was a licensed builder in Victoria;

- (d) that he wished to relocate from Sydney to Victoria and to carry out the renovation for them would enable him to do this;
- (e) that he had total control of the site as evidenced by:-
  - (i) materials being ordered in his name;
  - (ii) that the applicant sourced tradesmen, arranged to obtain quotations from them and to engage them;
  - (iii) he prepared materials lists for the respondents to take to suppliers and have satisfied;
  - (iv) that there were invoices for works carried out for materials delivered to the site in his name e.g. by Julius Plant Hire;
  - (v) that he controlled and ordered the progress of works including instructions to other trades.

And, there was an agreement between the respondents and the applicant for him to take on the role of builder as evidenced by their agreement, in that, first, he would renovate the stables/studio; and, secondly, as a variation to that contract that he agreed with them to carry out the renovation and extension of the existing house. That he agreed to undertake to be the builder on the renovation of the stable/studio prior to the respondents becoming aware that he was not registered in Victoria as a domestic builder.

- 120 The respondents submitted that these facts showed on an objective assessment the applicant had agreed with the respondents to undertake the role of builder on the site for the fixed price as set out in the quotation for the stables/studio and the renovation extension of the existing house; and, thereby, undertook to produce the result of a properly constructed building in accordance with the approved plans and specifications.
- 121 On the other hand the applicant submitted that there was no such agreement and that the agreement was that he would carry out carpentry work for the respondents at the rate of \$270 per day that was worked. He further submitted that the pricing he produced for the conversion of the stables to a studio and for the house renovation and extension were costs of labour and materials only. There were no final drawings of either the stables or the existing house renovation and extension at the time he prepared the estimates. Also, there were no services drawings e.g. electrical, plumbing, etc available; therefore, the estimates could only be a rough estimates. He submits that the evidence of the respondents' expert witnesses showed his estimates could not be quotations as the experts' estimates for rectification costs all contained preliminaries e.g. site supervision, together with contingency allowances for the builder's margin for profit and risk and also GST.

- 122 The applicant submits that the works done prior to his arrival on site, that is the demolition works, were done by the respondents at their own instigation and he did not have any involvement in this aspect of the work.
- 123 He denies that he selected materials for the project, he submits that the materials were shown on the approved drawings. He submitted that he worked in accordance with the approved drawings unless differently instructed by the respondents. All other trades required alterations. The applicant maintained in his evidence that he never told the respondents that he was currently registered as a domestic builder in Victoria.
- 124 Apart from the relevant points made by each of the parties I think it is also relevant to the consideration of this question are the following factors:-
- (a) there were never any plans produced that showed the works involved in renovating the existing stables to a guest room/studio;
  - (b) the applicant says that he never undertook any work on the stables/studio and this was not contradicted by the respondents;
  - (c) the respondents applied for consent to act as owner/builders;
  - (d) the respondents applied for a building permit as owner/builders, the application being filled out by the first respondent;
  - (e) the approved drawings were prepared by Mr Trevor Burns, draftsman, engaged by the respondents;
  - (f) the respondents were the owner builders on the building permit;
  - (g) all of the tradesmen working on the project were paid by the respondents;
  - (h) the material suppliers were paid by the respondents;
  - (i) both the applicant and the respondents sourced and arranged for different tradesman to give quotations
  - (k) the applicant agreed that he had set out the works for the brickwork, the bricklayer's lines – although he disagreed that he set the position of the damp proof course;
    - (l) if the applicant was the domestic builder no domestic building insurance was provided as required by the *Building Act 1993*;
    - (m) no major domestic building contract was prepared as required by the *Domestic Building Contracts Act 1995*;
    - (n) the applicant was bankrupt, which meant he would not be able to get any credit to finance the works as a normal builder would;
    - (o) the respondents engaged the building surveyor and the first respondent arranged the building surveyor's inspections and attended inspections and the inspection records were noted as being given to the first respondent;

- (p) there is a note in the first respondent's diary of 19 August 2005 which says "Greg \$270/day";
- (q) there were no other express terms as to the contract between the applicant and the respondent, there was for example no process for termination;
- (r) the first respondents submitted that there was a variation to the agreement between them in that after the applicants bank account was frozen due to his bankruptcy the respondents agreed to pay his fees when the applicant requested it, and to pay in cash;
- (s) in cross examination in answer to the question by the applicant that the jobs he undertook were equivalent to those of a site supervisor/foreman, the first respondent agreed that if this was correct;
- (t) the respondents did not negotiate the contract for the renovation and extension of the existing house until early October 2005 and finalise it in late October 2005 and this is before any detailed drawings were available as to the house renovation and after their knowledge that the applicant was bankrupt; and, as such, the respondents knew that the applicant had no likelihood of getting registration as a domestic builder;
- (u) the respondents, especially the first respondent, spent a lot of time checking on the quality of the applicants work and his rate of progress;
- (v) the interest shown and times spent inspecting the work and watching progress, by the first respondent particularly, was much greater than one would anticipate if the applicant was the major domestic builder. An experienced builder would have regarded the first respondent's constant presence on the site and questions as to progress as an interference with his access to the site, and potentially a breach of the building contract;
- (w) the respondents behaviour is more indicative of owner/builders with a lack of knowledge but keen to understand and watching carefully what their tradesmen were doing;
- (x) the first respondent in cross-examination agreed that the other tradesmen on the site, or who were employed on the project later, such as Joshua Smith, placed orders for materials and purchased materials for which they were reimbursed;
- (y) the applicant said in his evidence that he would not have carried out the work as the builder without a fixed price and a written contract, but that he could not do so without registration.

125 Taking all of the above points into account I consider that the applicant did not agree to be the builder as for the renovation initially of the stables.

There were no plans or proposals upon which a contract could be based. It would have been financially foolish for the respondents to enter into such a contract because if they bound themselves on without any proper scope of work, when they attempted to delete that work the applicant could have refused and sought damages for loss of profit and costs already incurred. I do not accept that the respondents entered into a binding contract with the applicant as a major domestic builder for the renovation of the stables/studio.

- 126 The applicant's estimate of costs was approximately \$275,000 for the renovation of the existing house, with \$130,000 if this was to lock-up only. If the applicant was the builder and was to be paid in stages, he had no finance with which to fund the carrying out of the works until he could complete a stage and receive payment for it. Secondly, the estimates he prepared contain no allowance for fittings, e.g. stoves, refrigerators etc.; there are no allowances for contingencies, such as prime cost items and provisional of sums and there is no allowance for profit. This would mean that if these were to be regarded as fixed prices the builder would certainly lose a substantial amount of money on the contracts. The first respondent gave evidence that from his daily fee the respondents had estimated that the applicant earnings would total what was approximately the builder's margin if the applicant completed all of the work. I do not consider this is a proper characterisation of the respondents' payments to the applicant. All parties agree that the applicant consistently worked on the site carrying out mainly carpentry work but also tasks involving other trades, e.g. welding, roofing, etc. The applicant's daily fee was for physical work. The builder's margin is a fee to the builder for undertaking the risk of building the house and to provide the builder with a profit for doing so; it has no relationship to physical work. If the respondents wished to provide the applicant with the builder's margin they would have to have agreed in the terms of their contract to pay the applicant their estimated sum of the builder's margin on top of his daily fees for physical work. I accept that their estimate of the builder's margin of approximately \$27,000.00, around 10% of the estimated cost, is correct.
- 127 Other points that I consider bear upon the finding of that the applicant is not the builder for the house renovation and extension are:-
- (a) the respondents were aware that the applicant was bankrupt prior to engaging him to carry out the work on the existing house; so that they would be aware that he did not have the resources or the necessary qualifications to be able to undertake the works as the builder;
  - (b) the estimates given by the applicant could not be regarded as binding as there were no detailed plans available for him to cost at the time the estimates were prepared;

- (c) after they were aware that the applicant was bankrupt the respondent's made application to the building surveyor to carry the work out as owner/builders.

128 Viewed objectively, I consider that the intentions of the parties on forming the contract was not that the applicant would act as the builder with overall responsibility for the job. Rather, I consider that the applicant's role as agreed between the parties was that he was a carpenter/foreman on the site who worked on the project as a carpenter and also assisted the owner/builders in the carrying out the work and dealing with other trades and suppliers. This was acknowledged in the report of Mr Croucher where he says in his introduction, the second paragraph on page 2 that:-

*“According to the owners, it was Mr Woodward's role to work as a tradesman (primarily carpentry), order materials and organise and co-ordinate other contractors and sub-contractors involved in the construction process”.*

129 To me this does not indicate that the respondents considered that the applicant's role gave him complete control of the site of the works; it acknowledges that there was someone in control of the applicant and that was the respondents as owner/builders. Thus under the arrangement entered into by the parties the applicant could not act as a builder in sole charge of the works.

130 That being said, this means that the applicant is responsible to produce satisfactory work in accordance with the approved drawings for the carpentry work which he undertook. Secondly, I consider that where the applicant undertook work that was not carpentry but work of another trade, for example, roofing, setting out, etc., then he held himself out as having the skill to do that work and he is under an obligation to carry it out satisfactorily. Where any of this work is established to have been defectively carried out then the applicant will be responsible for the rectification of that work.

131 Given my finding as to the applicant's control, it follows that this means that the contract between the applicant and the respondents was that he would work on a per day basis for a cash consideration of \$270.00. He did not agree to produce a final result, this was just a cost contract, not cost plus as there was no provision for profit; with the parties anticipating that the applicant would work through in his carpentry role until the completion of the renovation in accordance with the approved drawings. However, this did not occur, it was agreed between the parties that the applicant left the site in August 2008. The reason being disputed, the respondents maintaining that they terminated his engagement with them because of lack of progress and the applicant submitting that the first respondent stopped the work so that she could concentrate on her university studies.

132 In relation to the evidence from both sides, I don't significantly prefer the evidence of either of the parties over the other; I consider that, as is natural, both of the parties exaggerated those aspects and points that they consider benefited the positions they took and they denied those aspects that benefitted the other party's position. My decision as to the agreement between the parties is based largely on the circumstances surrounding the formation of the agreement and not on the parties specific assertions as to what they considered were the terms of the contract. As observed by the Palmer J. in *Merrag Pty. Ltd. (in liquidation) & Anor. v Khoury & Anor.* [2009] NSWSC 915 at paragraph [31] when assessing a witness's credibility:-

*"It is sufficient at this point to say that I have come to the conclusion that I am unable to rely upon the evidence of Michael unless it is inherently probable in the light of all of the circumstances or is corroborated by other reliable evidence."*

Given the salient points as set out from both sides and which I myself considered relevant, I think it is obvious that objectively there is any way that the parties could have agreed that the applicant was to be the builder, as the builder is commonly understood in domestic building parlance under the *Domestic Building Contracts Act 1995*. I consider that the parties agreement was that the applicant would act as a carpenter on the project, providing advice to the respondents when requested. Given the degree of involvement of the respondents in the work, I consider that they controlled the project both administratively and financially. I accept that they took the applicant's advice at times; and, I consider where that advice resulted in defective work the applicant should be responsible for its rectification.

## **QUANTUM GENERAL**

133 The respondents produced Further Amended Points of Counterclaim, dated 8 May 2009, which added further claims for rectification of defective works at paragraph 6 and 8. Given the difficulty in correlating the items of alleged defective work between the different expert reports of Paul and Croucher with the witness statements of the respondents, I informed the parties in the assessment of specific allegations of defective work and the cost of rectification I would be limiting it to matters that were raised in the further amended points of counterclaim. In other words, it meant I would not search through the expert reports, or the respondents witness statements, to ascertain if there were any missed allegations and to decide upon them. To this extent, as has been evident from the evidence of Mr Croucher, there are a significant number of allegations of defective work that rest on the instructions of the respondents.

134 I intend therefore to address the allegations of items of defective work in the order in which they appear in the Further Amended Points of Counterclaim starting with paragraph 6. First, I will set out the allegation as it is stated in the counterclaim; second, the evidence of the parties and the experts in

relation to that allegation. Third is my assessment as to, first, whether I consider the allegation of defective work is made out; and, if I accept that it is, secondly, what is the fair and reasonable cost of rectifying that defective work taking into account the principles set out in *Bellgrove v Eldridge* [1954] HCA 36.

- 135 As a general observation as the applicant did not undertake to complete the works and he was terminated by the respondents; therefore, he can not be liable for works that are in effect incomplete and not defective. There is a qualification to the previous statement, and that is the applicant can still be liable for defective work if the manner in which he carried out the work meant that the later carrying out of incomplete work was made more difficult and costly. An example of this is flashings to windows and doors. Normally windows and door frames are installed prior to the brickwork on a brick veneer home and the carpenters fix the flashings to the frame, all of the experts and the applicant agreed that it was much more difficult and took more time to fix the flashings if the brickwork had already been erected; for a window to fix the sill flashing it is often necessary to remove and replace the sill bricks.
- 136 Mr Croucher in his report said that he had reviewed Mr Cochrane's costings, who had informed him that the builders margin had been built into his work rates and I am unaware of the percentage of this allowance; however, Mr Croucher considered the costings fair and reasonable. He noted however, that Mr Cochrane's costings did not contain a contingency allowance of 10% and he recommended that this contingency be added to Mr Cochrane's costing. Mr Croucher in his costings used a builder's margin of 35% and I consider this is reasonable. I do not consider that a contingency rate of 10% on top of the builder's margin should apply. In normal building contracts for a fixed price contract, 5 to 10% of the contract sum is allowed as a contingency sum in case unforeseen events occur; however, these are unlikely and the normal expectation in the administration of such a contract is that this contingency will not be expended. I do not see that it is relevant to the costing of rectification works where the builder's margin is well in excess of the builder's margin in normal residential construction. I will not allow a contingency sum of 10% on the estimates of rectification costs. The rates and margins used in the costing is predicated on the rectification work being undertaken as one or a small number of rectification contracts and the costings do not reflect the cost of rectifying each item of defective work separately.

#### **QUANTUM – PARAGRAPH 6: RECTIFIED WORKS**

- 137 I will start with the items sought in paragraph 6 of the Further Amended Points of Counterclaim of 8 May 2009, being claims for money expended in rectifying the applicant's defective work. The references to subparagraphs at the end of each allegation are a reference the appropriate subparagraph in the Further Amended Points of Counterclaim.

- 138 *Install reinforcing to joists in southern kitchen to allow for missing concrete stumps at the cost of \$50 for labour only, excluding materials: subparagraph 6(a);*

The respondents allege that the floor in the southern area of the kitchen was excessively bouncy, due to the fact that the applicant had installed an 800mm concrete stump under the laundry door jamb that was founded on or near the cellar backfilled material and appears to have settled. The applicant in his witness statement at paragraph 16(iv) submitted that the allegation is that there was a missing stump in the kitchen. I consider that the applicant is referring to stumps that he built on the north side of the kitchen area. This allegation involves the southern area of the kitchen to the south of the cellar. Secondly, in his witness statement in reply to this allegation he submits that the installation of reinforcing to the joists in this area in the southern kitchen, by the addition of a timber bearer was unnecessary as the bearers were not over-spanned in this area which would lead to excessive floor movement. The applicant agreed that these bearers were spanning more than 1200mm; however, this was acceptable under approved plan No. A0 notes, which allow bearers to span 1900mm provided they are not supporting load bearing walls, in which case the span is limited to 1200mm. The applicant says that the bearers in this area did not have any load bearing walls located upon them. However, the applicant does not respond to the allegation that the stump he installed under the laundry door could have been founded on; or, so adjacent to the cellar backfill, which from approved plans Nos. A1 and S1, is relatively close to the laundry door, such that this stump installed by the applicant may have settled, resulting in the bounce in the bearers. I accept that there was unsatisfactory bounce in the kitchen floor in this area and that settlement of the stump installed by the applicant is the most likely cause. I consider the work is defective and I will allow the rectification sum of \$50 as sought in the counterclaim.

- 139 *Installation of packing to stumps in the living/meals area at a cost of \$270 labour only, excluding materials: subparagraph 6 (b).*

This was work carried out by the second respondent over a whole day and he seeks the same rate of payment as the respondents were paying the applicant. The respondents allege that the floors in the living/meals area moved excessively, i.e. bounced, due to the fact that the bearers were not sitting on the stumps. The applicant's answer to this was that when he left the site no packing was required and this could have occurred due to shrinkage or bowing of the timbers comprising the subfloor frame. He also says in evidence that it could be alleviated by cutting the bearer over the stump. I accept that this work was carried out by the second respondent and that he was rectifying a defect. However, because of the floor in this area is still not level and in a different allegation under paragraph 8 of the counterclaim, dealt with below, the respondents now seek that all of the floor in the meals area be removed, the subfloor frame, stumps and footings

be rectified so that it is level and the floor replaced so that it is satisfactorily level. Therefore, this work did not rectify the problem and therefore cannot be allowed.

- 140 *Set out for renderers on wall adjacent to the staircase for additional thickness of render to allow installation of the staircase at a cost of \$100 for labour only: subparagraph 6(c).*

This allegation arises from the fact the respondents allege that the applicant installed the P3 steel column out of alignment with the original house wall, such that the eastern timber frame wall of the new extension projecting on the existing eastern wall is out of alignment with the existing eastern wall by 20mm over a 2 metre length at the junction of the existing and the new wall. Once this was rectified it resulted in a gap of approximately 30mm between the finished concave wall and the stair treads in the centre of the staircase. The applicant denied that there was a gap and says that the difference was due to a bow in the wall. I accept the evidence of the respondents in this regard as from the photos and the inspection of the site, I could understand the slight kink in the wall at the junction of the walls would result in an apparent bow and this would be obvious when the staircase was installed beside the junction. The applicant agrees that he set out the alignment of the new wall when he did the set out for the footings. Therefore, I allow the claim and I allow it in the sum of \$100.

- 141 *Rectify incorrectly installed damp proof course and termite barrier in kitchen deck at a cost of \$400 for labour only, excluding materials: subparagraph 6(d).*

The respondents submit that the location of the DPC was directed by the applicant. The location of the DPC acted to trap water under the dwelling instead of keeping water outside the dwelling, as set out in the first respondents witness statement at paragraph 538; which explains the arrangement kitchen sub-floor timbers in order that they drain stormwater from the door sills. The applicant responded that he did not set the level of the DPC and that the reason for the water running onto the kitchen sub-floor timbers was the lack of sill flashing to the sliding bi-fold doors between the kitchen and the kitchen deck. The respondents submitted that the rectifying carpenter, who was also the floor layer, Mr Newcombe, spent a day removing the defective DPC and the unstable brickwork installed by the applicant in an attempt by the applicant to rectify this problem. The applicant's response was that the water damage was being caused by a lack of sill flashing and the location of the DPC was not the cause of the water penetration. The applicant gave evidence that he set the line for the bricklayers to lay to. He also gave evidence that where tradesmen requested information or advice he helped them if he could. So that I consider that it is more likely than not that the bricklayers requested the applicant's advice as he was setting their line and he told them at which brick course to position the DPC; and, that is the position it is today. I accept that this position is incorrect and not in accordance with the

requirements of the BCA. I consider that the applicant is responsible for the position of the DPC and I will allow the claim for one days labour for Mr. Newcombe, in the sum of \$400.00.

- 142 *Installation of trimmers along wall edges for floor installation where floor trusses were missing at a cost of \$125 for labour only, excluding materials: subparagraph 6(e).*

The respondents allege that the floor trusses ordered by the applicant and used for the first floor required particleboard sheet flooring; however, they had wanted floorboards and the installation of the floorboards meant that trimmers had to be installed along wall edges to allow the floorboards to be supported at those locations. The applicant submitted that these were the only trusses that were supplied, he did not address the requirement that where these trusses are used the flooring must be particleboard. The truss layout plan that came with the delivery of the trusses has a note which states that particleboard flooring shall be used. I accept that the applicant made an error in the order and that it is defective work and that now trimmers have to be installed to satisfactorily install the floorboards. The applicant is responsible for the installation of the trimmers. The applicant in his witness statement in reply says that he installed the trimmers. I do not accept the applicant's evidence in this regard. I prefer the evidence of Mr J. Smith that he installed the trimmers. I allow the cost of rectification in the sum claimed of \$125.

- 143 *Cut blueboard and rebate joists and sills of external door to allow installation of door frame at the cost of \$50 for labour only: subparagraph 6(f).*

This relates to the side door on the western side of the kitchen. The first respondent maintains that the walls installed by the applicant surrounding the kitchen side door were not square and plumb; further, there was blueboard cladding overhanging all sides of the bottom of the door opening and the joists under the door seals have not be rebated for flush installation with the floor. On balance I consider that these are incomplete works rather than the rectification of defective works as the rectifying works carried out does not include squaring the walls or making them plumb. This item of defective work is disallowed.

- 144 *Cut bricks and rebate doorsills and joists and replace Kordon (termite barrier) to allow installation of door frames to correct height at cost of \$373.50 for labour and demolition saw hire: subparagraph 6 (g).*

This is the external door at the back of the house from the living and meals area to the verandah. The respondents claim that the brickwork was laid too high in this area and that a neighbour observed it and said that the bricks would need to be cut to install the door frames and sills. The applicant did acknowledge that he set the bricklayers line for the laying of the bricks and as this area where a door was to be located was fairly critical. I accept on the balance of probabilities that he set the height to which the bricks in the

subfloor footing wall should go. I consider that this level was set too high if the bricks had to be cut out and as such it's a defect. However, I do not accept that rebating for the door sills and the timber joists for the installation of the door frames was defective, rather it was incomplete work. Therefore, I will allow half of the labour cost and the whole of the hire of the demolition saw, which gives an amount for this item of \$279.75.

- 145 *Rectify height of joists to allow installation of two-riser stair into hall and lounge at a cost of \$50 for labour only: subparagraph 6(h).*

On approved drawing No. A5 there was to be a rise in floor level of 360mm from the existing hallway level into the new extension, this allowed for a two-riser stair in this location to accommodate the difference in level. The problem was that the applicant says he set this 360mm difference at the dining room doorway and not in the hallway at the meeting of the existing house and the new extension. When the level set at the transferred across to the hallway it resulted in a level difference between the floor level for the extension and the existing hallway level of a 394mm difference at the location of the two stairs on the approved drawings that were to connect the existing hallway with the new extension. However, under the BCA the maximum riser height per stair is 190mm, giving a maximum rise for two stairs of 380mm. This meant that the two-risers would be at unacceptable height under the BCA and that three risers would be required, this could not be accommodated and it was necessary for the floor laying carpenter to plane the top surface of two joists installed by the applicant at the southern end of the extension and adding a landing into the original house to achieve the maximum permissible height of 380mm and thereby achieve a two-riser stair. I allow the costs of this rectification in the sum of \$50.00.

- 146 *Pack out entire stud wall for plastering and installation of stairs at a cost of \$50 for labour only excluding materials: subparagraph 6(i).*

The respondents allege that the applicant made an error in the installation of the structural steel and the construction of the stud wall for the eastern external wall of the extension is on the same line and is a continuation of the existing eastern wall but the applicant had constructed the stud wall of the extension so that it was misaligned. As I have accepted this allegation at subparagraph 6(c) above, I accept that additional packing would have been required to the new stud wall as an additional amount of render was required over the existing wall to rectify the appearance of the misalignment. I will allow the amount in the sum sought of \$50.00.

- 147 *Removal of incorrect trusses and replace with correct length trusses, remove, shorten and replace floor joists and move first floor double joist at the cost of \$225.00 for labour only excluding materials: subparagraph 6(j).*

This alleged defect was identified in R. Paul's early reports and noted as rectified in the report of his inspection of 31 May 2007, Item 24. In his earlier reports he had recommended that the method rectification should be to trim the floor joists and relocate the out of square double joist ("DJ")

beam at the northern end of the stairway opening and shown on Drawing No. S3. The carpenter who rectified this work, Mr J. Smith, says in his witness statement that the error in the locating of the DJ beam was due to the fact that the first floor trusses to which it had to connect were too long and forced the DJ beam 50mm out of its correct alignment. To rectify this Mr Smith says that it was necessary to remove the trusses that were too long and replace them with trusses of the correct length and relocate the DJ beam so that it complied with the drawings. The applicant in his witness statements says that this allegation related to allegation 6(c), the misalignment between the existing masonry eastern wall and the projection of it in a timber stud wall for the extension. This is directly at variance with the evidence of Mr Smith. In his witness statement in reply the applicant reiterates that he installed the DJ beam parallel to the wall of Bedroom 3; however, as can be seen on drawing S3 the DJ beam could have been parallel to that wall and then moved out past the wall to be out of square by the time it ended at another DJ beam across the head of the stairway opening: see drawing No. S3. In his closing submission the applicant says that the DJ beam was now out of square, this had not been raised previously by the applicant and no evidence was called to establish that this was correct and I will not consider this point by the applicant any further. I prefer the evidence of Mr Smith as it was a logical explanation of what occurred and the applicant's evidence is inconsistent with my previous finding the applicant's layout caused the misalignment between the old and new walls. I find this allegation established; I consider that a cost to rectify for labour only of \$225.00, i.e. 9 hours, is fair and reasonable.

- 148            *Packing and planing downstairs wall in kitchen, living, dining, skylights, around kitchen walls and beam L3 to create plumbline ready for plastering at the cost of \$500.00 for labour only excluding materials: subparagraph 6(k).*

The first thing to note about this allegation is that under the terms of the contract between the applicant and the respondent this is incomplete work. However, the allegation is not that the applicant's work in erecting the wall was inherently defective that it needed to be removed; but, that the wall was so badly erected that it required an excessive amount of time to check its plumb and squareness to ensure it was vertically and horizontally within the accepted industry tolerances, for example *The Guide to Standards and Tolerance*. Mr Smith estimated that to pack the stud walls to a similar sized extension prior to the installation of plasterboard would take approximately 8 hours. Between 2 November 2006 and 14 November 2006 he says he spent 20 hours packing these walls and the claim is \$500.00 for those hours. However, in cross examination on being shown a photograph of the packed kitchen wall he agreed that it was not a lot of packing but he thought that they reset the wall by moving the bottom of the wall across. Further, Mr Croucher for the respondents at paragraph 6(9) of his report of 29 July 2008 observed that on his inspection of the building on 8 July 2008, well after Mr Smith testified he had rectified these walls; that the wall between the

kitchen and the laundry was 15mm out of plumb over 2m, and, was therefore defective and required to be rectified. In cross examination, Mr Smith could not offer any explanation for Mr Croucher's observation. Given that this claim does not make allowance for the normal time required for packing and accepting Mr Croucher's observation of the lack of plumb in the kitchen/laundry wall I do not accept this claim.

- 149 *Packing and planing upstairs walls in the hall, bathroom, bedroom 1, hall cupboard, ensuite and robe, flue and skylights at the cost of \$1,050.00 for labour only excluding materials: subparagraph 6(l).*

As observed above, this is incomplete work unless it took an inordinate amount of time; and, further, as testified by Mr Smith, a significant amount of time should normally be allowed for packing and planing the stud walls to ensure they are plumb and square prior to the installation of the plasterboard. In Mr Smith's witness statement he refers to plumbing the internal southern wall to Bedroom 3; however, this is an existing masonry wall. The first respondent in her witness statement says it is the southern wall of Bedroom 1. I would agree with this. Mr Smith testifies that he spent a total 42 hours carrying out this work between 15 November 2006 and 22 November 2006. Mr Smith makes no allowance for the normal packing and planing time. The applicant submits in his witness statement that this was incomplete work and he is not responsible for it, referring to a series of photographs which he submits shows that the walls he installed were plumb, square and braced. This cannot be seen from the photographs which are taken a considerable but unknown distance from the walls in question. I therefore accept that there is a defect in the applicant's wall construction in this area. The question I have now is, whether the time spent in plumbing these walls was fair and reasonable. As noted above this is work to be completed and there should be a reasonable allowance for carrying out the work. Secondly, for a relatively small area in an around Bedroom 1, there is a great deal of time spent. In cross examination Mr Smith could not be positive that the two stud walls he had to build in this area to hide the flue from the solid fuel heater located on the lower storey was not included in the time claimed for this item, these walls are not large and I would consider that they would take about 1 day to erect. Further to this, in item 6(q) the second respondent claims 8 hours of labour to remove ply bracing installed by the applicant to install wall insulation as required by the approved drawings that was missed by the applicant and to plumb the internal southern wall of the bathroom on 18 November 2006. This seems an excessive time to me to plumb the walls in a relatively small area of the upper storey, although it is the most complex in terms of walls. I also note that Mr Smith has only been qualified as a carpenter for three and a half years and plumbing and straightening walls is a difficult task requiring skill and judgement. Therefore, I will allow half of Mr Smith's time on this task to cover all of the contingencies described above, which gives an amount of \$525.00.

- 150 *Application of speed bracing to all walls in accordance with engineering and plans at the cost of \$125.00 for labour only excluding materials: subparagraph 6(m).*

Mr Smith raised the need for speed bracing with the first respondent when he commenced work at the house and after checking with the structural engineer she requested him to install it. Mr Smith regarded that it had been omitted by the applicant. However, this was not of itself a defect, it was incomplete work; and, in his witness statement he does not allege that he had to do additional work as a result of the applicant's omission, as he did with the plumbing of the walls erected by the applicant. I find that this is incomplete work and this claim is not allowed.

- 151 *Installation of noggings: subparagraph 6(n).*

There is no monetary damages sought for this item and I make no reference to it.

- 152 *The rear verandah slab was deemed to require rectification work, which was subsequently found not to be required and two courses of bricks had to be removed at the cost of \$184.80 for labour and materials thrown away: subparagraph 6(o).*

The precise details of how this allegation arose is difficult to ascertain from the evidence. The applicant denies that it was his responsibility as the rear verandah slab was, according to the applicant poured some six months after his services were terminated. However, he acknowledges that the bricks to support the verandah base were laid when he was onsite and he had says previously in his evidence that he set the line for the bricks to be laid by the bricklayers. Further, I accept that the approved drawings lacked sufficient detail to show precisely how the verandah slab was to be constructed. And, I also accept the first respondents' evidence in this regard that the applicant proposed how the construction of the slab should be carried out and the first respondent accepted his advice. I accept that the applicant's advice was wrong and I allow the claim in the amount of \$184.80.

- 153 *Attach bracing ply in accordance with plans and building standards at the cost of \$150.00 for labour only excluding materials: subparagraph 6(p).*

The first respondent in her witness statement says that the applicant failed to install the ply bracing required by the approved drawing No. S5. Mr Smith completed the installation of this bracing and the respondent seeks to be reimbursed for his time. I cannot allow this claim as it is not defective work, it is incomplete work. The first respondent complains in her witness statement that the lack of this bracing and speed bracing substantially increased the time it took the carpenters to plumb and straighten the walls. I agree with this observation but this additional time has been allowed for in items above and will be considered further in items below.

- 154 *Install insulation to the external southern living and bathroom walls at the cost of \$540.00 for labour only: subparagraph 6(q).*

In his witness statement the second respondent alleges that the applicant placed bracing ply to the internal side of a number of walls and either placed the external covering on the walls or set it up for the bricklayers without placing the R2.0 wall insulation as required by the approved drawing No. AO. These walls are the southern bathroom walls and the southern living room wall. The second respondent carried out the rectification work by removing the bracing ply installing the required insulation and reapplying new bracing ply. He seeks recompense for his labour only at two days of time at \$270.00 per day. The applicant claims that this was incomplete work. To the extent of the installation of the insulation I consider that the applicant is correct. But in relation to the removal and reapplication of the bracing ply, I consider that this is incorrect, as this is work that has already been done and now as a result of the lack of insulation has to be removed and then done again. I consider that a substantial part of this claim involves the removal and replacement of the bracing ply. Further, the second respondent is not a qualified carpenter, nor as far as I am aware is he experienced in the trade; therefore, I do not consider he would have the same productivity as a qualified and experienced carpenter and I will allow half this claim, i.e. \$270.00.

- 155 *Re-install flue to manufacturer's specifications and according to plans provided at the cost of \$515.00 by a qualified plumber: subparagraph 6(r).*

The applicant agrees that he installed the solid fuel heater and its flue, however, he was not qualified to do so under the building regulations as he is not qualified as a plumber. The plumber who inspected the heater and flue at the request of the respondents, Mr D. Fleming found a number of elements of defective work by the applicant which he rectified before he would give the compliance certificate required under the building regulations. I allow this item in the sum claimed of \$515.00.

- 156 *Remove sump and inlet in cellar, excavate slab and reinstall new sump and inlet lower, in accordance with engineer's design at the cost of \$3,400.00 for labour and materials by qualified plumbers: subparagraph 6(s).*

This was identified as defective work in the Paul report at Item 12. The respondents claim that the sump to the cellar was altered by the applicant during the concrete pour and it was installed too high and this allowed groundwater to leak into the basement. To rectify this fault it was necessary to remove the sump excavate the concrete below it and relay it at the lower correct level. This work was done by plumbers, R M Noke, who invoiced the respondents \$3,400.00 for the work on 22 November 2006. This is substantially in excess of the Cochrane estimate to rectify this item of \$935.00; however, removing reinforced concrete with a jackhammer can take a very long time and is consequently expensive. The applicant maintains that he built the sump in accordance with the approved plans; except that the respondents informed him that they wished to have 200mm thick bluestone pavers on the cellar floor; therefore the applicant allowed the sump to be 200mm higher than the floor and as a result after it was built

the cellar flooded. To locate a sump so that it would allow a basement to flood , even on a temporary basis until the flooring was down is to my assessment unsatisfactory workmanship. There was no evidence that if the sump was located 200mm deeper than indicated on the approved drawings that any problems or complications would arise. I will allow the claim in the amount sought of \$3,400.00.

- 157 *Rectification to structural steel posts to comply with engineer's design on the approved plans at the cost of \$300.00 for labour and materials by the structural steel manufacturer: subparagraph 6(t).*

This allegation turns mainly on the applicant's failure to provide P1 steel posts that went to the top of the first floor and instead stopped at the floor of the upper storey. The structural engineer, Mr A. Daly inspected this installation and, according to the first respondent, required the addition of steel plates to the P1 posts at the kitchen door and the dining room window to provide additional connections to the other structural elements so that the structure had sufficient torsional restraint. This appears probable to me as without it the upper storey could move independently of the lower storey unless there was sufficient fixity between the two storeys and the lower storey was stiffer than that for a single storey building. The applicant in his witness statement does not comment on the engineer's requirements. In his witness statement in reply the applicant says he only found out later that the P1 posts should have gone to the top of the upper storey to act as torsional restraints. When considering this allegation in his report Mr Croucher report observes says that the structural drawings were vague in the detail as to whether the P1 posts were meant to be full height; I agree and this claim is dismissed.

- 158 *Rectification to steelwork connections to comply with engineer's design and in accordance with the approved plans at the cost of \$300.00 for labour and materials by the structural steel manufacturer: subparagraph 6(u).*

The respondents' claim that applicant failed to connect the B1 and B2 steel beams to the P1 posts in the manner required by approved drawing S3, in fact that were not fixed at all. There were also other connections that the respondents say were defective. The welder, Mr J. Aldabel of The Metal Guy Co., says in his witness statement that he attended a second day to weld on 24 November 2006 at the request of the respondents to install steelwork for the folding doors and that the respondents asked him to carry out additional works which were to weld the B1 and B2 beams to the P1 posts. For this work he charged \$300.00, which the respondents paid. The applicant submits that the original steelwork was not work carried out by him. I do not accept this as the applicant prepared the shop drawings for the structural steelwork and was paid for this preparation. He also agrees that he erected this steelwork. Therefore, I consider that he is responsible for the rectification of the connections. However, I don't consider he is responsible for the welding required of the kitchen folding doors. I do not

consider that welding the B1 and B2 connections would take very much time and as no allowance was made in the item above 6(t) for incomplete work, I am disallowing this claim.

- 159 *Excavate a 400mm deep trench for plumbing services at the cost of \$270.00 for labour only: subparagraph 6(v).*

The respondents claim that the applicant as builder was required to supervise the plumber in the carrying out of the plumbing works. The plumber neglected to check and ensure that all the trenches were dug when the plumber had an excavator onsite. A 10m. length of 400mm. deep trench was not dug and the second respondent dug it by hand and claims \$270.00 for this work. The applicant submits that it was not a term of the contract between the parties that he was responsible to supervise the plumbers. From my findings in relation to the nature and the terms of the contract between the parties I agree with the applicant and this claim is disallowed.

- 160 *Application of an extra layer of render to correct for the misaligned eastern extension wall for installation of a straight flight of stairs at the cost of \$512.00 inclusive labour and materials: subparagraph 6(w).*

In item 6(c) above I found that this misalignment was a defect for which the applicant was responsible. So he is also responsible for the additional layer of render to take out the misalignment. I allow this claim in its amount of \$512.00; as I consider \$16.00 per square metre for a layer of render to be reasonable.

#### **PARAGRAPH 7 – ALLEGATIONS OF RECTIFICATION CARRIED OUT BY THE APPLICANT FOR WHICH THE RESPONDENTS PAID AND FOR WHICH THEY SHOULD BE REIMBURSED**

- 161 These claims are for the reimbursement of money that the respondents paid the applicant for days spent on the job; but, which the respondents' claim the applicant was not constructing new work but spent this time claimed rectifying or attempting to rectify his own defective work; or, he spent an unreasonable amount of time on a particular task when compared to his estimate for that item or the time set down in the works programme prepared by the applicant. These claims are for overpayment by the respondents to the applicant and the respondents seek reimbursement. The evidence in regard to these allegations is almost all evidence from the parties; there is some opinion evidence of Mr Smith as to the applicant's general standard of workmanship, but nothing bearing directly on these claims. None of the experts called by the respondents provided any observations or opinions in regard to this work.
- 162 *On the balcony floor the Applicant spent a total of three days at the cost of \$810.00 rectifying his defective work and the Respondents paid an additional \$682.00 for materials used and thrown away, totalling \$1,492.00: subparagraph 7(a).*

The applicant says that the first respondent requested him to remove the hob, shown on approved plan No. A6 as “150 high hob to door at balcony”, as she did not want to step over it. The first respondent denies this, but gives no explanation as to why the applicant did not build the 150 hob. When the water proofer attended on 6 July 2006 he observed that the substrate of cement sheets was unsatisfactorily laid in that it did not have gaps between the sheets to allow for expansion, the required 150 hob was not built and there was insufficient difference in the balcony door level and the level of the cement sheet to have the minimum required slope of 1:100 to the downpipe in the northeast corner of the balcony. The respondents claim that all of these deficiencies are the responsibilities of the applicant. The applicant in his witness statements concentrates on the 150 hob; however, I do not consider that the hob is all that relevant. What is relevant to the rectification work that was required was the defective substrate and the inability to drain the balcony at 1:100. The substrate deficiencies I consider are the responsibility of the applicant; he should be aware that cement sheet in an external environment requires expansion joints. However, I do not consider that he is responsible for the lack of room for drainage at 1:100 on the balcony; I consider that if there was to be a minimum slope over the balcony surface of 1:100 to provide adequate drainage then it should have been shown on the drawings. I do not consider that the design of stormwater collection is something that a carpenter has to have knowledge of; this information should have been on the approved plans. As it was not, the responsibility for the lack of information is the respondents. The applicant cleaned and reused the cement sheets. I consider the materials cost for the purchase of the 190 x 45 solid hardwood floor joists to get sufficient fall across the balcony to the downpipe and for the installation of them is the respondents’ responsibility. I will allow the reimbursement of 2 days work by the applicant for removing, cleaning and relaying the cement sheet substrate, a sum of \$540.00.

- 163 *Within the pantry/laundry roof the Applicant spent a total of seven days working and reworking his defective work at the cost of \$1,890.00 for labour and the Respondents had costs thrown away for materials: subparagraph 7(b).*

The first respondent says that in mid-June 2006 she accepted the quote of a roofer, Mr Lander, to install the upper storey roof and he attended the premises to carry out a site measure. During that attendance she requested him to look at the pantry/laundry roof and give her his opinion. She says in her witness statement that he says that there were a number of defects in the construction of this roof that he said required rectification to make it satisfactory. Also, under the building regulations in Victoria, only plumbers could carry out roofing and roof drainage works and the respondents as owner-builders would need a plumbing certificate of compliance from a plumber to obtain an occupancy certificate. Mr Lander provided a quote to rectify the pantry/laundry roof and to provide the necessary certification. The respondents accepted his quotation. However,

before he would start Mr Lander told the first respondent of the work he wanted the applicant to attend to before he could commence work on this roof; and, which she wrote in her diary. The respondents asked the applicant why he had built the roof when he was not a plumber and he says that he was not aware of these provisions in the building regulations in Victoria, in NSW carpenters can do roofing work. The respondents submit that the applicant's work on this roof and his attempts to rectify his work was ineffective. It was not work he was qualified to do and it was work that they had to get rebuilt by Mr Lander. In his witness statement the applicant says that he acknowledges that the box gutter draining the pantry/laundry roof was flat but that he rectified this. He makes no further comment on the matters raised under this item in any of his witness statements. In his evidence in chief he says that nominal pitch of this roof was 2 degrees minimum on approved drawing No. A6 but the respondents wanted 15 degrees and this increased the difficulty of installing the skylights. This was further exacerbated as the first respondent significantly increased the size of the laundry skylight. The respondents have not provided me with the quote of Mr Lander so I have no information as to the exact scope of work in the quote or its cost. My concern in this item is that normally the rectifying plumber will very carefully go over the previous work by the unqualified roof installer and ensure that is in all ways satisfactory and will rectify what is unsatisfactory; the rectifying plumber does not demolish the earlier work regardless of its quality and insist on rebuilding it. I expect that some or a significant amount of the applicant's work will be accepted by the rectifying plumber; however, I cannot know how much and it is the respondents obligation to provide this information to me if they seek recompense; or, alternatively, they should have called Mr Lander. From the first respondent's description of the work done by the applicant on this roof, as set out in her witness statement, it appears that on the first day he worked on this roof the applicant installed ceiling joists and there is no mention of these being removed, so this work appears productive. The first respondent says the second day was spent getting fall on the box gutter this appears a long time and I accept this as rectification. The third day was spent installing a skylight that Mr Lander required to be removed, this is a wasted day. The fourth day was spent removing many of the materials comprising the roof on the instructions of Mr Lander. The fifth, sixth and seventh days were spent carrying out Mr Landers instructions to install the skylights and complete the timber framework and I consider it is useful work. I find that the applicant is liable to the respondents for three days when his work was totally unproductive and he should recompense them for this amount, being \$810.00.

- 164 *Structural steel was rectified on site by the Applicant requiring an extra five days labour at the cost of \$1,350.00, excluding materials cost of \$800.00: subparagraph 7(c).*

The respondents claim that the applicant in his programme had the period for the erection of the structural steel as 2 days and it actually took the

applicant 7 days; and, they are seeking recompense for the difference. The applicant says that he rectified much of the structural steelwork free of charge, so that there is a dispute as to whether the applicant sought payment for the days for which the respondents are seeking recompense. There is another difficulty for the respondents, Mr Croucher says in his report in relation to the P1 posts he says that the structural drawings were vague, I agree. I go further, I consider the structural drawings lack the proper detail and that some rewelding would have been necessary in any case. I find that this allegation has not been proved and it is disallowed.

- 165 *The rear verandah slab which had to be removed at a cost of \$750.00: subparagraph 7(d).*

This item is withdrawn.

- 166 *The rendered stair wall required additional packing and render at a cost of \$500.00: subparagraph 7(e).*

This item has been withdrawn.

- 167 *To compensate for the incorrect first floor trusses the Applicant spent two days labour totalling \$540.00 on rectifications and the Respondents paid \$230.90 for materials, totalling \$770.90: subparagraph 7 (f).*

Set out below is my consideration as to whether the first floor truss joists should be rectified to provide proper and sufficient support under the first floor walls: see below, the allegation at “Upper Storey (a) Provide floor joists to walls”. I found that they should be and allowed the respondents claim in this regard. If I allow this item the respondents are getting the required support under walls for nothing. What the applicant warranted to do was properly support the walls for the price he charged and that is the cost to the respondents of having that work carried out; and, they are not entitled to claim this cost back. This item of the counter claim is disallowed.

- 168 *First floor trusses were not installed according to the approved plans. Throw away costs of steel cleats ordered by applicant but not used of \$210.00: subparagraph 7(g).*

According to the first respondent in her witness statement the applicant requested the respondents to obtain for him sufficient cleats to attach the truss floor joists to the upper floor to their supports but he changed the method of fixing the truss joists and the cleats became superfluous. The respondents seek to be recompensed for the cost of the cleats of \$210.00. The applicant does not directly refer to the cleats in his witness statement. In his witness statement in reply the applicant submits that the respondents could have used the cleats to attach the verandah joists and in his evidence in chief he says they could have been used on the balcony to fix the rectifying shallower 190 x 45 floor joists. This does not get away from the fact that the applicant requested a material that was not used and I consider that it was his responsibility if he was not using it to take it back to the

supplier and obtain a credit; otherwise he is liable for its cost of \$210.00, and I so find.

- 169 *The applicant spent a total of half a day to rectify the leaking flue installed by him at a cost of \$270.00, excluding materials: subparagraph 7(h).*

The respondents claim that the applicant had defectively installed the flue to the solid fuel heater and when it rained it leaked. The first respondent says that when she terminated the applicant on 30 August 2006, she requested that he attend the next day to fix the leaking flue. The applicant did this on 1 September 2006, taking half a day. The applicant says in his witness statement that the second respondent told him the flue was leaking, but he considered this was the rectifying plumber's problem. The first respondent says it was her that informed the applicant that the flue was leaking and that his work on 1 September 2006 rectified the leak. The respondents' claim for the rectification of the flue installation by a qualified plumber was allowed in allegation 6(r). Therefore, this claim is disallowed.

- 170 *The applicant spent approximately three days at the cost of \$810.00 labour carrying out works to compensate for the misalignment of the external bathroom wall over B3 beam external wall over bedroom 3 by packing the entire wall and the Respondents paid \$64.00 for materials totalling \$874.00: subparagraph 7(i).*

The respondents submit that the applicant's site measure of the truss floor joists for the upper floor were 20mm short, which the respondents say resulted in the B3 beam moving 20mm to the east to accommodate the short trusses and leaving the exterior faces of the P1 posts on the western external wall 10mm proud of the face of the external wall and the applicant spent a total of three days packing the whole wall. The respondents claim repayment of the applicant's wages for these days. The applicant in his witness statement appears to confuse Bedroom 3 of the existing house, I do not understand what the applicant is trying to establish. The applicant says that changes to the laundry roof skylight required minor packing at the skylight and post junction. However, again I do not understand how this links with the respondents' allegations. His evidence in chief was similar to his witness statement. However, I have no direct evidence that the truss floor joists were short; in other words I had no evidence establishing from the site measurements what the length of these joists should be and what they are; secondly, what is a normal allowance to pack a wall for some misalignment in structural elements; more fundamentally, what is the allowable tolerance in misalignment for such structural elements? I do not consider that this claim is made out.

- 171 *The applicant unsatisfactorily rectified the kitchen deck base brickwork, air vents and damp proof course. The applicant spent one day at the cost of \$270.00 labour and excluding materials carrying out that work: subparagraph 7(j).*

I find in the allegation at the item at “Lower Storey (a) install DPC” below that the applicant was responsible for the incorrect positioning of the DPC and he is responsible for its rectification. This includes his own ineffectual efforts at rectification. I allow the claim of \$270.00.

172 *The installed rear gates required moving by the Applicant as they were obscured by the setout shed location. The Applicant spent one day at the cost of \$270.00 labour, excluding materials rectifying this: subparagraph 7(k).*

I accept the respondents’ evidence that the applicant selected the location of the rear gates and that this clashed with the location of the sewerage which necessitated the shifting of the gates from the eastern side of the property and this was work that need not have occurred if the applicant had selected the correct position for the gates. I will allow this claim in the sum of \$270.00.

## **PARAGRAPH 8 – ADDITIONAL ALLEGATIONS OF DEFECTIVE WORK ARISING FROM THE FINAL PAUL REPORT AND THE CROUCHER REPORT:**

### Lower Storey

173 The final Paul report maintained that because of the elements set out as (a) to (d) below this meant that all of the exterior brickwork would need to be removed to rectify these items of defective work. Mr Cochrane estimated the cost of removing the brickwork and rectifying the defects and then replacing the brickwork at \$33,445.30; whereas the cost of rectifying these items separately taking the cost of rectifying Items(a) to (c) from the Paul report with Mr. Cochrane’s costings and the cost of rectifying Item (d) from the Croucher supplementary report, totals \$14,314.00. Therefore, I do not accept the Paul proposal that this rectification is best done by the removal of the lower storey brickwork. Each of the items of defective work in the lower storey will need to be costed separately and this will be assessed under each of their headings.

*Lower storey - requires removal of exterior brickwork to:*

(a) *Install a damp proof course at the correct level:*

For the reasons set out in subparagraph 6(d), I accept this claim and I consider the cost of injecting a chemical DPC at \$3,080.00 to be fair and reasonable.

(b) *Install adequate sub-floor ventilation;*

Given my findings in the allegation above I accept this claim and I consider the sum claimed for rectification of \$418.00 to be fair and reasonable.

(c) *Correctly re-install rear double doors:*

There is no further explanation of this allegation and I consider that it is made again below at allegations 8(d) and (e) and I will deal with these allegations in that location.

*(d) Raise sub-floor and structural frame in meals area to be level:*

The respondents claim that the applicant's failure to provide a level sub-floor frame meant that the floor in the meals area was laid out of level and to rectify this the floor needs to be removed the sub-floor structure level and the floor replaced. Mr Croucher in his supplementary report estimated the cost of carrying out this rectification is \$8,325.00. In his main report Mr Croucher reported that he measured a difference in level across the floor in the meals area of 14mm with a hump in the middle of the floor. He submits that this is defective work as the maximum amount of out of level over the floor of a room allowed under the Guide to Standards and Tolerances is 10mm, I agree. The applicant says that the laying of the floor was carried out after he had left the site. He submits that he is not responsible as the floor laying carpenter should have checked that the sub-floor frame was level before starting to lay the floor. The respondents in their witness statements say that the floor layer carpenter, Mr D. Newcombe, told them that the floor was not level in the meals area. The respondents do not say whether this was before or after the floor was laid in the meals area. The respondents also says that Mr Newcombe told them that he couldn't level the meals area sub-floor frame as it had been bricked into its current position. However, how this occurred and why it was not rectified is not specified. Notwithstanding this the floor should not have laid out of level, this was defective work, the sub-floor frame had to be levelled before the floor was laid, it was a failure of the respondents to mitigate their own damage. Accordingly, I consider that the applicant is responsible for the cost of levelling the sub-floor frame without the floor laid. Under his supplementary report Mr Croucher estimates this cost at \$440.00 to "Raise floor structure and build at correct level" and \$220.00 to "Level stumps over SF1", allowing margin and GST this amounts to \$980.00, and this is the amount that I will allow.

### Upper Storey

- 174 Similar to his proposal for the lower storey Mr Paul in his final report proposed that to rectify the items of defective work numbered (a) to (d) below it would be necessary to totally demolish and rebuild the upper storey. Mr Cochrane estimated the cost of this at \$123,426.42. Whereas the estimated cost of rectifying the items separately, taking the cost of Items (a) to (c) from the Paul report and the cost of Item (d) from the

Croucher report is \$14,440.77. Therefore, I do not accept Mr Paul's proposal to demolish and rebuild the upper storey and each of the items will be costed separately. Mr Paul agreed in cross examination that the method of rectification put forward in the final report was made at the request of the respondents. Therefore, it was not his opinion.

Upper storey - requires removal of upper storey to:

(a) *Provide floor joists under walls: Paul Item 4;*

The Croucher report observes the some internal walls do not have a truss floor joist underneath them and are defective in this regard. The manufacturers "Guide to Specification" requires at page 10 that where fitted flooring, i.e. floorboards, are used there must be a floor truss joist under all non-load bearing walls. I accept that this is defective work. I will consider the appropriate rectification and its cost below.

(b)*Re-align floor joists: Paul Item 5;*

The only explanation in the Paul final report for this allegation is "Provide a sub-floor frame to approved plan No. S3". There is no direct reference to the need for the re-alignment of floor joists in the Croucher report or the respondents' witness statements. The Applicant in his witness statement says that he installed the truss joists in accordance with drawing No. S3 and the manufacturer's layout drawing No. L11435. Mr Croucher in his report observes that "It would appear the joists have been set out at consistent 450mm centres as for a platform floor." I have already accepted that there are aspects in which the applicant's work regarding the ordering and installation of the upper storey floor joists is unsatisfactory but I do not consider that it involves the re-alignment of floor joists. I do not accept this claim.

(c)*Provide floor joists suitable for strip flooring: Paul Item 6;*

The applicant failed to install a platform floor of particleboard as required by the manufacturer for this type of truss joist and Mr Croucher is of the opinion that the floor requires significant rebuilding to make it satisfactory. A number of these works have been carried out and allowed for above, see 6(e) above. I will deal with any remaining rectification works below.

(d)*Provide level floors to the pre-determined reference point: Paul Items 6.1 and 25.*

The Croucher report identified that floor in Bedroom I was out of level to an unsatisfactory degree and required rectification. He identified a hump over beam B2, i.e. the beam has been installed too high relative to the surrounding structure. Mr Paul, in his Final Report at Item 25, observed the top landing of the stairway to the

upper storey was out of level due to an incorrect installation of beam B2. The applicant does not comment directly about these allegations in his witness statements. I accept that the floors are out of level in both these locations and need to be rectified, the out of level is visually apparent upon inspection. The upper storey floor items requiring rectification are (a), (c) and (d) and these can be costed together. I do not consider that the omission of (b) will change the costs of rectification, there are no specific allowances in any of the costings for the re-alignment of floor joists. Mr Croucher in his supplementary report has only allowed to level the floor in Bedroom 1, whilst Mr Cochrane in his costing of the above items allowed to remove and replace all of the floorboards and to strengthen the truss joists with posi-struts. I would also like a check on whether all the recommendations made by the manufacturer's representatives who inspected the installation have been carried out; these involved the installation of a ramset connection between the top chord of the truss joist and steel beams B1 and B2 and the skew nailing of the truss joists to provide resistance to twisting and movement. Therefore, I prefer the costing of Mr Cochrane to that of Mr Croucher. I also find Mr Cochrane's costing easier to follow, check and work with. Mr Cochrane in his costing for Paul Item 6 has included the rectification necessary for Paul Items 4 and 5; and for the levelling of Bedroom 1 and the landing the specific costs to do this work can be added to the costing for Item 6. The costing for Item 6 is \$8,299.77. To be added to this for the landing from Item 25 of the Cochrane costing is to remove and replace truss joists for \$157.50, prop floor joist for \$50.00, remove beam B2 for \$67.50, rectify B2 connection steelwork for \$300.00, reinstall B2 for \$150.00 and reinstall floor joist for \$94.50. In respect of the levelling of bedroom 1 floor I consider it will be largely alleviated by the rectification of beam B2; however, other adjustments are likely to be required to ensure the Bedroom 1 floor is satisfactorily level and I will allow Mr Croucher's estimate for this specific work of pack, plane and straighten floor to a straight line of \$220.00, allowing his margin of 35% and 10% for GST, gives a sum of \$326.70. The total estimated cost for carrying out this work is \$9,445.97 and this is the amount I will award for these items.

**FURTHER WORKS: THESE ARE ALLEGED DEFECTIVE WORKS THAT HAVE NOT BEEN CARRIED OUT BUT WHICH THE RESPONDENTS CLAIM ARE DEFECTIVE**

175        *Remove particle board supporting box gutter and replace with hardwood: subparagraph 8(a) 003 Cochrane Report*

The respondents claim that particleboard is an unsatisfactory material upon which to support a box gutter. It was identified as a defect by both Mr Paul,

Item 3 and Mr Croucher, paragraph 6.3. The applicant submits that the roofing plumbing contractor gave a certificate of compliance; therefore, there cannot be a defect. I agree that in an external location particleboard is an unsatisfactory material and that it needs to be replaced. I accept the costing of Mr Cochrane to carry out this rectification in the sum of \$638.00.

176 *Flashings to windows installed incorrectly – fit to manufacturer’s specifications: subparagraph 8(b), 010 Cochrane Report*

The respondents maintain that at on the advice of the applicant they allowed the brickwork to proceed before the windows were installed and it was now a lot harder to flash the windows. It is the applicant’s position that he had left the site before any windows had been delivered. The respondents’ specific complaint is that “The applicant did not install flashing all around the windows and door openings, as required, prior to installing the paper and brickwork”. Mr Cochrane made an allowance of the installation of 5m of flashing for \$60.50. I accept that the flashings are much more difficult and time consuming to install if the windows are installed after the brickwork; which is why it is normal building practice to install the windows first. The applicant did not have a satisfactory explanation as to why normal building practice was not followed and I consider that this allegation is made out. I will award the sum sought of \$60.50.

177 *Cellar back fill not required 20mm gravel - replace with 20mm no fines gravel :sub paragraph 8(c), 013 Cochrane Report.*

The respondents claim that the applicant should have ensured that 20mm single size screenings was supplied instead of the mixed size crushed rock which was supplied. The approved drawing No. S2 has a note which says that the backfill behind the cellar walls was to be ‘No fines gravel’. The first respondent says she rang the designer, at the applicant’s request, to ascertain the meaning of this note and Mr Burns says it meant 20mm screenings with no fines. The respondents submit that the gravel supplied is unsatisfactory for the purpose and should be removed and replaced by the correct gravel. Mr Cochrane’s estimated cost to carry this out is \$5,128.00. However, the respondents do not say how the use of this gravel supplied will result in them suffering a loss. I was not provided with any size analysis of the mixed stone to say how fine the material got down to. I was supplied with a sample of the stone in a jar taken from around the cellar. It appears to me to be a clean mixed crushed rock, in other words as though it was the smallest portion of the crusher run below 10mm nominal size. There are no cohesive lumps or soil particles evident in the sample that would clog up the operation of this gravel acting as a drainage medium for water seeping down behind the cellar wall. Nor, do I consider that the presence of rock fines in the gravel will progressively impede the proper operation of the agricultural drain around the cellar. Mr Croucher in his report considered that the amount of fines in the gravel would impede the operation of the agricultural drain. However, in cross examination he agreed that he considered a reference to fines in the approved drawings

meant soil particles. From the sample I have, I do not consider that there were any soil particles in the gravel as supplied, there are some small lumps of soil in the sample, but this is the same type and consistency of the soil on the property and I consider that it is contamination from the local soil. Without further analytical evidence, I consider that this gravel will act satisfactorily as a drainage medium. Therefore, I do not consider that this is defective work by the applicant.

178 *Door frames not flashed - install flashing to door frames: subparagraph 8(d), 022 Cochrane report*

Following my determination of Item 8(b) above and for the same reasons I consider this item to be defective work by the applicant and the claim is made out for the sum sought of \$48.40.

179 *Large gap between the doors and adjacent brickwork – provide suitable size door frame and doors: subparagraph 8(e), 023 Cochrane Report*

The respondents claim that the applicant insisted that the brickwork be erected prior to the windows being installed and to show the bricklayers the extent of the brickwork required by placing wooden guides onto the studs to mark the window or door openings. In the case of the rear door onto the verandah the respondents desired a bluestone trim around these doors and this meant that the maximum gap between the doorframe and the surrounding brickwork was 25mm either side. However, on one side the applicant fixed the guide so there was a gap of 40mm between the stud opening and the brick edge on the western side of the door and a gap of more than 25mm on the other side. The respondents submit that as a consequence, this work is defective and should be rectified. Mr Croucher concurs but does not specify the method of rectification. Mr Paul's opinion is that this item would be rectified by providing a suitable and correct size new door frame and doors. In his costing of this method Mr Cochrane allowed for the removal of the existing rear door, rebate the door frame to suit the brick opening, supply a pair doors and frame to suit external opening and paint the doors at a total cost of \$2,403.50. I do not consider that this will necessarily let the respondents achieve the bluestone surround that they want. In relation to rebating the frame, I do not consider that this will satisfactorily rectify the problem as the main problem is that the brick opening for the window is not evenly out of tolerance and as can be seen from the photograph CV cited in the first respondents witness statement, where the 40mm gap has occurred the brickwork will be some distance behind the stud opening in which the window must fit. I consider that this gap needs to be rectified by bringing it back to a maximum of 25mm by amending the brickwork along that side and then amending the stud opening to ensure that the existing window fits. The applicant submits that this window was installed after he left the site and that he had no involvement with these works. But the first respondent submits in her witness statement in reply that the doors and frames were delivered on the final day the applicant attended the site. From this I infer that he knew the

size of the doors that had been ordered. There are no specific measurements of the gap stated in the respondents' witness statements. On balance I accept that the 40mm gap is a defect and needs to be rectified. Therefore, I will allow Mr Cochrane's costing amended to delete the supply of new doors, I estimate adjustment of the studs will not be a large cost and I will allow the same provision as Mr Cochrane allowed for the rebate of the frame of \$300.00, adjustment of the brickwork on the western edge of the opening to fit the stud opening I estimated at \$600.00, this amounts to \$1320.00 including GST. Painting has not been allowed as this is incomplete work.

- 180 *Top landing over B2 steel beam is not level – modify floor frame to provide a level floor surface: Item 6.1, Croucher Supplementary Report.*

This has been dealt with in lower storey items above.

- 181 *Fire rated boundary wall not constructed as designed or as necessary: Item 16, Croucher Report*

Mr Croucher in his report identified the lack of a fire rated stud wall over the subfloor timbers on the external wall of the laundry and pantry to be a defect. In fact there is no wall covering at all over the subfloor timbers from the bottom plate down to the top of the base brickwork a vertical distance estimated by the applicant to be approximately 140mm. The applicant accepts that this is a defect; but says that he was always going to finish it. However, he did acknowledge that it should have been done prior to the wall being built. Mr Croucher submits that to rectify this problem there is little alternative but to partially demolish these rooms in order to construct base brickwork in accord with the BCA; his cost to carry out this work is \$21,969.09. However, Mr Croucher makes no allowance for the original cost of the construction of the fire rated wall in this location; which in my opinion would have been a considerable sum, as I address below. The applicant does not consider that such demolition is required; he submits that there is sufficient gap between this wall on the boundary and the wall of the adjacent dwelling to slide in complying wall material made up of a layer of blueboard and a layer of Fyrecheck plasterboard glued together and then glued in place and also screwed to the floor joists using brackets made from steel angle. The applicant estimates that this work will cost \$1,000.00 with two days work; allowing this work to be additional, two days work for a carpenter at \$55.00 per hour is \$880.00, with margin and GST, this totals \$2,791.80. Mr Croucher does not consider that there is a sufficient gap to slide the fireproofing wall material between the dwellings and also the spaces between the joists have been filled with chocks that will be difficult to remove; Mr Croucher said in cross examination that it could take days of work to prepare and slide the necessary wall material between the dwellings. From my inspection of the site I consider that there is sufficient gap between the two buildings to slide a complying fire rated material and wall covering in to ensure the boundary wall complies with the BCA; however, it will be tight and I agree with Mr Croucher's opinion that it

could take days to achieve. Therefore, I disagree with the applicant's costing. I do not consider that it allows for the tightness of the site of these works or the difficulty of getting a satisfactorily secure fixing between the new piece of external wall and the existing layered blueboard and Fyrecheck above it and the base brickwork below it to provide the necessary degree of fireproofing. This means the work will take considerably longer than if it had been carried out before the external wall was erected; and, this is what I consider that the applicant should compensate the respondents for. This means that the applicant is not liable for the cost of providing the wall material, steel angle brackets and glue as this was incomplete work. I disagree with Mr Croucher's method of rectification and the applicant's costing; so I will need to carry out my own assessment of the cost of rectification. I consider the gap in the external wall that exists as a result of the subfloor framing is more likely to be in the order of 250mm. I consider that the top and bottom overlap of the new wall and the existing should be 300mm at the top and what can be achieved at the bottom to a maximum of 300mm; this will result in a wall section with a depth of approximately 850mm that will need to be slid into place. To gain access to the subfloor and the area lacking the fire rated wall it will be necessary to remove a 1 metre wide strip of flooring against the external wall of the laundry and the pantry and replace this floor at the completion of the work, this is a floor area of approximately 6 square metres. I don't consider that these floors need to be removed for any of the other rectification work so that I will allow this cost in this item of work. I don't consider any plumbing fittings have to be removed and replaced. I will use Mr Cochrane's rates for the removal and replacement of the floors and Mr Croucher's labour rate for carpenters of \$55.00 per hour. Once the floors are removed it will be necessary to remove the blocks put in between the floor joists that Mr Croucher considers will be hard to remove; however, I do not consider it will be that difficult. Once the new section of wall is slid into place it will be necessary to get a secure and tight fit between the new section and the existing wall sections above and below the new section and this will require a means of pulling the new section of wall onto the existing sections of wall to ensure a tight bond for the glue to seal over the depth of the overlap. I consider that this could best be done by attaching threaded nuts on the inside face of the new wall that will be each side of every second joist and when the new wall is in place and the glue has been liberally applied threaded rods can be screwed into the nuts and by means of a turnbuckle, or other apparatus for shortening a length, can be used to pull the new wall towards the existing sections of wall. This will call for a careful site measure and skilled fabrication of the new wall section so that it will be satisfactory. I consider that it will take two carpenters to carry out the work, given the degree of handling that will be needed. After the removal of the floors I consider the next phase is to site measure, purchase materials and fabricate the new section of wall, which I consider will take both carpenters 4 days. The following phase is to clean out any

impediments to sliding the new section into place, attaching the anchors to the floor joists for the pulling apparatus, sliding in the new section and gluing and securing it in position, which I consider will take 4 days. The next phase is to clean up which I consider this will take the two carpenters 1 day. I estimate it will take the two carpenters ten days to complete this work. However, this section of wall is incomplete work and there needs to be an allowance for the erection of this section of wall before the external boundary wall was erected. To erect this section of fire rated wall prior to the erection of the external boundary wall would have been difficult and I consider it would have taken two carpenters 2 days, so the additional time as a result of the applicant not building it at the correct time is 16 days at \$55.00 per hour, gives a labour cost of \$7,040.00. To achieve a tight and satisfactory connection an apparatus to pull this section of wall onto the base brickwork below and the subfloor members would have been required if the wall had been built at the correct time; therefore I do not consider that there will be any additional material purchases. At Mr Cochrane's rates the cost of removal and replacement of floor vary slightly but the most common rates are \$9.00 per square metre to remove strip flooring, reinstall timber floor \$20.25 per square metre and make good/ refinish floor of \$20.00 gives a total of \$49.25, say \$50.00 per square metre, \$300.00 for 6 square metres. Mr Croucher in his estimate has allowed to retille the laundry and pantry floors and I will accept that this is necessary and to achieve an acceptable finish it will be necessary to replace all of the floor tiles in the two rooms. Mr Croucher's rate supply tiles and install is \$100.00 per square metre, which I will allow, giving \$1200.00 for 12 square metres. With builder's margin and GST to these costs add up to the sum of \$12,681.90 and this is the sum I will award to the respondents for this item.

182 *Articulation joints do not comply with BCA requirements: Items 17-19 Croucher Report*

In Mr Croucher's opinion the articulation joints do not comply with the BCA and require rectification. The first respondent in her witness statement says that engineer had instructed them to install articulation joints in the brickwork when he attended the site at the time that the base brickwork was installed without any articulation joints and exhibited cracking. The first respondent says that the bricklayers told her that the applicant had told them not to install articulation joints in the base brickwork. The applicant denies this and says that he did not supervise or instruct the bricklayers. The first respondent says that she left the applicant to ensure that the engineer's recommendations were adhered to. I accept the first respondents' evidence in this regard and I accept that the applicant is responsible for the lack of articulation joints in the base brickwork and I will allow Mr Croucher's assessment of the rectification cost in the sum of \$1,604.00.

183 *Floor in Meals Area is not level and stumps provided not at correct founding depth: Croucher Supplementary Report, dated 16 March 2009.*

This item of work was dealt with under the heading of Lower Storey above.

184 *Floor and sub floor in Lounge Room of the original house installed significantly out of level: Item 20 Croucher Report, dated 29 July 2009.*

The applicant agrees that this floor is out of level but submits that to remove a number of floorboards and pack the western wall plate would take a carpenter one days work, say \$440.00; with margin and GST a sum of \$653.40. Whereas, Mr Croucher estimates the cost to rectify this defect at \$2,475.00. I accept the applicant's time estimate to remove and replace the floorboards and pack the wall plate as more accurate than Mr Croucher's, but the applicant has made no allowance to remove and replace the vinyl flooring. Accepting Mr Croucher's rates for these work items, I would reduce his time for the removal of the vinyl from 4 to 2 hours and I accept the lounge is 16 square metres. This gives an additional cost of \$670.00, which with builder's margin and GST gives a total rectification cost for this allegation of \$1648.35.

185 *Plasterboard ceiling not back-blocked in Bedroom 2: Item 2 Croucher Report*

The applicant installed the plasterboard and agrees that back blocking should be carried out, but says this was incomplete work. The respondents submit that it is defective work. I consider that this work is required but it is incomplete work and as such still work to be carried out and it is not defective work for which the respondents have paid. I do not allow this item of the counterclaim.

186 *Dead bolts to double hung windows installed incorrectly: Item 22 Croucher Report*

The respondents say that the applicant installed the dead bolts to windows defectively and they have to be removed and installed correctly. This has been confirmed by Mr Croucher. The applicant denies that he did this work. I accept the respondents' evidence in this regard as the applicant undertook a number of tasks outside the normal carpentry requirements. I accept that there will be the consequential costs of filling holes and painting and I accept Mr Croucher's estimate of \$751.00.

187 *Butt jointed glass to bay window installed out of plumb to compensate for the base slab cast out of level: Item 23 Croucher Report*

The respondents say that the applicant cast the base slab for this window out of level and this led to all of the problems including the out of plumb glass. Mr Croucher concurs with the respondents' assessment. He submits that to rectify the bay window it will be necessary to remove the existing glass, level the top of the base slab with a further small concrete pour, recut new glass and reinstall; which with allowances for materials and sundries he estimates the cost at \$3,222.00. The applicant accepts that the top of the concrete base of the window was out of level as the formwork was knocked and damaged prior to the original pour, resulting in a slight sag in the top of

the base. The applicant says that the first respondent told him that the top would be tiled and the face finished in Kanmandoo stone. The applicant says that to rectify the slab may need some topping but there was no need to remove the existing glass. I accept that the top of the slab is out of level and the glass is not plumb and these aspects of the window need to be rectified. I do not accept the applicant's evidence that the first respondent told him the slab was to be clad in a different material; the detail of the approved drawing of the bay window details, drawing No. A1A, show the top of the slab as having a "Natural concrete finish" and that is what it has. Therefore, I do not accept that there was an instruction from the first respondent to vary the finish of the base slab from that shown on the approved drawing. I consider that Mr Croucher's method of rectification of levelling the top of the slab and replacing the out of plumb glass is appropriate; however, I consider that some of his allowances are excessive. He has allowed 8 hours for a glazier to remove the defective glass, as it is going to be replaced this glass can be destroyed in the removal process and I consider two hours would be sufficient; and, I consider that it could be removed by a carpenter. I accept 1 day for a carpenter to scabble and pour a cementitious compound to give a level top and \$50.00 for sundry materials. Mr Croucher allows 2 days for a glazier to cut and reinstall the glass without any explanation; I consider that this is excessive. The window opening is a height of 1644mm and width of 1690mm, from the approved plan the glass width is 1860mm and the external outstand from the exterior wall is 500mm. The glass height runs from the top of the base slab to above the opening where the drawing stipulates that the connection between the top layer of glass and the external brick wall be "*silicon joint full perimeter*". However, there is no height given for this joint and I will assume 20mm; giving a total height of the glass of 1664 mm. This results in a main vertical pane of 1860mm wide by 1664mm high, two side panes of 500mm wide by 1664mm high and a horizontal top pane of 500mm wide by 1860mm long. This results in a total glass area of 5.7 square metres and a total minimum cut length of approximately 11m; I do not consider that this is a large or difficult structure to fabricate or erect and I consider a competent glazier would take 1 day. Finally, allowing "make good" at 2 hours for a carpenter and the labour cost of an experienced glazier at \$65.00 per hour, gives a total cost for this item, allowing builder's margin and GST, of \$1,826.55. This is the sum I will allow.

## **BOUNDARY FENCE**

188 The respondents say that they decided to replace their boundary fence with 42-44 Wolseley Parade, Kensington, when the owner of that property suggested this to them. This work was not part of the original scope of works that they wished the applicant to carry out. They originally agreed with the neighbor to seek prices from fencing contractors. She discussed this with the applicant who said he could provide a quotation for the work and in February 2006 he gave the first respondent two quotations for fences

with different strengths. The applicant told her that the fence would take 5 days to erect. The owners selected the cheaper fence with at a cost of \$5,932.00 and the first respondent told the applicant that they were each paying half the cost of the fence; and, during the construction the neighbour gave the respondents half the cost of the quotation of \$6,472.00 less \$540.00 for the deletion of the agricultural drain, a sum of \$2,966.00. The applicant estimated it would take him 36 hours to build the fence at \$25.00 per hour, \$900.00; with the remaining sum of \$5,032.00 being for materials and sundries.

- 189 The materials costs for the fence totaled \$4,330.74 and the respondents claim that the applicant worked on the fence exclusively from 14 to 20 April 2006 and 22 April 2006, a period of 8 days; which at the rate of \$270.00 per day was a labour cost of \$2,160.00; which the respondents have paid. Therefore, the respondents have paid \$3,524.74 for their half of the fence cost, which is \$558.74 in excess of the half they consider they were required to pay under the quotation, they seek a reimbursement of this sum from the applicant.
- 190 The applicant denies that the erection of the boundary fence was a separate fixed price contract. He said that he only gave the respondents an estimate of the cost. He says that he also worked on the fence on 21 April 2006.
- 191 In their witness statements in response the respondents deny the applicant's evidence saying that at no time did the applicant inform them that the price given was not a fixed price. Further, they say that the applicant's estimate for the cost of the fence is not an estimate but a Quotation as can be seen from the copy of the estimate exhibited as it is inclusive of his daily fee and materials.
- 192 In my assessment of this claim I first say that given the positions of the parties it is not relevant to this claim, if the applicant worked on the fence on 21 April 2006. Secondly, I do not accept the respondents' submission that on its face the fence estimate is a quotation. The document does not contain the word "Quotation"; and, even if it did this would not be definitive. I do not consider that the inclusion of the applicant's daily fee and the materials costs is indicative of a quotation as opposed to an estimate. Both should contain all of the costs that the estimator considers will be incurred in carrying out a scope of works in order that the purchaser of the building services is aware of what their contractual obligations will be before entering into the contract.
- 193 If the fence costing was meant to be a fixed quotation then as I have discussed above in relation to the parties contract for the renovation and extension, I would have expected to see an allowance for the builder's margin for profit and risk. Further, given the applicant's financial position at this time I would not have expected that he would have had sufficient funds to carry the materials purchases until he was paid the contract sum at the completion of the work, which is the normal manner in which fencing

contracts are carried out between neighbours and the fence builder. Unforeseen and latent conditions can always arise in any construction work and it is unwise for the arranger of those works, in this case the respondents, to accept payment from the contributing neighbor until the work is complete and the fence builder has submitted his invoice for the work and the owners are aware of the final cost. Finally, between the parties, neither of them treated the construction of the fence any differently than the renovation and extension works. Therefore, I do not consider that the erection of the fence by the applicant was a separate contract between the parties; rather, it was a variation of their existing contract and this claim is dismissed. I note that in the estimate that the applicant put his labour time in the estimate at \$25.00 per hour, which gives a daily fee of \$200.00; however, all parties treated the applicant's labour cost at the normal rate of \$270.00 per day.

## **RENTAL AGREEMENT**

194 According to the respondents, the applicant was required to leave a caravan park where he was staying because he had a dog with him; and, about 29 September 2005 he moved into the Wolseley Parade property. At the time the existing house had no floors or bathroom facilities. The applicant immediately laid some temporary floors. The applicant used the respondents' apartment's bathroom facilities and the next door neighbour's outside toilet facilities. The second respondent says that he told the applicant when he came to the respondents' apartment for his first shower there that he was not keen on the arrangement but the applicant could stay if he paid some rent; and, after some negotiations they agreed that the applicant could use the bathroom facilities at the respondents' apartment and he would pay rent of \$140.00 per week that would be offset against the applicant's claims for work done; meanwhile the applicant would continue to look for alternative accommodation. The applicant moved out of the property about 10 December 2005. The applicant moved back into the property about 28 January 2006, staying in the second bedroom on the upper storey of the existing house. During December 2005 a toilet, shower and hot water system was installed in a shed in the rear of the property. The respondents had moved into the existing house in early January 2006, giving up the rented apartment. During February 2006 the applicant sought rental accommodation; and in early March 2006 the first respondent wrote a reference for the applicant to give to the agent renting the accommodation that the applicant was seeking, which contained a statement that the applicant's fees allowed him to pay a rent of \$140.00 per week. The second respondent is not explicit in his witness statement as to when the applicant stopped residing at their property; the last claim for rent owing is the week commencing 4 March 2006. The second respondent says in his witness statement that no offsets for rent had been made prior to the Tribunal's orders in relation to the applicant's claim of 15 April 2008. The respondents' claim a total of 17 weeks, making a total claim for rent owing of \$2,380.00.

195 The applicant in his witness statement denies that there was any agreement that he pay rent for staying at the respondents' property. At the time he had partially demolished the existing house and it had no kitchen, bathroom, toilet or floors. There was only ladder access to the upper storey. The applicant says that the respondents said that he could stay in the house without charge.

196 In his oral evidence in chief, the applicant said that in the reference prepared by the first respondent it stated that he could afford the \$140.00 per week rent, the applicant said that this statement was also in the other two references from acquaintances that he gave to the renting agent.

197 In assessing this claim I only have the word of the parties. Therefore, I need any other inconsistencies and discrepancies that will establish on the balance of probabilities whether I should find that such a contract exists. The inconsistencies that do exist lie at the feet of the respondents. First, the first respondent was an assiduous note taker and time keeper. Both the carpenters that worked for the respondents at the property, the applicant and Mr Smith, said that they used the entries in the first respondent's daily diary to tell them the days they worked. Further, the only direct written evidence of the contract between the applicant and respondents for the renovation and extension is a notation in the first respondent's daily diary of the agreed daily payment to be made to the applicant. Therefore, I find it difficult to believe if the rental arrangement commenced about the start of October 2005, lasting until mid-December 2005, to be restarted near the end of January 2006, ending in early March 2006, that there is not one reference in the first respondent's diary to the rental amount or the times the applicant was residing at their property. This is reinforced by the fact that the second respondent said that one of the terms of the rental contract was that the rent payable would be offset against the money due to the applicant for work done; therefore, how does the first respondent keep a track of what is owed between the parties if she does not keep the weeks the applicant stayed at the property in her diary. Another inconsistency arising out of this term is why this term was not implemented so that the rent was progressively deducted from the amount due from the respondents to the applicant for work done. The respondents say nothing about the rental agreement until the proceeding commences. When the applicant brought his final claim in October 2006, they did not reply and deduct the amount they claim for rent. The last inconsistency is the amount of the rent, at the time the second respondent says that the rental agreement was made the existing house had been significantly demolished and had none of the normal facilities associated with a habitable dwelling, other than a roof and walls. It appears odd to me that the parties agree on a rental sum that is the same as the rent that 5 months later the applicant would offer to pay for a habitable apartment, albeit small. As a result of these inconsistencies I accept the evidence of the applicant and I do not consider that there was any agreement between the parties for the applicant to pay the respondents rent for the period of time that he resided at their property.

## **CONCLUSION**

198 In conclusion I award the respondents \$43,289.22 on their counterclaim. The time to produce the determination was substantially longer than a case of this quantum normally takes. The information provided by the respondents was too large and out of all proportion to the size of their claim. It was also poorly put together and it was not correlated. The hearing of the counterclaim took approximately 17 days, which is far too long for a case of this size.

**SENIOR MEMBER R. YOUNG**