VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING & PROPERTY LIST VCAT REFERENCE NO. BP1521/2016

CATCHWORDS

Domestic building work – defects and incomplete works

APPLICANTS	Terry Yarnall, Wendy Yarnall
RESPONDENT	Nigel Evans t/as Nigel Evans Carpentry
WHERE HELD	Melbourne
BEFORE	Senior Member S. Kirton
HEARING TYPE	Hearing
DATE OF HEARING	29, 30, 31 October, 1, 2 November 2018, written submissions filed 13 December 2018, 11 February, 21 February 2019.
DATE OF ORDER	18 April 2019
CITATION	Yarnall v Evans (Building and Property) [2019] VCAT 572

ORDERS

1. The respondent must pay to the applicants the sum of $143,655.86.

2. There is liberty to apply on the question of interest and costs and reimbursement of fees. I direct the principal registrar to list any application for hearing before Senior Member Kirton for one hour. Any affidavits in support or opposition must be filed and served 7 days prior to the date of the costs hearing.

SENIOR MEMBER S. KIRTON

APPEARANCES:

For the Applicants	Mr K. Oliver, Counsel
For the Respondent	Mr J. Doyle, solicitor

REASONS

BACKGROUND

1. The applicants are the owners of a home in Cowes, Phillip Island. They had used it as a holiday home for a number of years, but in 2014 decided to undertake an extension and substantial renovations, so that they could live there permanently.

2. In July 2014 they engaged the respondent builder to carry out this work and they signed an HIA Victorian Plain English Building Contract for Alterations, Additions & Renovations on 28 July 2014. The contract price was $210,000, and included a $10,000 allowance for painting. The owners accept this was in substance a provisional sum. The contract documents consisted of four pages of architectural drawings, a structural drawing and specifications contained in a document called "Terry and Wendy's List".

3. Works commenced and progressed without any dispute until 21 December 2014. On that date the builder met the owners on site and Mr Evans presented the owners with an invoice for the completion payment of $21,000, plus a claim for variations of $32,292.70, making a total of $53,292.70. The builder also indicated that he would not allow them access to the property on that day, although eventually Mr Evans reversed that position and the owners were given possession of the property so they could stay there for Christmas with their family.

4. The parties met again the following day. Although Mr and Mrs Yarnall disputed some of the variations claimed, the owners agreed to pay $47,599.20, with $45,519.20 to be paid immediately and the balance of $2000 to be paid when the defects were rectified and the house completed. This agreement was reflected in an amended tax invoice prepared by the builder. The agreed amount was paid by the owners by cheque on 22 December 2014.

5. The owners then prepared a list of defective works which was given to the builder in January 2015. Some work was done, but much was left undone. The trail of correspondence tendered during the hearing supports the owners' contention that they made many attempts throughout 2015 to get the builder back to complete the work and rectify the defective work, but that Mr Evans often did not respond. Further, when he did, he did not commit to carrying out the work.

6. On 22 October 2015 the owners gave notice under the contract of their intention to terminate the contract. The builder replied on 5 November 2015, saying "… I believe I have done the best we can do". On 8 November 2015 the owners sent a notice to the builder terminating the contract.

THE ISSUES IN DISPUTE

7. Mr and Mrs Yarnall commenced this proceeding seeking an order for damages in respect of the cost to complete and rectify the incomplete and defective work. They relied on the expert opinion of Dr Ian Eilenberg, who had prepared a series of reports, culminating in his estimate of the cost to complete and rectify of approximately $190,000[1].

8. The builder's pleaded defence was, in summary, that:

   a. the owners were not entitled to deliver a Notice to Remedy Breach and Intention to End Contract,

   b. he accepted those incomplete items identified by his expert Mr James Campbell,

   c. other items had been rectified or were outside the contract scope, or

   d. they had been settled by him forgoing an allegedly outstanding payment of $2000.

9. During the hearing, Mr Doyle was given leave to file an amended Points of Defence to add that:

   9(a) The respondent was ready willing and able to complete the works subject to payment for painting and withdrawal of demands for out of scope work to be carried out without payment.

   10(c) Further or alternatively, the applicants are by their conduct estopped from asserting or have waived any right to require the defective or incomplete works completed other than as contemplated at 21/12/14.

10. In the builder's final written submission he says that one of the issues for determination is "the circumstances in which the building contract came to an end". His submissions raise a number of new issues which have not been pleaded, and in respect of which no evidence was led. I will address these further below.

THE HEARING

11. The owners were represented at the hearing by Mr K. Oliver of Counsel. Mrs and Mr Yarnall gave evidence. The respondent was represented by Mr J. Doyle, solicitor. Mr Evans gave evidence, as did his subcontractor concreter Mr T. Newman. Expert evidence was given by Dr Eilenberg for the owners and Mr Campbell for the builder. The hearing took place over five days, with a view occupying one day and expert evidence given

[1] The final amount claimed was not ascertained until the conclusion of the expert evidence as adjustments were made to various items by Dr. Eilenberg.

concurrently over 1¾ days. The parties then obtained a transcript of the evidence and provided written submissions.

A note on the builder's final submissions

12. The builder's final submissions were lengthy, confusing and not helpful. For example, the relevant legal principles set out at pages 6-7 are not controversial. However it is curious that the authority cited for "damages at common law" is not a building case. It is not clear why Mr Doyle has addressed me on "diminution in value" (at paragraphs 20 and 113) as that is not how the owners' claim is put. The summary of the background, including the steps taken in the proceeding, which occupied five pages of the submission, is not in dispute.

13. At page 13, Mr Doyle states the obvious that "the respondent has a right to know the case it has to answer". He then says that "these proceedings are remarkable for the fact that the pleadings have been substantially amended and deleted by the abandonment of majority of claims made by the owners, more than a year after the application was lodged". He goes on:

> "On and from 29 November 2017, the owners abandon any claim for economic loss and for the repayment of the variations… It is on this basis that the owners be limited to pursuing the cost of rectifying defective work and completing incomplete work as per… the expert report produced by Dr Eilenberg dated 11 May 2016 and subsequently updated during the latter stages of the proceedings. Any further evidence with respect to matters not directly related to the above-mentioned claim, should be excluded."

14. The point of this submission is unclear, because the owners' claim is only for the cost of rectifying defective work and completing incomplete work, as proposed by Dr Eilenberg. Mr Doyle's own submission notes that he understood this was the case he was answering since 29 November 2017. Mr Oliver's opening of the case on 29 October 2018 confirmed this, and if that were still unclear, his written final submissions set out in table form each item claimed. It is obvious from that table that the claims are for defects or incomplete works and the amounts listed in the table are the amounts estimated by Dr Eilenberg. There is no suggestion of any other claims being made.

15. At paragraphs 33-34 Mr Doyle suggests that the Tribunal is faced with the fact that there is no positive evidence before it that the painting works, asbestos removal and hallway hump were within the builder's scope of works under the contract and that I should not simply draw an inference that the works were within the scope from the fact the owners expert witness was so instructed. This submission ignores the fact that the owners have conceded that the asbestos removal and hallway hump were not within the builder's scope of works and are not part of this claim. As for my findings

as to the scope of works, I have not drawn any inferences. I have based them on the contract documents and the evidence of the parties.

16. At paragraph 46.1, Mr Doyle contends that "the builder's pleaded position is that the works are defective and incomplete to the extent set out in the expert reporting of Mr Campbell". That is incorrect, because paragraph 7.6 of the Defence admits only the incomplete works listed by Mr Campbell.

17. I will now address the builder's submissions about "the circumstances in which the building contract came to an end" (as Mr Doyle expresses it and following his headings).

ESTOPPEL, WAIVER AND ELECTION

18. At paragraph 46.2 Mr Doyle contends that the builder's pleaded position is that the owners agreed to accept the works as built by taking possession when they entered into an agreement with the builder to "settle accounts and claims to deduct $2000". As best as I can understand his submissions, he elaborates on this argument at paragraphs 47 – 59.

19. It appears that the builder contends that the owners are prevented from bringing the claims in this proceeding either by:

    a. their conduct during construction, by allegedly inspecting and approving the work, or

    b. by the terms of an alleged agreement made in December 2014, when the builder agreed to allow them to withhold $2000 from the claimed final payment.

20. I do not accept either of these hypotheses. Apart from the fact that the first ground of estoppel was not pleaded (even after the amendments made during the hearing), there is no evidence to support the contention. Mr Doyle was not able to refer me to any occasion on which the owners did anything more than attend the site, take photographs and have conversations with the builder. Mr Evans' own evidence does not say that the owners approved his works.

21. The second contention is also not supported by any evidence. Mr Evans' evidence (at paragraphs 185 and 186 of his witness statement) was that:

> "In or around mid December 2014, I spoke to the owners whereby I agreed to waive the sum of $5693.50 and that the owners hold the remaining $2000 on account for defects… However the owners continued to identify defects that were clearly beyond the scope of the works under the contract. The remaining money was to be used to rectify the alleged defective work. "

22. This statement is contradicted by the next 21 paragraphs of his witness statement, where he set out all the occasions throughout 2015 that he attended to the site or made efforts to rectify and complete the outstanding work, culminating in the statement at paragraph 207 that:

> "On 11 October 2015, I emailed Wendy Yarnall and advised that I had been caught up with work, and intended on attending to their list of alleged defects the following day."

23. The evidence in his first witness statement is also contradicted by his second witness statement, where Mr Evans said (at paragraph 17):

> "The $2000 that I waved was originally held by the owners until I had attended to the alleged defects. However the $2000 was waived for the damaged carpet to be replaced. I note that this was significantly more than the quote received to replace the carpet. I did agree to return to the site and rectify the defects and did so with relation to the defects that were inside my Scope of Works."

24. Further, on the last day of the hearing, Mr Doyle sought and was given leave to amend the Defence to include at paragraph 9(a) the defence that the builder was "ready, willing and able to complete the works…".

25. The evidence set out above is inconsistent with the present contention that foregoing the payment of $2000 was in full and final settlement of all defects. However it is consistent with Mrs Yarnall's evidence that "Nigel offered to allow us to retain $2000 from the final payment and said that he would come back and do all of the work required".

26. I do not accept that the owners are estopped from bringing the claims in this proceeding, nor have they waived their rights or elected not to do so. Even if there were any merit in Mr Doyle's contention, he has omitted to consider the effect of sections 10 and 27(2) of the *Domestic Building Contracts Act* 1995 (DBC Act), which provide as follows:

> **Section 10**:
>
> A provision of an agreement or instrument that purports to restrict or remove the right of a person to take proceedings for a breach of any of the warranties listed in section 8 is void to the extent that it applies to a breach other than a breach that was known, or reasonably to have been known, to the person to exist at the time the agreement or instrument was executed.
>
> **Section 27(2):**
>
> A building owner may still dispute any matter relating to work carried out under a domestic building contract even though the building owner has paid the builder in relation to the work.

TERMINATION OF THE CONTRACT

27. Mr Doyle then submits (at paragraph 37) that the pleadings do not disclose any proper basis available to the owners to justify the alleged termination pleaded at paragraph 9 of the Points of Claim. The submission continues with a line of authority to the effect that where the likelihood of the applicant's case and the respondent's case is perfectly balanced, the applicant will not have proven its case and the Tribunal cannot use conjecture to choose between competing possibilities. While Mr Doyle does not say what is the relevance of these authorities, I presume that the builder contends that there is competing evidence as to the termination of the contract and the owners have not satisfied the onus of proof.

Repudiation

28. Paragraphs 60 to 62 of the builder's submission come under the heading 'Repudiation'. Curiously, despite this heading, there is no further reference to any supposed repudiatory conduct. Instead, Mr Doyle says that the owners should have alerted the builder to the defects before terminating the contract. Leaving aside the relevance of this proposition, it completely ignores the agreed evidence that the owners did regularly notify the builder.

29. Mr Doyle then relies on clause 47 of the contract and says compliance with this clause "is a condition precedent to owners having a right to terminate the contract and commence any action against the builder". He also says that clause 47.1 restricts an owner to the cost of completing the work and does not entitle the owners to seek inflated damages for defects.

30. The version of clause 47 in the Tribunal Book (to which Mr Doyle has referred me) does not support either of these contentions. The clause does not operate as a condition precedent to terminating a contract or commencing any action. Instead it is a clause that applies after an owner has brought a contract to an end. It provides that in that event, an owner can set off the reasonable costs of completing the building works and fixing any defects against the unpaid balance of the contract price.

31. In any event, even if Mr Doyle were correct, clause 46.0 operates to preserve the rights of owners to recover damages or exercise any other right or remedy when a builder is in breach of the contract. For the reasons set out in this decision, I am satisfied that the builder is in breach of the contract and so the owners' rights are preserved.

Termination And Estoppel

32. At paragraphs 63 to 87, Mr Doyle addresses termination and estoppel. He submits that "During the course of the works the owners conducted themselves on the basis that the procedural terms of the contract in relation to claims would not be strictly enforced". As best as I can understand the

submission, he says that the owners requested and received additional work by way of compensation for the defects. As the builder does not make any counterclaim or set-off for extra work, and the owners do not make any claims for a refund of variations, these submissions are irrelevant.

33. He then sets out a number of authorities in relation to estoppel and waiver, and concludes (at paragraph 80) that the owners' conduct "has established an unequivocal representation… that it would forgo its right to strictly rely upon contractual preconditions… in relation to… the alleged defects". The Defence does not raise the issue of estoppel by representation, even after leave was given during the hearing for amendments to be made. Accordingly, I have no regard to the submission.

34. Further, even if I were to consider it, the submission is hopelessly vague. For example, the builder has not identified or established the necessary elements of estoppel by representation, including the promise which the owners are alleged to have made which would prevent them from relying on section 8 of the DBC Act, the reliance placed on the promise by the builder, the detriment that the builder will suffer, or the unconscionable conduct of the owners on which the estoppel defence is based.

35. At paragraph 83, Mr Doyle contends that the owners "failed to properly notify the builder of the alleged defects prior to termination, and the owners further failed to provide a reasonable opportunity to attend to the same following receipt of the notice or any reasonable list of defects". This submission is directly contradicted by the contemporaneous documentary evidence which establishes that the builder repudiated the contract by refusing to return to attend to the defective and incomplete work (see paragraphs 5 and 6 above).

The role of Peter Innes

36. Mr Innes was appointed by the owners to liaise with the builder for them when they went overseas in November 2014. Mr Doyle in his submissions (even though this is not pleaded) contends that the authority went further, even though "the owners were confused as to the authority given or the role he was to play", and that I should accept that Mr Innes was "appointed as the owners' contact and was authorised to instruct the builder directly under the contract". He contends that Mr Innes accepted the work carried out by the builder on the owners' behalf.

37. I do not accept that contention, firstly because the allegation is not pleaded, and secondly, because there is no evidence to support the contention. It is difficult to see how an owner can have appointed someone as their agent with unlimited authority to sign away their rights when "the owners were confused as to the authority given or the role he was to play".

38. Even if I were to accept that Mr Innes had such a role, Mr Doyle has not been able to point me to any evidence from Mr Evans that he and Mr Innes reached an agreement to the effect that the owners would not make a claim for any of the 25 items in this proceeding. Instead, Mr Evans' evidence at its highest, as set out in his final witness statement (emphasis added), was that he and Mr Innes:

> "… went through the list item by item and Peter was happy with the rectification work I was going to undertake. Upon completion of some of the rectification works, Peter Innes was satisfied."

39. Mr Doyle invited me to draw a negative inference from the owners failure to call Mr Innes to give evidence, in accordance with the rule in *Jones v Dunkel*[2]. In circumstances where there is no pleading by the builder in which Mr Innes' role is referred to, and the witness statements of Mr Evans made in November 2017 in January 2018 did not call for a response from Mr Innes, there is no substance to the submission. In any event the rule applies such that an unexplained failure by a party to call a witness may lead to an inference that the uncalled evidence would not have assisted the party. As Mr Evans' own evidence does not support the contention put by Mr Doyle, it is not appropriate to draw any inference.

CONCLUSION ON TERMINATION

40. I am satisfied that the owners were entitled to and did terminate the contract in October 2015, on the grounds that the builder was in substantial breach, for the reasons set out in the Notice of Remedy Breach and Intention to End Contract. In particular, as will be seen from the discussion in respect of the individual defects below:

    a. the builder had not completed the works (for example, items 1, 4, 6, 8, 9, 13, 14);

    b. the builder did not carry out the works in a proper and workmanlike manner (for example, items 1, 2, 3, 5, 7, 9, 11, 12, 13, 14, 15, 17A, 18, 20, 21, 22, 23, 24);

    c. the materials supplied by the builder for use in the works were not good and suitable for the purpose for which they were used (for example items 5, 22);

    d. the builder did not carry out the works with reasonable care and skill (for example, items 1, 2, 3, 5, 7, 9, 11, 12, 13, 14, 15, 17A, 18, 20, 21, 22, 23, 24);

[2] (1959) 101 CLR 29

e. the materials used in carrying out the works were not reasonably fit for the intended purpose or were not of a nature and quality that they might reasonably be expected to achieve that result (for example, items 5, 22); and

f. the builder suspended carrying out of the works when he refused to return in October 2015.

THE DEFECTS AND INCOMPLETE WORKS

41. During the site visit, Dr Eilenberg pointed out each item of complaint. There was some discussion on site between him and Mr Campbell and their evidence was given concurrently at the Tribunal over the following 1¾ days. Both experts are to be commended for the professional, objective way they gave their evidence and for making appropriate concessions when required. Mr Campbell's evidence was limited by the scope of his instructions, but he did the best he could to challenge Dr Eilenberg's opinion when appropriate.

42. I pause here to deal with the builder's objection to Dr Eilenberg's evidence. Mr Doyle submitted (at paragraphs 102, 110-111) that:

> "Without any a proper basis for the Tribunal to determine matters otherwise than by resort to conjecture or speculation, the owners expert has adopted a total re-build approach which artificially inflates the amount claimed. The expert add builders overheads and profit to simple trade work which requires little coordination and is subject to active competition. The expert evidence provided by the builder is to be preferred…
>
> The expert took no account of any information provided or arrangements made by the owners after the contract was signed and in particular did not have any instructions which he revealed as to the changes which occurred after the contract started. Accordingly, he measured against a standard (by deliberate tactic) that no evidence was called to verify, and his report should be viewed as unproven and unreliable.
>
> Further, in most cases of alleged defects he recommended total replacement. In this he failed to produce evidence which should persuade the Tribunal adopt that course."

43. Those general complaints are not supported by any specific examples. Further, as will be seen during the discussion below in relation to each item, Dr Eilenberg has not resorted to speculation or conjecture. He and the owners referred me to particular plans, specifications or other documents in order to establish the contractual scope of work. Dr Eilenberg and Mr Campbell often agreed on what was within the builder's scope, and often agreed on the rectification required. The complaint about a lack of evidence is more appropriately made about the builder's case, and the

submission that Mr Campbell's evidence should be preferred is surprising, in that Mr Campbell was specifically not instructed to look at defects or to provide a cost estimate for many items. Nevertheless, despite his limited brief, Mr Campbell provided comments on Dr Eilenberg's opinions, which I have taken in to consideration, as set out below.

44. All costings below exclude profit, overheads, margin, contingencies and GST. This will be added at the end.

1. Painting

45. Both experts agree that the painting work is generally incomplete and defective in areas. Dr Eilenberg said:

> "A major issue on this premises is the quality of the painting. In many areas of the old house, there are signs of lack of preparation – filling, sanding smooth etc and in the windows areas of the frames that clearly have not been prepared or painted, at all.
>
> In the new area, much of the paint looks very thin and I have severe reservations that more than one coat of paint or at most an undercoat and one top coat, has been applied.
>
> Painting should be undertaken in accordance with Australian/New Zealand Standard AS/NZS 2311: 2009 - Guide to painting of buildings… It is my opinion that the quality of this work does not meet the requirements of the Standard."

46. Mr Campbell was only instructed to report on incomplete works, not defects in the painting. In his oral evidence he said:

> "My understanding with the painting, from my observations there was a lot of incomplete painting work…
>
> When I did my first inspection and I was looking at incomplete painting work saying, 'Well, if the job was supposed to be finished, how come we have got all these incomplete works'…"

47. The parties agree that the contract contained an allowance for painting of $10,000, and this was in effect a provisional sum. As part of the final claim, the builder included a claim for $8250 (including GST) over and above the $10,000 allowance. As Mr Evans conceded, the owners paid this part of the final claim the following day, making a total payment to the builder for painting of $18,250.

48. Despite this, the instructions from the builder's solicitors to their expert, Mr Campbell were that:

> "The applicants were unwilling to spend more than $10,000 on painting and therefore the quality of the painting was unable to be completed to the standard usually required by our client"[3].

49. This incorrect instruction infected Mr Campbell's report. For example, he said that the $10,000 budget dictated by the owners was "totally inadequate", and the problems with the painting works were due to "the issue of funding" and the "lack of adjusted painting funds allocation".

50. Mr Campbell's opinion, expressed during the concurrent evidence, was that the extent and quality of the painting work which had been carried out was what he would have expected for $10,000. The difficulty for the builder is that, in fact, the owners have paid $18,250 for the painting.

51. In circumstances where the builder had carried out $10,000 worth of painting, then had told the owners that he had completed the painting at a cost of $18,250 (by making the final claim), but now says that amount was not sufficient to complete the work, the onus is on him to satisfy me that he in fact spent the $18,250 he was paid and that this amount was not enough. He has not done so. Mr Evans was unable to tell me how much he actually spent on the painting works. The invoices and receipts for labour and materials which he had discovered totalled only $9798.22. Mr Evans was not able to justify the extra $8451.78 charged to the owners.

52. The next issue raised in by Mr Doyle is the suggestion that I cannot decide on thinness without the paint coverage having been tested. In circumstances where the lack of coverage is visible to the naked eye, as I observed during the site visit, I do not accept that testing is also required. The 2007 Guide to Standards and Tolerances published by the Victorian Building Authority ("the Guide") was incorporated in to the contract by the notation on drawing 1203-01:

> All building work to be carried out to exceed the minimum quality as described in the 'Guide to Standards and Tolerances 2007'".

53. I am satisfied that the Guide provides a suitable method of assessing the appropriate standard of paintwork, and does not require testing:

> **Surface finish of paintwork**
>
> Paintwork is defective if the application has blemishes such as paint runs, paint sags, wrinkling, dust, bare or starved painted areas, colour variations, surface cracks, irregular and coarse brush marks, sanding marks, blistering, non-uniformity of gloss level and other irregularities in the surface that are visible from a normal viewing position.

54. I am satisfied that the builder is liable for the cost of completing and rectifying the painting works, as he has been paid a sufficient amount to

[3] letter from Doyles to Mr Campbell dated 22 February 2017

have carried out the work properly in the first place. The failure to do so is a breach of the contractual term to complete the agreed scope of work, and a breach of the warranties implied as terms of the contract by section 8 of the DBC Act.

55. Dr Eilenberg estimated the cost to complete the defective and incomplete painting, including painting following rectification of other work, at $13,000. Mr Campbell did not provide an estimate as he had not been instructed to do so. As there is no contrary evidence, I accept Dr Eilenberg's opinion and I will allow this amount.

56. For the sake of completeness, I note that the submission prepared by Mr Doyle indicates that he still labours under the misapprehension with which he instructed Mr Campbell, that the owners are only entitled to $10,000 worth of painting works. Despite his acknowledgement (at paragraph 123) that "the builder's liability for the painting extends to the $10,000 … and an additional $8250…", at paragraphs 126 and 129 he submits that the budget was capped at $10,000. This submission is not accepted.

2. External paving - generally

57. The claims in relation to the external paving fall into three separate complaints:

    a. a step has been constructed in the path running along on the north side of the dwelling, contrary to the express instructions of the owners;

    b. the path constructed on the east side of the dwelling is 1000mm wide instead of the specified width of 1200mm; and

    c. the east side path slopes towards the house in places.

2a. External paving – north side step

58. The owners' evidence was that they expressly advised the builder that the new path running along the north side of the dwelling, past the front door, should have no step. They rely on an email dated 22 July 2014 sent to the builder prior to entering into the contract, which attached specifications for the project, and in which they stated:

> "Remove existing slab and replace. Extend to match depths at front of house (sloping – no step) and create a path (1200) at side of garage…"

59. They also rely on the drawing 1202-02, which shows a slope, not a step.

60. The builder agreed that he had demolished the existing path and that his concreting subcontractor Mr Newman had constructed the new path. His evidence was that this work was a variation, which Mrs Yarnall had requested directly from Mr Newman, without his involvement. Mr

Newman's evidence in his witness statement contradicted Mr Evans', in that he said "The Builder was present during every conversation I had to vary the Works with the Owners".

61. Mr Newman also said in his witness statement that in December 2014 he told Mrs Yarnall there would be a slope in the path, that he suggested a step, and she agreed. Mrs Yarnall denied this conversation. I prefer Mrs Yarnall's evidence about this issue to Mr Newman's. His overall recollection of events was vague, whereas hers was clear. For example, Mr Newman confirmed that in preparing his witness statement, he had told the solicitors that the conversation happened in December. He also checked his witness statement before he approved it. However in his oral evidence, he admitted that he was not sure about the dates things had occurred. He said that he had commenced pouring the concrete slab in September. He then constructed the north path, then the east path, then the south side. However in the next sentence he said he could not be sure that was the order he did the work in, and it "would all have been pretty much at the same time". His invoice for the north path was dated 15 December 2014, which he said indicated he may have actually carried out the work in November. When it was suggested to him that a conversation with Mrs Yarnall in December would have been after the path was constructed, his answer was "it might have been earlier on in the piece, I'm not sure".

62. Mrs Yarnall's evidence was that the path was removed without her consent in September 2014, and she provided corroborating photographs taken at that time. Mr Newman initially did not agree with that evidence and said he would not have removed the path without her consent. He said he got that consent during the conversation in December, although "maybe my dates are out of skew. I'm not sure". He then said that in fact he removed the old path at the same time as removing the old slab, at the request of the owners, and that he was "pretty sure" that he had told Mr Evans at that time.

63. On the other hand, Mrs Yarnall was clear and unshaken in her evidence that the path was removed without her knowledge or consent, and when she asked Mr Evans why, he said it would look better and will be replaced when he concreted the front of the garage. I also accept her evidence that she was not told that there would be a step in the path, nor that she could have ascertained from the formwork that a step was being built. I agree with the suggestion made by Counsel for the owners to Mr Newman that he simply went on site and did what he thought would be required, without reference to the plans, as he always did when working with Mr Evans. Mr Newman agreed that was correct, although he said he always had an owner's instructions. As I do not accept that he had obtained those instructions in this case, I find that the construction of the step in the path is a failure to comply with the terms of the contract.

2b. External paving – width of east path

64. Similar issues arise in respect to the width of the east path. The contract plans (drawing 1203-02) provide for the builder to construct a 1200mm wide concrete path along the east side of the house. Terry and Wendy's List refers to a "Concrete path to east to garage to be approximate 1200 garden 800". The specification attached to the email of 22 July 2014 stated "… create a path (1200) at side of garage…".

65. The path that has been constructed is 1000mm wide. Mr Newman claimed that he had a discussion with Mrs Yarnall and that she instructed him to reduce the width of the path. Mrs Yarnall denied this conversation. For reasons similar to the previous issue, I prefer Mrs Yarnall's evidence to that of Mr Newman. During cross-examination, Mr Newman admitted he was not sure whether he did have that conversation with Mrs Yarnall. He said "Maybe she did ask me. I'm not quite sure".

66. I am not satisfied that there was any variation to the contract drawings in respect of the side path. I accept that the construction of the concrete path is a failure to comply with the terms of the contract.

2c. External paving – slope of east path

67. There was some discussion between the experts about the fall of this path, and whether it is sloped towards the garage wall at its southern end, allowing water to penetrate into the garage. The contract required all finished surfaces surrounding the house to be graded to give a slope of not less than 50mm over the first 1 metre from the building (drawing 1203-01 General notes). Some water testing was done during the site visit and it was apparent that some water was flowing towards the garage side door.

68. However, as I have determined that the path must be removed and replaced because of its width, I do not need to decide whether or not the fall of the path is an issue.

2d. External paving – cost to replace

69. Dr Eilenberg provided an estimated cost to replace both the north and east paths, of $9275.18, which included breaking up the old concrete, hiring a breaking machine, truck and driver hire and loading costs, tip fees, then forming new concrete paths to north and east, concrete pour, labour, separation joints and sealing. Mr Campbell did not provide a costing but commented on Dr Eilenberg's. He agreed that their labour costs were "pretty close", as one used Cordell's rates and one used Rawlinson's, which are very similar. Mr Campbell disagreed with the need for a truck and driver, saying this was an unnecessary cost, as a skip could be used instead to take away the rubbish. He also disagreed with the estimated hire cost of

the breaker, saying $180 for a day would be sufficient rather than $100 per hour for eight hours, plus the cost to pick up and return.

70. In circumstances where Dr Eilenberg has provided an itemised costing, nominating a detailed scope of work and precise numbers of hours, rates and materials, while Mr Campbell was not instructed to provide any costing at all, apart from giving his comments during cross-examination, I prefer the opinion of Dr Eilenberg. Even if I were persuaded that, for example a skip would be a more reasonable cost to a truck, Mr Campbell did not provide any estimate of the likely cost for a skip. Accordingly I accept Dr Eilenberg's evidence and will allow $9275.18 for these items.

3. Drainage - north end of garage

71. The contractual drawings show that there is to be a strip drain installed between the garage floor and the north side concrete path. In fact, the builder has installed a strip drain on the outside of the concrete path, next to the lawn. Dr Eilenberg's opinion is that, apart from the specified location, it is good practice to locate the drain at the opening to the garage, to prevent water entering. Further, the drain that has been installed is too short, as it does not cover the full width of the opening. I was also shown photographs of a significant amount of water on the floor of the garage, and was told that this occurred after a rain event, as the drain as presently installed was unable to prevent water flooding the garage floor.

72. Mr Campbell's opinion is that the location of the drain is satisfactory. The path grades away from the garage and the opening is overhung by the balcony above. A grate on the inside of the path would serve little purpose.

73. In light of the evidence relating to the flooding of the garage, and the fact that the drain is not installed in accordance with the contractual drawings, I do not accept that the drain as presently installed is suitable for purpose. Accordingly I will allow for the cost to relocate the drain and to ensure that it runs the full width of the garage opening.

74. Dr Eilenberg provided a costing for these works, while Mr Campbell did not comment. The cost of pulling up the path has already been allowed in the previous item. The extra cost to install a preformed strip drain and connected to the main storm water drain is $565.36. I will allow this amount.

4. Drainage - south end of garage

75. All parties agreed that the contract required a strip drain to be installed at the southern opening of the garage, and that this work was incomplete. As I am satisfied that the owners' termination of the contract was valid, the builder is liable for the cost to complete this item. Dr Eilenberg provided an estimate of $1020.27, while Mr Campbell provided an estimate of $343.

76. The differences between them are the cost of labour and the scope of work required. Dr Eilenberg allowed to surround the drain with a concrete strip, while Mr Campbell explained that concrete was not shown on the drawings, and that the drain should be set in a trench in packing sand. Further, Dr Eilenberg estimated the installation of the drain would require 8 hours labour, while Mr Campbell allowed 4 hours. There was a $77 difference between them for the cost of the plumbing materials required.

77. I agree with Mr Campbell that the drawings do not require the drain to be set into concrete. Accordingly, I will allow his estimate of $343, as the reasonable cost of the work required to complete the contractual scope.

5. Windows

78. The issue is that the windows do not match the profile of the cladding, as the windows protrude. The most significant is Window 1 (W1), being the triple stacker sliding door unit on the ground floor of the north side. The original design, shown on the plans, was that the surround to the garage door (east of W1) was to be clad in "Scyon Matrix Cladding" while the existing brickwork wall to the west of W1 was to remain.

79. Mrs Yarnall's evidence was that after W1 had been installed into the existing brick wall, Mr Evans suggested changing the brick wall to match the cladding around the garage. The reason for this was that the existing north wall had a number of different levels, and Mr Evans suggested that the recessed wall of bedroom 7 (to the west of the front door) could be brought forward to match the new front door and to provide space for an internal wardrobe. Mrs Yarnall said that while she and her husband agreed to the rebuilding of the north wall, Mr Evans did not mention that the result would be part of the W1 window frame sits proud of the new wall. Had he done so, they would never have agreed.

80. There was no dispute that the cause of the problem was that W1 had been designed and installed to match the profile of the existing brick work. By removing the bricks and replacing it with a different cladding system after it had been installed, without making appropriate adjustments, W1 now protrudes in an unsightly fashion.

81. Dr Eilenberg said that the thickness of the wall was reduced by 130mm in the change from brickwork to cladding. This has exposed the stile profile of W1. The builder could have moved the window inwards, by removing the internal reveal, or could have put a timber column on the west side to hide the protrusion. Mr Campbell agreed that moving W1 inwards would have improved the protrusion by 50 to 60mm, and then a trim or a timber architrave could have been installed on the outside. However his opinion is that the window is fit for purpose and is compliant and the question is a cosmetic or aesthetic choice. He conceded that whoever suggested

changing the cladding should have considered what effect that would have had on W1, and a competent builder would have had a discussion with the client before making the change.

82. The second window issue is that where cladding has been used for the upstairs walls, the new windows also protrude. The cladding specified in the contract was "Scyon Matrix", but this was changed by the builder to "Axon". Axon has a 20 mm narrower profile than Matrix, once installed. Mr Evans agreed that the Matrix product would have been affixed to battens, and so would sit level with the windows, whereas the Axon is affixed directly to the frame, which is why the windows protrude.

83. Mr Evans response to the owners' complaint was that when he suggested the change from Matrix to Axon, he drove them past his own house to show them the Axon walls he had, and so they should have seen that the windows would protrude. Neither Mr or Mrs Yarnall were asked about this drive-by. There is no evidence that Mr Evans told them what the final look of the windows would be if Axon cladding were used. The owners complained as early as January 2015 that the windows were not satisfactory. They asked for cover strips to be installed in their first defects list.

84. In the words of Mr Campbell, a competent builder would have had a discussion with the client about the effect of making a change in the cladding. I do not accept that a drive past Mr Evans' house, with no specific discussion, is satisfactory.

85. The solution to the upstairs windows (agreed by both experts) is that the builder should have supplied and installed the trims which James Hardie offers for windows used with Axon cladding. He did not do so. Mr Evans claimed this would have been an extra cost, but he has not provided any details of what that cost would be. Nor has he allowed any credit for the change from Matrix to Axon which would need to be factored in to any variation claim by the builder.

86. The third window issue is that window 13 was specified (in drawing 1203-3) to be a double slider, whereas a single slider with a fixed panel has been installed. No evidence was given that there was any agreed variation to contract. The window should be replaced as this is a failure to comply with the contract.

87. I accept Dr Eilenberg's scope of work and cost estimate to rectify these window issues. During the course of the proceeding Dr Eilenberg put forward several alternative scopes, including removing and replacing the windows, removing and replacing the walls and moving W1 inwards. Ultimately, in accordance with his obligations to the Tribunal, he proposed the most cost effective solution, which is to replace W1 and W13 and install James Hardie trims to the other windows. His cost estimate is $13,510.56.

Mr Campbell agreed with the scope of work and did not provide an alternative costing. I will allow this amount.

6. Master bedroom wardrobe

88. Both parties agreed that the master bedroom wardrobe had not been completed. The estimated costs given by each expert were similar, and the parties agreed that I should "split the difference" and allow the amount of $806.50.

7. Roof under deck (also item 19)

89. The underside of the timber deck on the north face of the house was clad with corrugated colorbond steel sheets, with an internal gutter, as provided for in Wendy and Terry's List. Water leaked around the colorbond sheets, and they were ultimately removed to prevent further damage to the fascia and soffit. Upon their removal, Dr Eilenberg said that it became obvious that the structure had not been sufficiently graded to allow water to drain. Further issues also were observed, including that not all joist hangers had been appropriately nailed and the joists had not been capped. In his evidence at the Tribunal, Mr Campbell agreed with Dr Eilenberg about the lack of fall.

90. At the same time, engineering expert evidence was given by Mr Horan and Mr Nettle (whose reports were tendered without cross examination by agreement) that cappings over the joists are required to prevent rotting and that the decking above would have to be lifted to allow the installation of this capping. Mr Campbell did not necessarily agree that capping was required, but I prefer the evidence of the two engineers given with the agreement of the parties in this regard.

91. Dr Eilenberg estimated the cost to lift the deck, rework the roof flashings and adjust the gutters, fix cappings to the timbers below, fix joist hangers, and refix and coat the decking at $7416.86 (he amended his estimate during his oral evidence in respect of this item). He also allowed a further $1761.30 (at item 19) to replace areas of deck after having installed the cappings. Mr Campbell did not provide a costing. He challenged Dr Eilenberg's calculation of hours required, which led to Dr Eilenberg reducing his estimate to the figure above.

92. I accept the appropriate concessions made by Dr Eilenberg, and in the absence of any contrary evidence by Mr Campbell, I will allow the combined cost for these two items of $9178.16.

8. Laundry in garage

93. Both parties agreed that the laundry had not been completed. The estimated costs given by each expert were similar, with Dr Eilenberg allowing $1552.60, and Mr Campbell allowing $1068 plus a further $226 during his

oral evidence. The parties agreed that I should "split the difference" and allow the amount of $1423.

9. Bathroom off the garage

94. I viewed incomplete and defective work in this area. Mr Campbell agreed there was incomplete work and provided a costing of $770 to complete. He was not instructed to and did not comment on the defects. Dr Eilenberg's opinion is that the tiling does not comply with AS3958 and the Guide. He has allowed $9235.04 to completely strip out and retile the bathroom, as he said that is a cheaper option than trying to rectify what has been done.

95. Issues I observed on site included that the timber edges of the doors and windows had not been painted, the tiling was generally poorly done, with lipping of the shower tiles, grout lines not lining up on adjacent walls, the cutout around the sliding door very rough and not sealed. Also, the vanity drawer had been poorly modified and the seal on the shower door was cut too short and was in two pieces.

96. I agree with Dr Eilenberg that the tiling in the downstairs bathroom is defective, other defects are present, and that the room as a whole is incomplete. In particular I rely on clauses 11.01 and 11.08 of the Guide, which provide:

> **11.01:** Unless documented otherwise, tiling work and materials must comply with AS3958.1 Ceramic tiles – guide to the installation of ceramic tiles and AS3958.2 Ceramic tiles – guide to the selection of a ceramic tiling system and the manufacturer's installation instructions for the materials selected.
>
> **11.08:**… tiling is defective if it has joints that are not uniform, of even width, aligned or in the same plane.

97. As Mr Campbell did not provide a costing for this work, I accept Dr Eilenberg's evidence that the appropriate rectification cost is $9235.04.

11. Rumpus room cupboard/under stair

98. The drawing 1203-02 required a built-in wall shelving unit on the wall under the stairs. It is obvious that the unit installed by the builder does not comply with the drawing. The owners gave evidence, which I accept, that what has been constructed will not hold their entertainment equipment. Dr Eilenberg estimated $204.43 to rebuild this item, after allowing a credit for work removed from the contract. I will allow this amount. Mr Campbell provided no costing.

12. Rumpus room wardrobe cupboard

99. The experts agreed that the door handles, mortise latch and shelving have been fitted poorly or incorrectly. They agreed to split the difference

between their costings ($252 and $392), which gives a figure of $254. I will allow this amount.

13. Kitchenette – ground floor

100. The kitchenette has not been completed and there is evidence of poor quality finishes to the work that has been done. In particular, kick rails are missing, timber infill above cupboard is missing, there is a poor finish between the tiling and the joinery, the fitting of the exhaust fan and exhaust has been poorly executed, tiling around the kitchen cupboard is of poor quality. Further, the step between the kitchen/rumpus room and the garage is rough and incomplete.

101. Further, the owners' complaint is that the tap has been installed in the wrong location. The cost to now move the tap is significant, as it will require a new benchtop. Mrs Yarnall's evidence was that at the time of designing the kitchenette, there was a generic drawing showing the tap in its present location. Then, prior to the kitchenette being installed, she gave a diagram to the builder showing the location of the tap to be in the corner of the benchtop. The location is important because there is a dish rack above the sink and the tap had to be in the corner to avoid hitting the dish rack.

102. Mr Evans' acknowledged that he had received both of the owners' drawings. He said "I knew the tap had to be in the corner. But then we have another drawing. I don't know which drawing was the latest. I don't go through all the papers to make sure there is not a second instruction." He said he gave the pile of paperwork to the plumber and did not supervise the installation of the tap. His defence is that if there were two contradictory drawings, it is not his fault. However he conceded that he was speculating as to the order in which he received the drawings.

103. On this issue, I prefer the evidence of Mrs Yarnall. She had a good recollection of the order in which the documents had been produced, and her recollection is supported by the documents showing the dates when the kitchen materials were supplied to the builder. She was not shaken in cross examination. On the other hand, Mr Evans' evidence indicates that he was aware the tap should have been in the corner, and that the error occurred, he speculates because either the documents were misleading or his plumber erred. Whichever is the situation, I am satisfied that he did not properly instruct his subcontractor and I will allow for the cost to move the tap.

104. Dr Eilenberg estimated that the cost to rectify all items in the kitchenette is $3678.94. Mr Campbell did not provide a costing. Dr Eilenberg conceded that if the wall tiles do not need to be replaced, his costing would be reduced by $604.71. I am satisfied that the wall tiles themselves are not so poorly laid that they should be replaced. Accordingly, I will allow $3074.23 for this item.

14. Ground floor bedrooms

105. There are four bedrooms downstairs, which variously demonstrate poorly finished doors and paintwork, badly finished carpet, spilled paint, a tear in the carpet, incomplete joinery and door hardware. Further, the set-out of bedroom 5 does not match the drawings, with the result that bunkbeds that were to be installed do not fit.

106. I accept that the work in these areas is incomplete and in places poorly carried out. The main issue for me to determine is whether an amount should be allowed to rebuild the cupboard in bedroom 5, to make it comply with the drawings. The required distance between the west wall and the cupboard was 2200mm. The builder has constructed the cupboard such that the distance is only 1800mm. Mrs Yarnall's evidence was that this means the bunkbeds she had bought for that space do not fit. Generally speaking, owners are entitled to be placed in the position they would have been had the contract been complied with, unless it is unreasonable to do so[4]. In the present circumstances, I find that it is not unreasonable for them to receive a room which is fit for the purpose for which it was designed.

107. Dr Eilenberg originally estimated a total of $5140.08 to rectify these issues, although during the hearing he conceded that his estimate for carpet ($2500) should be reduced if only two rooms are allowed. His estimated carpet price per room was $700-$800. The owners obtained a quote for replacement carpet in bedroom 7 for $709. I accept that recarpeting will be required in bedroom 5 and bedroom 7 so will allow $1400 instead of the $2500 estimated by Dr Eilenberg. I will allow a total of $4040.08 for these items. Mr Campbell did not provide a costing.

16. Garage – floor roughly finished, ceiling not level, door rails, leaking through east wall

108. Both experts agreed that the concrete garage floor was not well finished. Dr Eilenberg said that the solution was to grind the floor to a smooth surface and then paint it. Mr Campbell initially said that the finish is consistent with a garage floor, but in his oral evidence agreed that there were some blemishes and "there is some mortar, lots of stuff on…" and "it could certainly do with a tidy up". However he did not think grinding would solve the colour differences and instead suggested cleaning and painting would be a preferable solution. He has not provided me with a scope of work or cost estimate for that solution. Accordingly based on the evidence before me, I accept Dr Eilenberg's scope of work and cost estimate of $3336.30.

[4] see *Tabcorp Holdings Pty Ltd v. Bowen Investments Pty Ltd* [2009] HCA 8; *Clarendon Homes Vic Pty Ltd v Zalega* [2010] VCAT 1202 and the cases there cited

109. Measurements taken using a straightedge show that the ceiling is out of level more than 4mm over 2m. The Guide does not specifically refer to ceiling levels, but both experts agreed that the reference to floor levels would be applicable to ceilings. The level of the ceiling in question is therefore defective, according to the Guide. Dr Eilenberg has allowed to cut out sections of the ceiling, realign it, replaster and repaint, including requiring the services of an electrician. Mr Campbell said that the ceiling could be made to appear more level without such invasive work, by re-fixing the light fitting. From my observation on site, the ceiling level is not an obvious issue. The scope of work proposed by Dr Eilenberg is significant. I find that it is disproportionate to the defect, and that it would be unreasonable to carry out that scope of work[5]. Mr Campbell did not provide a cost estimate for his scope of work, so I will allow the amount for the electrician and the sundry materials estimated by Dr Eilenberg, being $908.72.

110. The door rails for the tilt up garage door require the excess to be cut off, and there was no dispute about Dr Eilenberg's estimate of $69.69. I will allow that amount.

111. The fourth issue in the garage is the water damage caused by water entering around the side timber door. A number of photographs were tendered which were taken on or shortly after rain events in April 2015 and December 2016. While there was a dispute about whether the water was coming from the east wall or the north or south doors, there are signs of water damage along the skirting on the east wall and around the timber door. The water testing of the east path on site corroborated the theory that some damage was caused by water entering in that location. Dr Eilenberg allowed $139.38 for repairs to the timber door, but removed the other three items from his costing relating to this issue, on the basis that the east path would be rebuilt. I will allow the $139.38.

112. For the sake of completeness, there is also an item in Dr Eilenberg's costings for servicing the garage doors. I was not addressed on this issue and I do not allow it.

17. Stairwell

113. The complaint about the stairwell is that the paint was rough, the stair edges were not finished and a second handrail has not been installed. There were originally two handrails, one on either side of the staircase. These were removed when the wall of the stairwell was rebuilt. A new handrail has been installed on the western wall, and no handrail has been put on the eastern wall.

[5] Ibid

114. Drawing 1203-02 contained a note to the eastern handrail, "Change Handrail – Confirm with owner". Dr Eilenberg's opinion is that this notation is not clear. Mrs Yarnall's evidence was that they require two handrails to be able to climb the stairs easily. She said that the plans only show the eastern handrail as it needed modifying and that as the western handrail did not need modifying, there was no need for a notation on the plans.

115. The builder submitted that if a second handrail were required, that would be a variation to the contract, as it was not shown on the plans. Mr Campbell said that the original handrail on the western wall could not be kept, as it would not be possible to match the original.

116. I do not allow this item. In circumstances where the drawings are unclear, and they were obtained by the owners, then it would not be fair to hold the builder responsible for that lack of clarity. Moreover, I am satisfied that the builder had not allowed for two new handrails in the contract price, and so the cost of a second handrail would be a variation which the owners would have had to pay to the builder, unless they wanted mismatched handrails.

17A. Kitchen – 1st floor

117. The existing kitchen of the house was left largely intact during the renovation. The builder's scope of work (as set out in drawing 1203-02 and Terry and Wendy's List) was to install an extra row of cupboards and benchtop, which were supplied by the owners. These are located under the window to the alfresco area and form a servery area. The builder was also to fit kickboards and fill in the end of the appliance cupboard.

118. Mr Evans carried out this work, but submitted a variation of $4200 with his final claim for the installation of the kitchen. The owners disputed this variation, but agreed to compromise by paying half the amount.

119. The claim made in this proceeding is that the servery unit was installed defectively resulting in a poor appearance. The join in the benchtop is unacceptable, being taped rather than fitted with an aluminium angle, the bottle unit is coming apart, a slide out door for the rubbish bins has not been installed and kickboards were not fitted to the existing part of the kitchen.

120. The builder's defence is that he simply fitted what was provided to him by the owners. Mr Evans did not give any evidence about these matters, but Mr Campbell said he was instructed that as the owners did not provide an aluminium angle for the benchtop, the builder taped the join. Those instructions are contrary to the owners' defects list handed to the builder in January 2015 which noted that the owners had temporarily taped the join.

121. Similarly, in regards to the bin cupboard and the kickboards, Mr Evans did not give any evidence that he installed what was supplied to him. His position was put through instructions to Mr Campbell. Mr Doyle did not challenge the owners that they had provided the appropriate components. Nor did the builder raise this defence when responding to the owners by letter dated 12 September and 5 November 2015.

122. I am satisfied that the owners provided the builder with the materials necessary to complete the kitchen as shown on the plans. I base this finding particularly on the fact that the builder claimed and was paid an extra amount for works that were apparently part of the contractual scope. If the builder had not been provided with the necessary materials, he would not have been entitled to the variation. Further, as Mr Evans did not give evidence about these matters, I have no basis for accepting hearsay evidence from Mr Campbell.

123. During his oral evidence, after being challenged by Mr Campbell on the number of hours allowed, Dr Eilenberg revised his estimate for the cost to complete the kitchen to $2702.21. I will accept this amount.

18. Lounge room

124. This issue relates to the fireplace and shelving in the lounge room which have been poorly installed. Mrs Yarnall's evidence was that although the builder had previously attended to issues with the fireplace, it had not rectified the problem that it now sits proud from the wall. Having viewed the fireplace, I accept that the quality of workmanship is unacceptable. Dr Eilenberg estimated $2209.06 to remove the chimney lining, remove the Jetmaster unit, reframe the chimney and refit the unit, including a gas plumber. Repainting the wall has been allowed as part of item 1. Mr Campbell did not provide a costing.

125. The shelving units are built on either side of the fireplace and over the study desk, and are roughly finished. From my inspection, they appear not to have been built by an experienced carpenter. I accept that this is a defect. Dr Eilenberg estimated $3443.14 to remove the existing shelves, to manufacture, supply and install new shelving and to rework the study desk shelving. Mr Campbell estimated $565. Dr Eilenberg conceded during his evidence that his estimate was "a bit on the high side" but that Mr Campbell's was not high enough. In the absence of any other evidence, I will allow a figure halfway between the two, being $2004.

19. First floor decking (also item 7)

126. The original complaint made by Dr Eilenberg was that the deck slopes towards the house, there are incorrect screw fixings and the boards and nail fixings are poorly aligned. Mr Campbell did not agree that these issues were sufficiently serious to warrant the decking being re-laid.

Nevertheless, I do not need to decide whether the deck was originally poorly installed, as I have allowed the cost to remove and replace it as part of item 7.

20. Flooring – living/dining room

127. It was apparent during the view that there is a hump in the floor running from north to south across the dining room at the point where the existing floor meets the extension to the house. Compounding the problem, as Dr Eilenberg said, is that the new floor on the east side of the room and the existing floor on the west side are on different horizontal alignments and are out of level within each other.

128. Across the whole living/dining room the floor is outside the tolerances allowed by the Guide, being more than 4mm in any 2m length or more than 10mm in any room or area. Dr Eilenberg's measurements show that the new floor is 20mm out of level over 1200mm, which he extrapolates to be in excess of 45mm over the full floor extension. The old floor is slightly out of level. Dr Eilenberg's opinion is that the level should have been resolved when the new floor was installed to ensure a totally level installation.

129. The owners rely on clause 24.1 of the contract which provides, in substance, that if the builder finds a need to rectify any deficiency in the pre-existing datum points then the builder must promptly notify the owners in writing. The owners must then advised the builder in writing how to resolve the problem.

130. They also rely on clause I of the Guide (which is a contract document as noted on drawing 1203-01) which recommends that before starting work, the builder inform the owner of any potential circumstances and conditions of the existing building that may have a detrimental effect on the standard of the new work.

131. Dr Eilenberg suggested that a method of resolving the problem would have been to apply a levelling compound to the existing floor before the vinyl flooring was laid. The estimated cost of this would be about $2000. Mrs Yarnall's evidence was that Mr Evans never discussed levels with her. She said that had he done so, she would have agreed to pay $2000 to have the old floor levelled before the final flooring was laid. Mr Evans did not dispute that evidence.

132. I accept that it would have been impossible to achieve a level floor across the old and new areas by the framework alone. However I am satisfied that in failing to advise the owner of the potential for the hump, the builder is in breach of the contract and the warranties to carry out his work in a proper and workmanlike manner and in accordance with the plans and

specifications set out in the contract, and with reasonable care and skill. I accept Mrs Yarnall's evidence that had she known of the hump, she would have paid to have the floor levelled before the flooring was laid.

133. Dr Eilenberg has estimated the cost to remove the vinyl flooring and skirtings, plane and adjust the base flooring, apply a self-levelling compound, relay new vinyl plank and skirtings, at $10,130.63. Mr Campbell did not provide any alternative estimate and I accept Dr Eilenberg's figures. However, in order to put the owners in the position they would have been in had they been properly informed, I will deduct $2000, as Mrs Yarnall said she would have spent that amount to have the floor levelled. Accordingly, I will allow $8130.63 for this item.

21. Alfresco

134. According to Dr Eilenberg, the ceiling of the alfresco does not comply with the contract drawing 03, in that a Villaboard flush type ceiling was specified whereas cement sheet with H sections has been installed. Further, the ceiling that has been installed is sagging and does not appear to have been correctly fixed. The wall tiling behind the barbecue is also poorly finished and an incorrect end panel was installed. Mr Campbell's evidence was that he was not aware of what ceiling had been specified. His view is that the ceiling is within tolerances, and the issue is incomplete painting.

135. Dr Eilenberg estimated $1596.27 for this item. Mr Campbell did not provide a costing. From my inspection, I accept that the joins in the ceiling of the alfresco are not level and that the tiling behind the barbecue has been poorly executed. In the absence of any other evidence, I will allow Dr Eilenberg's estimate.

22. Timber fascia and pergola

136. The engineering drawings which form part of the contract provided for a treated pine timber fascia beam to be installed to the pergola. Both experts agree that this is the recommended material to be used in this location. Instead, from the markings on the timber, it appears that the builder installed a LVL (Laminated Veneer Lumber) treated to 'H2S' resistance.

137. Dr Eilenberg's opinion is that this material is not appropriate for external use. Mr Campbell said that if it is painted and capped it could be acceptable. He speculated that the builder chose this type of beam because he was unable to source treated pine in six meter lengths. Both experts said that if the project engineer and the building surveyor had approved the change in material, they would accept that decision. However, the builder was unable to provide any engineering or surveying approval for the change and I am satisfied that this failure is a breach of the builder's warranty to comply with the plans set out in the contract.

138. Dr Eilenberg said that in order to replace the fascia will be necessary to remove and reconstruct the pergola. His estimated cost is $4312.95. Mr Campbell did not provide a costing. On the basis that Dr Eilenberg's evidence was the only evidence before me, I accept this amount.

23. Roofing

139. The complaint is that the two penetrations for the vents in the metal roof sheeting are blocking the water flow and leaving dirt on the roof. Although the vents come with their own flashing, a flat metal panel (appropriately flashed) should have been used to prevent this problem.

140. Mr Campbell reported his instructions were that arrangements had been made with the roof plumber who has agreed to rectify the situation. Mr Doyle suggested that the work was carried out by the electrician engaged by the owners. The builder gave no evidence about who installed the vents.

141. In the absence of any evidence from Mr Evans, I do not accept the hypotheses put by Mr Campbell and Mr Doyle. As both experts agree that works are required, and as the builder is responsible for the works carried out by his subcontractor plumber, I accept this item. The only cost estimate was provided by Dr Eilenberg, at $1642.48. I accept this amount.

24. External stair

142. The issue is that an external staircase has been built from the upstairs barbecue area down to the ground on the south wall of the house. The staircase prevents the bathroom window from fully opening. Dr Eilenberg estimated that two hours would be sufficient to modify the edge of the staircase at a cost of $239.38. Mr Campbell did not comment on this item.

143. In the absence of any contradictory evidence, I accept that this item is a defect and I accept Dr Eilenberg's cost.

25. Plumber/drainer

144. During the site view, Dr Eilenberg pointed out issues with the external pipe work, including downpipe brackets, condensate cover and roof pop-ups. He has allowed $498.12 for a plumber to check and rectify where necessary. Mr Campbell did not comment on these items. In the absence of any proper investigation by Dr Eilenberg or a plumber, I am not satisfied that the owners have satisfied their burden of proving this item.

26. Additional costs – contingency, overheads, profit and location allowance

145. On top of his base figures, Dr Eilenberg allowed a further:

    a. 160 hours for supervision

b. 10% contingency

c. 20% for overheads

d. 20% for profit, and

e. 1.174% location factor.

146. His opinion is that the owners will need to employ a builder to carry out the rectification work. A new builder would normally allow 10% profit, but because of the distance factor here plus the difficulty in finding rectification contractors he has allowed 20% for profit. The overheads are to cover the on-site costs, equipment, a supervisor, insurance building permit fees and so on. Supervision is a separate cost as he has assumed the owners would employ a supervisor independent to the builder to check the work. The percentage for contingencies is relatively high because the nature of the work has a higher risk factor than a new build. Lastly, as the work is in Phillip Island, the location factor is allowed by Rawlinson's and Cordell's costing guides.

147. Mr Campbell said these amounts are excessive. Rawlinson's and Cordell's set preliminaries at 9% to cover overheads. His opinion is that even this amount is too high for relatively simple rectification work and he would allow 5%. He agrees that 20% profit is acceptable. There is no need for a contingency as there are no real unknowns in this job. Accordingly he would allow 25% plus GST.

148. I agree with Mr Campbell that the extra costs proposed by Dr Eilenberg are excessive. I am not satisfied that supervision is required when the work has been priced on the basis of a new builder taking on the job as a whole. Nor do I think that a contingency is required, given the scope of works is known. I will allow 20% for overheads, as I note that this includes insurance and building permits. These will both be required for this work and I am not satisfied that a 5%, or even a 9%, allowance would be sufficient to cover the cost of these, as well as the on site costs. I will also allow 20% for profit and 1.174% location allowance.

Summary of defect / incomplete work claims

No.	Item	Amount allowed
1	Painting	13,000.00
2	External paving	9,275.18
3	Drainage – north of garage	565.36
4	Drainage – south of garage	343.00

5	Windows	13,510.56
6	Master bedroom wardrobe	806.50
7 and 19	Roof under deck and first floor decking	9,178.16
8	Laundry in garage	1,423.00
9	Bathrooms off garage	9,235.04
11	Rumpus room cupboard under stairs	204.43
12	Rumpus room wardrobe cupboard	254.00
13	Kitchenette – ground floor	3,074.23
14	Ground floor bedrooms	4,040.08
16	Garage	4,454.09
17	Stairwell	0
17A	Kitchen – 1st floor	2,702.21
18	Lounge room	4,213.06
20	Flooring – living/dining room	8,130.63
21	Alfresco	1,596.27
22	Timber fascia and pergola	4,312.95
23	Roofing	1,642.48
24	External stair	239.38
25	Plumber/drainer	0
	Subtotal	**92,200.61**
	Add Location allowance 1.174%	1,082.43
	Subtotal	**93,283.04**
	Add Overheads 20%	18,656.60
	Add Profit 20%	18,656.60
	Subtotal	**130,596.24**
	Add GST 10%	13,059.62

	Total	**143,655.86**

ORDERS

1. The respondent must pay to the applicants the sum of $143,655.86.

2. There is liberty to apply on the question of interest and costs and reimbursement of fees. I direct the principal registrar to list any application for hearing before Senior Member Kirton for one hour. Any affidavits in support or opposition must be filed and served 7 days prior to the date of the costs hearing.

SENIOR MEMBER S. KIRTON