VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D375/2007

DOMESTIC BUILDING LIST

CATCHWORDS

Contract of sale of partially completed house – contract providing that further work be done and that money be withheld in the meantime and until certain conditions complied with – amount withheld considered part of the purchase price and not the price of the work - claim by purchasers for damages for breach of warranty – assessment of quality of work to be done of the house as it was built – possibility of future changes generally not relevant – doubtful whether set off of damages available against purchase price of house – interest on amount of purchase price unpaid - express warranties as to quality of work pursuant to s.137 Building Act 1983 - known defects not excluded by contract – assessment of damages

APPLICANT	Carmelina Augello
RESPONDENTS	Peter Leslie McLean, Jennifer Charmaine McLean
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	1 October 2007
DATE OF ORDER	13 December 2007
CITATION	Augello v McLean (Domestic Building) [2007] VCAT 2437

ORDER

1. Order the Respondents to pay to the Applicant the sum of $73,961.
2. Order the Applicant to pay to the Respondents the sum of $20,031.
3. I direct that the two sums be set off and that the difference, being $53,930, be paid to the Applicant by the Respondents.
4. Order the parties to procure that the amount of $51,767.88 or thereabouts held by Messrs Clark & Barwood, Solicitors, together with any accrued interest thereon, be paid to the Applicant in or towards satisfaction of this order and that any balance of the said sum held by those solicitors then remaining be paid to the Respondents.
5. Liberty to apply in regard to the implementation of this order.
6. Costs will be reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Mr J.M. Shaw of Counsel
For the Respondents	Mr A. Donald of Counsel

REASONS

Background

1 This proceeding concerns the sale of a house by the Applicant ("the Vendor") to the Respondents ("the Owners") in November 2005.

2 The parties had been in negotiation from June 2005 but the contract of sale ("the Contract") was not signed until 21 November 2005. Settlement was due very shortly afterwards, on 2 December 2005, but did not take place until 6 December. The house had been constructed by the Vendor as an owner/builder but the building work appears to have been carried out by her husband, Mr Augello, who is a bricklayer and who co-ordinated other tradesmen. It had been their intention to live in the house themselves but, following an approach from the Owners, they decided to sell it to them instead.

The written proposals

3 In the course of the discussions concerning the sale there were two written proposals put to the Vendor by the Owners but she did not accept either of them. There were also discussions about potential Stamp Duty savings for the Owners because the house was not finished and also about further works to be done which would be included in the price. However, no agreement was reached until the Contract was prepared by the Vendor's solicitors and signed by the parties.

4 While the negotiations were in progress there was correspondence between the parties where the Owners requested various items of work to be done and they also had discussions with the Vendor's tradesmen.

5 The earlier documents indicate the course of the negotiations but cannot be used to vary, add to or subtract from the Contract. I find that the agreement between the parties was as recorded in the Contract and not otherwise.

Mistake?

6 There was a suggestion by the Owners that the list of additional works in the Contract was incorrect in that it provided for paving at the front of the property, which had already been done, but no paving at the rear which the Owners say, and the Vendor denies, was intended to be included. Nevertheless, they signed the Contract in this form and although there may have been a mistake on the part of the Owners I am not satisfied that there was a mutual mistake or a unilateral mistake that it would be inequitable for

the Vendor to rely upon. If it was a mistake, what was the location or extent of the concreting that the parties had intended to include? This could have been dealt with in the Contract but it was not.

7 Rear paving had been included in the Owners' earlier proposal but that was not accepted by the Vendor. She denies that it was included and has the Contract to support her. Further, on any view the precise area to be concreted was not determined at the time of the Contract. Mr Augello said that all that had to be done was a small area below the back door. Ultimately, a much greater area was concreted.

8 For the reasons that follow I think it likely that all parties believed that the Contract required some concreting at the rear of the property but there had been no agreement as to what that would be. The Owners seem to have contemplated something like what was ultimately provided but the Vendor and her husband seem to have contemplated something less. The evidentiary burden of proving a contractual obligation to provide a particular amount of concreting, or even a reasonable amount of concreting, is on the Owners and that has not been discharged. There was no claim by the Owners for rectification of the contract perhaps because of these difficulties and the more significant fact that, in the meantime, the Vendor had done the concreting they wanted anyway.

The works to be done

9 At the time the Contract was signed, the house was incomplete. According to the Owners the Vendor had done the painting, the guttering, part of the fixing stage, the front garage (although there were still things to do), the front veranda, installed the windows, the baths and showers and finished the tiling and brickwork. No stormwater drains had been installed but the downpipes were in. The drainage was installed between 27 February and 4 March 2006.

10 In Special Condition 10 of the Contract there is a list of works to be done by the Vendor before completion. A further item, the completion and construction of a garage, was to be done within 90 days. This was included in the price of the house. By that Special Condition, the Owners were entitled to withhold the sum of $60,000.00 of the purchase price which was not to be paid to the Vendor until the second garage was complete and three documents were handed over to the Owners, namely:

a an owner/builder report for the purposes of s137B of the *Building Act* 1985;

b evidence of domestic building insurance; and

c a Certificate of Final Inspection.

11 The second garage was completed in February 2006, the rear concreting and the stormwater drainage underneath it were done and there was no further work carried out after 4 March 2006.

Demand for the $60,000 and payment for the paving

12 On 3 April 2006 the three documents were provided but the $60,000.00 was not paid. In May 2006 the Owners' solicitors sent a cheque to the Vendor's former solicitors for $51,767.88 together with a proposal for settlement. Those former solicitors banked the cheque in an interest bearing deposit account where it is still held. The Owners contend that by banking the cheque the Vendor has accepted the offer of settlement contained in their solicitors' letter but it is clear from the correspondence that the offer was not accepted. The Vendor now claims payment of the $60,000 plus interest at the contract rate, being 2% above the rate fixed from time to time pursuant to the Penalty Interest Rates Act 1983. (That amounts to 13% up to 30 September 2006 and 14% thereafter.)

13 The other aspect of the case relates to the paving work done at the rear of the property. The Vendor alleges that this was done pursuant to an oral agreement whereby the Owners were to pay $17,000.00 for it. The Owners deny that any such agreement was entered into and say that the paving work was part of the work to be done to complete the house and that the omission of the work from the list of works in the Contract was a mistake.

14 This proceeding was commenced by the Vendor to recover the said sum of $60,000.00 and also the further $17,000.00 for the concreting work.

Hearing

15 The matter came before me for hearing on 1 October 2007 with 5 days allocated. Mr Shaw of Counsel appeared for the Vendor and Mr Donald of Counsel appeared for the Owners.

16 For the Vendor I heard her evidence and that of her husband, Mr Augello, in regard to all matters and from Mr Augello's father and a Mr Genova in regard to the concreting work. They called a building consultant, Mr Anderson, an engineer, Mr Pegoli, to give expert evidence. For the Owners I heard their evidence, evidence from the next door neighbour, Mr Mercuri, and from a glazier, Mr Patching, who had tried unsuccessfully to remove scratches from glass panes in some of the windows. The Owners also called a Building Consultant, Mr Hart, and two engineers, Mr Metwally and Mr McLaren to give expert evidence.

Decision

17 I am not satisfied that there was any agreement for the Owners to pay $17,000.00 for the paving at the rear of the house so that part of the claim is dismissed. The claim for the $60,000 was not disputed, although the Owners claim to offset damages for defective workmanship. I assess those damages at $20,031. In doing so I have generally placed a greater reliance upon the evidence of Mr Anderson than that of Mr Hart because Mr Anderson had spoken to both sides and in most cases I thought he adopted a more practical and realistic approach, such as in the case of the brickwork

behind the fence. I also thought Mr Hart's suggestion to cut up and remove all of the rear paving was excessive in the circumstances. From the photographs I cannot see that the Owners would ever think it worthwhile to carry out that work when the problems can be overcome by adopting the much simpler and cheaper solution suggested by Mr Anderson. In regard to the engineering matters the Owners' engineers did not have the advantage of the Vendor's witnesses who either saw or were told about the depth and extent of the excavation for the footings for the rear garage and the position of the pipe. The reasons for these conclusions follow.

The claim for the concreting

18 The burden of proving an agreement to pay $17,000 for the concreting is on the Vendor who asserts it. In the absence of any other evidence one would expect that there would have been some agreement to pay something for work of this magnitude since tradesmen do not usually do work for nothing. Even a request to do work is usually sufficient to imply a contract to pay a reasonable price for it even if no agreement to pay a particular price is found. However in this case I am satisfied that all parties contemplated that there was some concreting to be done by the Vendor in order to complete the house although there was no agreement as to precisely what was to be done.

19 The Vendor relies upon a plan prepared by the Owners setting out the area to be concreted which they have signed and upon which the Vendor hand wrote the figure "$17,000". The Owners deny any agreement to pay $17,000. They say that the figure of $17,000 was not on the plan when they signed it nor was it written on it in their presence. They say that the plan was prepared following the Vendor's request for it and the agreement was, not that the work would be done for $17,000 but rather, that that was the area to be concreted which, until then, had not been agreed upon.

20 It is a question of whom to believe and I have some concerns about Mr and Mrs Augello's evidence concerning the matter. In the end, I do not accept their account because:

(a) the date upon which the agreement to pay $17,000 is alleged to have taken place changed in their evidence from December to January and then February.

(b) the Vendor wrote to the Owners on 25 January asking for the copy of the plan of the area to be concreted. When asked why she did so when she claimed the agreement was made and the plan was signed before Christmas she said that the Owners signed the plan and then took it away with them. This seems unlikely because the Vendor says that her husband asked for the plan to be signed before they would commit to doing the work. Why then would they allow the Owners to take it away?

(c) their account does not allow for any credit for the area that they considered had to be done anyway in order to complete the house;

(d) it is apparent from the correspondence that by the time the Vendor and the Owners are alleged to have agreed for the concrete to be laid the parties were not on good terms. According to his evidence, Mr Augello did not want to lay any concrete for the Owners at all. I think it is unlikely that the Vendor would have agreed to lay the concrete if she had not felt that she was obliged by the Contract to do so.

(e) when the concreting was completed, no bill was given to the Owners. Mr Augello said that he made an oral request for payment but there was no payment made and there was no written demand for payment until their solicitor's letter of 27 April which was sent in response to a defects claim by the Owners. Mr Augello's explanation for the absence of earlier paperwork was that the job was to be done for cash. If that were so, that might explain why no bill was handed over initially but some considerable time was then allowed to go by after the concrete was laid before a formal demand was made and that was only made in response to the Owners' complaints about the quality of the work.

(f) in that letter of 27 April, demand is also made by the Vendor for a further $12,095 for additional work, together with GST, but there is no claim for payment of those sums in this proceeding. I found the Augellos' explanation for the abandonment of those further claims unconvincing. It is a substantial sum and it seems unlikely that it would have been so readily abandoned if they really thought it was owed by the Owners. This leads me to wonder about the reliability of the evidence of the Vendor and her husband as to what she was owed.

(g) although some corroboration of the alleged agreement was provided by Mr Augello's father and by Mr Genova I thought the evidence of those witnesses was somewhat vague and equivocal.

21. On the other hand, there is some difficulty about the evidence of the Owners as to when the concreting work was done. They said that the ground was prepared on 1 and 2 March and the concrete was laid on 4 March. However it is clear from the expert evidence that a sealer was applied. Mr Augello said that the second of the two sealing coats was applied 15 days after the concrete was laid. Mr Shaw submits that I should therefore find that the concrete had been laid on 19 February, making it unlikely that the plan was handed over on that day.

22. The evidence as to an agreement to lay the concrete for $17,000 is conflicting and I have to decide who to believe. On balance, for the reasons given I think the Owners' version is to be preferred.

23. In case it might be thought that this conclusion is inconsistent with what I have said about the Contract, it must be remembered that, insofar as the

claim for the $17,000 is in contract, it is not necessary to resolve the dispute as to whether there was a mistake in the preparation of the Contract or whether it was intended that the concreting at the rear was to be included in the sale. To succeed in the claim for the concreting at the rear of the house the Vendor must establish that there was an agreement that the Owners would pay $17,000 for it and I am not satisfied that there was any such agreement.

24. No contract can be implied because the proven facts are equally explicable on the basis that the parties considered that the paving was to be done as part of the house. Indeed, that seems to be the more likely explanation. To succeed on the money count of work and labour done it would need to be shown that the work was done in circumstances where the law would imply a promise to pay. Otherwise:

> "The general rule with respect to work voluntarily done is that a Plaintiff cannot confer a benefit on a defendant and then make him pay for it against his will." *(Halsbury 4th Ed. Vol 9 para 697)*

25. For these reasons the claim for the sum of $17,000 will be dismissed.

Defects

26. In accordance with s.137C(1) of the *Building Act 1993*, the following express warranties were made in Special Condition 8 of the Contract:

> "The Vendor warrants that:
>
> (a) all domestic building work carried out in relation to the construction by or on behalf of the vendor of the home was carried out in a proper and workmanlike manner; and
>
> (b) all materials used in the domestic building work were good and suitable for the purpose for which they were used and that, unless otherwise stated in the contract, those materials were new; and
>
> (c) that domestic building work was carried out in accordance with all laws and legal requirements, including, without limiting the generality of this warranty, the Building Act 1993" (sic.).

27. In accordance with s.137B of the *Building Act 1993* the Vendor obtained a report from a building surveyor, Mr Roger Gillett as to the condition of the house. The inspections upon which this report is based occurred on 5 and 23 September 2005. This lists a number of items of defective or incomplete work. It would have been open to the parties to have excluded liability in the Contract of Sale for any of these items and any other items that were known or ought reasonably to have been known to the Owners (*Building Act 1993 s.137C(3))* but they did not do so. Hence the warranties in Special Condition 8 apply to all the domestic building work.

28. Mr Shaw submits that many of the complaints are merely cosmetic and relate to matters which should have been clearly apparent to the Owners at the time they entered into the Contract. As such, he submitted that the

complaints are not actionable because they are part of what the Owners agreed to purchase. He referred to the cases of *Winter v Housing Guarantee Fund and Gray* [1997] VDBT 53; *De Lutis v Housing Guarantee Fund Ltd* [2004] VCAT 2544; *Beamish v Rosvoll & anor* [2006] VCAT 440.

29. The first two of those were insurance cases and the question was whether the Applicant had suffered a loss covered by the insurance policy by reason of the existence of a defect. In each instance the defect was obvious at the time of purchase and the claim failed.

30. In *Winter*, (referred to with approval in *Beamish*) the former Domestic Building Tribunal said (at p. 4):

> "In the result, the Tribunal's view is that the observation or ready observability of the defect or defects prior to purchase does not of course render a defect not a defect. However, a prospective purchaser may have clearly observed the situation which constitutes a defect and not been offended by (indeed, may have positively accepted) the situation. In those circumstances, it will be untenable for the purchasers to later attempt to establish loss - particularly loss of an aesthetic nature. Consequently, depending whether the observation or ready observability is demonstrated and accepted, it may negate the loss or damage which may otherwise be suffered and consequently the cost which the approved guarantor is obliged to meet in honouring its obligation to make good, particularly in the case of a defect giving rise to a visual or aesthetic loss."

31. In *De Lutis* the Tribunal said (at p.:

> "I accept Mr Stuckey's submission that the Applicant and indeed anyone else who looked at the walls of this house at the time of the purchase must have seen these spots, although they may not have actually noticed them for what they were. I accept that there were probably not as many then as there are now but there would still have been a significant number of them and they must have been seen.
>
> ……..
>
> Where ……I buy at auction a property that has a defect so patent that it must reasonably be supposed that it would have been known to the parties bidding at the auction then the price that I pay must be expected to represent the value of the house in its apparent state that is, with the patent defect; in this case, the blemishes caused by the rust spotting. Of course, as was pointed out in ***Cameron's case***, this argument holds only for patent defects that must be presumed to be already reflected in the price paid by the purchaser.
>
> Ultimately, it is a question of fact. The duty of an insurer is to indemnify against loss. It is a question of fact whether there has or has not been a loss suffered. I am not satisfied in the evidence of this case that the Applicant has suffered any loss. It appears that the auction was well attended and the bidding was competitive and spirited. The house was a very expensive one and it might

be expected that the parties bidding would have taken care to satisfy themselves as to its condition before bids of this magnitude were made.

For all these reasons the case must fail, since the contract of insurance is only a contract of indemnity and if there is no loss demonstrated there is nothing to indemnify. The application will therefore be dismissed."

32. This is not a claim for damages against an insurer for breach of a contract to indemnify with respect to a loss suffered by an insured. In such a case the questions are, was there a loss suffered, was it a risk covered by the policy and has the insurer granted indemnity? In a claim for damages for breach of contract simpliciter, the questions are what was the term of the contract, has it been broken and what damage may fairly and reasonably be regarded as arising naturally from the breach *(Halsbury 4th Ed. Vol.12 para 1175).* It is no answer to such a claim to say that the damage did not arise because the defective work was known to the Owners at the time of the contract. The Owners had a contractual right to receive a house in accordance with the express warranties set out in the Contract.

33. In the present case, whatever the knowledge of the Owners as to the condition of the house there were terms of the Contract to the effect that the building work used in its construction was done in a proper and workmanlike manner using good and sufficient materials and in accordance with the specified regulations. Insofar as it was not, there has been a breach of the relevant term and any damage that may fairly and reasonably be regarded as arising naturally from that breach is recoverable by the Owners. I repeat that it would have been open for the parties to have exempted these known defects from the scope of the warranties given but they did not do so.

34. The conclusion therefore is that the Vendor is liable in damages with respect to any breach of the warranties referred to.

The garage

35. The main defect alleged relates to the garage floor slab which was laid across a sewerage easement. According to an engineer, Mr Metwally, the slab was not designed to suspend over the sewer. He was supported in this view by another engineer, Mr McLaren. The engineer called by the Vendor, Mr Pegoli, disagreed and was supported by the Building Surveyor, Mr Gillett. Each engineer provided calculations to support his opinion. It is apparent from the evidence of Mr Augello, who witnessed the excavation that was done for the laying the footings for the slab, that they excavated to weathered rock. The excavation was also done next to the sewer pipe which then had to be isolated from the concrete footing. These factors were not taken into account by the Owners' experts who adopted the quite reasonable assumptions that the slab had been constructed as shown by the plan and the sewer pipe was in the position indicated on the plan. I prefer the opinion of Mr Pegoli who based his opinion on the actual site conditions.

36. Accordingly, I am not satisfied on the balance of probabilities that the slab is inadequate.

Timber floors

37. It is common ground that these were laid well before the Contract was signed. There are a number of issues raised by Mr Hart in regard to the appearance of the floor boards but by a letter dated 29 January 2006 the Owners agreed to accept agreed rectification work which was done. It is therefore not necessary to consider whether the appearance of the floorboards is merely a cosmetic issue and the finish the Owners agreed to purchase, or whether it is a defect covered by the warranty.

38. Apart from appearance, there is a complaint that the floor is not properly adhered to the slab. I find this complaint justified and accept Mr Anderson's figure of $3,278.00 for the cost of injecting an appropriate adhesive beneath the floor boards, making good gaps caused by movement and re-sanding and sealing the floor.

39. There was also a complaint about the level of the floor in the kitchen/living room. This is a large open plan room in which the highest level is 17mm above the lowest level. The issue here was whether the variation in level is within tolerance. The applicable Guide to Standards and Tolerances permits levels in one room to be plus or minus 10mm, which would allow a highest to lowest difference of 20mm over the whole room. The Guides are, as their name would suggest, only a guide but in any case I am not satisfied that the flooring is defective on account of a difference in levels.

Further defects

40. The following further defects are alleged:

    (a) <u>No weather seal under roller door to garage.</u>

    I accept that a seal must be provided. I do not think any greater scope works is necessary. I will allow Mr Anderson's figure of $93.00.

    (b) <u>Colour variation of bricks in second garage.</u>

    I find that the central section of the wall facing the house will have to be re-laid with a better blending of colours and accept Mr Anderson's figure of $2,863.00. Mr Shaw submitted that this was a cosmetic issue only. However, this work was done after the Contract had been signed so it cannot be argued that this was an appearance the Owners had agreed to accept. A requirement for good workmanship was a reasonable blending of colour and that was not done so the warranty was broken.

    (c) <u>Bricks laid back to front in the construction of the garage.</u>

    This relates to the brick wall laid next to the paling fence. The neighbour would not permit the fence to be removed for the purpose of laying the bricks for the wall and so the bricks were laid overhand.

Further, as Mr Anderson pointed out, attempts to scrape off excess mortar during laying can result in scrapings dropping to the bottom of the gap between the fence and the wall and accumulating, causing water penetration problems.

The interior face of this brick wall is not seen because it is covered with a plaster internal lining. The exterior face below the level of the fence is covered by the fence. It is not face brickwork and so I find no defect. It was suggested that at some time in the future the fence might be taken down exposing the wall but that is always a possibility with concealed brickwork. It was not face brickwork when it was laid and so it should not be judged as such.

(d) Slab left exposed and not covered by path

This item is proven and I will allow Mr Anderson's figure of $60.00.

(e) Changes to layout of second garage.

The door to the toilet was not sliding and the positions of the wall, the toilet and the window were changed. I find the Owners accepted these changes.

(f) Panel of brickwork above the door to the cellar in the second garage is not double brick.

I accept Mr Anderson's evidence that this complies with the plans. It is not shown as double brick in the plans.

(g) Gap under the skirt in the toilet in the second garage.

I accept that this is a defect and accept Mr Anderson's figure of $73.00.

(h) Wires exposed in wine cellar.

The wires were not exposed. They were run through conduit. This is a wine cellar in a garage. The fact that the conduit itself was not buried inside the wall is not a defect in the absence of a contractual requirement for it to be buried.

(i) Wine cellar in the second garage is out of square by approximately 20mm.

I am not satisfied on the evidence that this is the case.

(j) Mortar holes.

There is missing mortar in various places namely, the bricks at the front of the garage beside the roller door, under the pier adjacent to the roller door and in the shark's teeth brickwork facing the house. There is also a mortar hole under the facia at the back of the garage. I find that all these will have to be filled and I accept Mr Anderson's figure of $32.00. In case it might be thought that this figure is low it must be remembered that I have allowed for the relaying of a garage wall. The

bricklayer will be on site with mortar mixed so I think Mr Anderson's figure is justified.

(k) External paving at rear

The complaints are that the rear paving in the patio area is poorly levelled allowing water to pool, the colour is inconsistent, with varied texture, the rubber expansion joints have not been trimmed and there are splashes of concrete on the brickwork. I accept that is the case. Mr Hart suggests that the appropriate method of rectifying the problem is to cut up the concrete and replace it. He says that, apart from the matters mentioned, there is also the problem that the concrete partially blocks the weepholes in the wall of the house that are intended to drain the cavity behind the brickwork of the walls of the house that are covered by the veranda..

Mr Anderson said that pulling up the concrete was excessive and that a more reasonable solution was to fill the low spot near the door with a levelling compound, grind the whole surface back and re-apply the colour. In order to deal with the question of levels it will be necessary to also seal the weep holes to prevent water entering. This was, he said, a viable option because the whole area was protected by a roof and was not exposed to rain.

Mr Hart said Mr Anderson's suggestion was not a viable option because the roof may need to be taken down in the future and the wall might then be exposed to the weather. However, at the time the concrete was laid the house had been constructed with this area under cover and if for any reason the roof is removed in the future (and no reason has been suggested why it would be) then some consequential alterations might have to be made, including adjusting the level of external paving. I think in assessing the reasonableness of a solution to a slight irregularity in the level of external paving I should take into account the condition of the house as the builder constructed it and not according to some hypothetical future situation which might never occur.

I accept Mr Anderson's evidence that the breaking up, removal and relaying of the concrete paving is excessive in all the circumstances and accept his solution. His figure of $5,877.00 also includes the cost of cleaning off the cement splashes and trimming the rubber expansion joint material.

(l) The front concrete path has been defectively laid.

This is proven and I will allow Mr Anderson's figure of $1,205.00.

(m) Roller Door in the Front garage.

The gap under the roller door has not sealed. The gap is approximately 10 mm and allows excessive rainwater to enter. Mr

Anderson says this can be dealt with by adjusting the seal. I accept that evidence and also his figure of $93.00.

(n) Guttering holding water

I accept that to avoid water damming in the gutter a spreader needs to be inserted under the guttering at the front of the house to run the water onto the veranda roof. For this and for the gaps left in the joins in the spouting Mr Anderson gave a price of $41.00 if the work were to be carried out by the certifying plumber. In assessing the loss to the Owners I do not think that I can make the assumption that the certifying plumber will return and do this. The alternative figure that he provides is "in the order of $300.00". I will therefore allow $300.00.

(o) Front fence post cracked.

I accept Mr Anderson's evidence that the split shown in the photograph tendered is a result of natural shrinkage and does not mean that the work on the fence or the materials used were deficient.

(p) Windows scratched and stained.

I am satisfied, particularly from the evidence of Mr Patching and Mr Mercuri, that the windows were left some time with water splashes on them. According to the Owners' evidence the Vendor's own cleaners drew the scratches to their attention and told the Owners that they (the cleaners) had not caused them. The Vendor and her husband suggested that the scratches were caused by the Owners cleaning the windows themselves but there is no evidence they did so and their evidence was that they did not.

On balance I think that the scratches were caused by the Vendor, by Mr Augello or by their tradesmen. The glass in a number of the windows has already been replaced at a cost of $268.40 and Mr Anderson agreed with Mr Hart's figure of $680.00 for the replacement of the glass in the remaining windows.

(q) Rear pergola spouting

The exposed clips do not match the house spouting and need to be replaced. I will allow Mr Anderson a figure of $32.00.

(r) Spouting over front veranda

This is a different colour from the rest of the spouting and will need to be replaced and rematched. I accept Mr Anderson's figure of $277.00.

(s) No weather seal to the rear panel door of the front garage.

It is not established that the omission of such a seal is a defect.

(c) Articulation joints

The engineering drawings prepared for the house by Mr Metwally required 26 articulation joints, although two of these were next to a pillar that was omitted from the front garage so they were not needed. Mr Metwally said that only 13 had been constructed but it appears that 14 were, one having been concealed near the front door. Since this is not a claim by an original owner against a builder who had agreed to construct according to the plans, the question is not what it would cost to put in all the construction joints required by the plans but rather, what it would cost to put in sufficient construction joints to ensure that the work is done in a good and workmanlike manner and in accordance with the relevant regulations.

The number of construction joints provided in the plans is very high and reflects a very conservative approach by the engineer. Mr Metwally agreed in cross-examination that the number and positioning of articulation joints is not an exact science and there may be more than one solution. I accept Mr Pegoli's evidence that a further five articulation joints in the positions indicated in his evidence will provide sufficient articulation for the building and that this will cost approximately $300. I will therefore allow $300.

(d) Windows next to articulation joints

Mr Hart said that to provide a continuous articulation joint next to a window there has to be a 10mm gap left next to the window. He said that all such windows must be removed and reduced in size at a cost of $16,000. He said that if this is not done, some windows might become crushed and broken through movement of the brickwork. I have never heard this suggested in any of the many building cases I have heard over the years and Mr Hart acknowledged that it is not common practice for builders to do this. There is nothing in the Guide to Standards and Tolerances that imposes such a requirement nor was it required by the design engineer in the plans that have been tendered. Mr Metwally did not raise the issue and the Masonry Code was not tendered. I am not satisfied as to this item.

(e) Tiling grout

Mr Hart said that the interfaces between the tiled surfaces were not executed in a flexible grout. This is not part of the counterclaim and was not addressed by the Applicant's witnesses.

(f) Stormwater drainage on the south side

It was acknowledged that the surface drainage of the concrete paving at the rear and southern sides of the house is inadequate. Levels taken by Mr Metwally show a high point in the paving approximately half way along the east wall of the rear garage falling to the north towards the street and to the south towards the south west corner of the house.

From the corner of the house it falls a further 90mm towards the rear of the front garage. Any water runoff then has no way to go because the garage extends from the house to the fence.

It is not an answer for the Vendor to say that it is up to the certifying plumber to return and fix any problem. Insofar as the work is deficient she is responsible.

A number of solutions were suggested. I am not attracted to the notion that a pump be installed in a sump because, as Mr Metwally pointed out, that would require continuing maintenance. The simplest solution is to put a pipe under the garage floor and work with the levels as they are. All of the water will then be able to drain away with the fall of the land in both directions. In addition to the pipe under the garage it will be necessary to put in a grated drain outside the rear doorway of the garage to stop water from running under the door. A spoon drain and a grate are also required to collect run off along the path. Mr Hart and Mr Metwally thought that all the external paving and the stormwater drains beneath should be taken up and replaced but if these measures are taken that should not be necessary. I accept Mr Pegoli's figure of $4,600 which, although originally calculated for a different scope of works, he said would be sufficient for this solution.

The paving problems encountered at the rear of the house can be addressed as part of the re-levelling of that area, for which an allowance has already been made.

The re-levelling of the spouting and installation of an additional downpipe are included in Mr Pegoli's figure.

(g) Dampcourse

Mr Hart said that he could not see any visual evidence of a cavity/dampcourse flashing but the evidence is that one was installed.

(h) Shower bases

It is claimed that the shower bases are drummy. Mr Hart said that this indicated that this indicated "possible lack of support" as a result of failing to pack the voids under the waste pipes to full capacity. Mr Anderson disagreed and said that it would not have been practicable to fully pack the voids in any case. It was accepted that it was necessary to create the void to enable the waste pipe to be fitted following the installation of the bases. I am not satisfied that a defect has been established.

(i) Garden edging

The contract required the Vendor to construct "Brick Borders as per plans to front yard." Photographs were tendered showing the bricks were not laid on a concrete footing but Mr Anderson said that a concrete footing is not required for garden edging. A mortar base is

shown and the walls look straight in the photographs. No soil had been placed on either side of the edging at the time the photographs were taken to support the brickwork or keep it in place The Owners had the edging replaced with edging laid upon a concrete footing. The complaint is about cracking and allegedly poor alignment which was not described in any detail. There is nothing in the photographs to indicate poor alignment and because of the very nature of brick garden edging some cracking at the mortar joints between the bricks will inevitably occur and does not demonstrate poor workmanship. I am not satisfied about this item.

The claim for interest

41. The Applicant claims interest on the $60,000. It is quite clear from the correspondence between the solicitors that objection as taken by the Owners to the Vendor receiving the money that was tendered and it was eventually accepted by both sides that it should remain in the trust account of her former solicitor pending the outcome of this proceeding. In those circumstances, she has not had the use of the money and so no payment can be said to have been made to her.

42. Further, this is not a case where the Owners can withhold payment because the work is not done. In the first place, the work was done, albeit with some defects. Secondly and more significantly, although the $60,000 was withheld in order to secure the doing of further work, it was not the agreed price of that work. It was part of the purchase price of the house and land. It must therefore be dealt with as provided in the Contract.

43. By their defence the Owners seek to set off at trial the amount of any damages against the $60,000 due. It is not suggested that the money was not due under the Contract to the extent of the damages they suffered. Indeed at law it is doubtful that any such suggestion would have been open (see *King v Poggioli* [1923] 32 CLR 222). Accordingly, the Contract required the whole of the money to be paid and it has not been paid. Hence interest is payable under the Contract upon the full sum of $60,000 up to the date of judgment. The damages due to the Owners from the Vendor may then be set off against the $60,000 plus interest as sought in the defence.

44. The relevant documents were handed over on 3 April 2006 and so the $60,000 was payable on 10 April 2006, being 7 days thereafter. General Condition 9(a) of the Contract incorporates Table A of the Seventh Schedule of the *Transfer of Land Act 1958* and Condition 4 of Table A provides for payment of interest at 2% above the rate fixed from time to time by the *Penalty Interest Rates Act 1983*. The appropriate rates are therefore 13% up to 30 September 2006 and 14% thereafter. Interest from 10 April until 20 December 2007is $13,961.

45. Since I have found that the $60,000 was not paid to the Vendor it follows that any interest accrued on the money held by Clark & Barwood must go to the credit of the Owners.

Orders

46. There will be an order that Owners pay to the Vendor the sum of $73,961. There will also be an order that the Vendor pay to the Owners the sum of $20,031. I will direct that the two sums be set off. I will order the parties to procure that the amount of $51,767.88 held by Messrs Clark & Barwood, Solicitors, together with any accrued interest thereon be paid to the Vendor in or towards satisfaction of the difference, being $53,930, and that any balance then remaining of the said sum held by those solicitors be paid to the Owners. Costs will be reserved.

Rohan Walker
Senior Member