VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST **VCAT Reference:D109/2004**

CATCHWORDS

Rectification works – reasonable and necessary where extensive reconfiguration and modernisation works have been carried out, cost of rectification works, reliance on estimates where invoices available, Applicant's loss and damage where defects apparent at time of purchase.
[2006] VCAT 440

APPLICANT:	Olivia Beamish
FIRST RESPONDENT :	Erik Rosvoll
SECOND RESPONDENT:	Archicentre Ltd (ACN 001 866 520) (released from proceedings 9/11/05)
BEFORE:	Deputy President C. Aird
BEFORE:	Deputy President C. Aird
HEARING TYPE:	Hearing
DATE OF HEARING:	7, 8, 10, 11, 14, 17, 18 November and 5 and 6 December 2005
DATE OF ORDER:	17 March 2006

ORDERS

1. The First Respondent shall pay the Applicant the sum of $81,663.35.

2. Costs and interest reserved – liberty to apply.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For the Applicant:	Mr D Aghion of Counsel
For the First Respondent:	Mr Rosvoll in person until 5 December 2005
For the Second Respondent:	Mr Herskope of Counsel until Second Respondent released from proceedings on 9 November 2005

REASONS

1. By contract dated 11 November 2002, the Applicant ('Mrs Beamish') purchased the subject property from the First Respondent ('Mr Rosvoll), who had carried out extensive renovations to the property, including the addition of a second storey, as an owner builder. The property was purchased by Mrs Beamish as the family home and both she and her husband inspected it prior to her entering into the contract – it was clear from Mr and Mrs Beamish's evidence that although purchased in Mrs Beamish's name, all decisions in relation to the purchase and the subsequent works were joint decisions.

2. Prior to selling the property Mr Rosvoll obtained a report from Archicentre to enable him to arrange the required warranty insurance. The Archicentre report is expressed as a "Blue Ribbon Authorization" with the comment "No serious defects". A copy of the report was annexed to the Section 32 Vendor's Statement. After moving in, Mrs Beamish became aware of what have been described as significant defects in the works carried out by Mr Rosvoll which she says were not apparent when she carried out two brief inspections prior to purchasing the house. Mrs Beamish claims the cost of rectification of the defects.

3. Evidence was given by Mrs Beamish, her husband, Mr Lionakis (an electrician), Mr Kambouris (a builder who inspected the property in June 2003 with reference to a defects list prepared by Mr Heber) and Mr Setford, building consultant. Mrs Beamish was represented by Mr Aghion of Counsel and Mr Rosvoll appeared in person for most of the hearing. Archicentre was represented by Mr Herskope of Counsel. The proceeding

as between Mrs Beamish and Archicentre was settled during the hearing.

The claim

4. Mrs Beamish's claim was amended on a number of occasions. Her initial claim as set out in the application lodged on 18 February 2004, was for $471,163.00 which was reduced to $253,054.00 in September 2003. A view was conducted on the second day of the hearing at which time it was clear that extensive modernisation and improvement works had been carried out. At the commencement of day four of the hearing (Friday 11 November 2005), Mr Aghion sought a short adjournment to enable Mr Heber (the builder who carried out the rectification and improvement works) to reinspect and review the works so that he could indicate the cost of replacing 'like with like'. A half day adjournment was granted. This reinspection and review apparently followed my observations that I would be concerned to understand the cost of replacing 'like with like', and the rectification works which were reasonable and necessary in all the circumstances.

5. As evidenced by the ever-decreasing quantum of the claim, there seems to have been little, if any, attempt, prior to the commencement of the hearing, to properly differentiate between rectification and improvement works, and identify or estimate the cost of carrying out the necessary rectification works. At the commencement of day five of the hearing (Monday 14 November 2005) Mrs Beamish sought leave to file a further report from Mr Setford, Further Updated Particulars of Loss and Damage and further witness statement by Mr Heber. Notwithstanding the assurance on day four of the hearing that Mrs Beamish was relying on the estimates prepared by Mr Irwin, a quantity surveyor, ($253,054.00 or $271,701.00 if some

additional works were included), Mr Aghion indicated that following the further inspection by Mr Heber and preparation by Mr Setford of an estimate of the cost of the rectification works, she had reduced her claim to $163,704.00. Mrs Beamish's amended claim is as set out in the Further Updated Particulars of Loss and Damage dated 11 November 2005 to be read in conjunction with Mr Setford's estimate of the same date (in the amount of $230,225.00), and Mr Heber's further witness statement. Not surprisingly, Mr Rosvoll expressed concern that Mr Heber's further witness statement and the amended Particulars of Loss and Damage had been prepared following the view, his cross examination of the witnesses who had been called to date, and he said, with the benefit of the comments he had made during that cross examination.

6. After consideration of detailed submissions and being mindful of the tribunal's obligations under s97 of the *Victorian Civil and Administrative Tribunal Act* 1998 (the *'VCAT Act'*) leave was granted, as not to have done so may have disadvantaged Mr Rosvoll. Mr Rosvoll was granted an adjournment for the balance of the morning to enable him to consider the further material. On resuming at 2.15 p.m. he indicated he would require more time to properly consider the material and discuss it with his expert, Mr Gordon. He was given leave to file and serve any answering material until 12 noon on the Wednesday with the hearing to resume at 10 a.m. on the Thursday.

Mr Rosvoll's position

7. Mr Rosvoll denies liability for the rectification works. He maintained throughout the hearing that all works carried out prior to the sale of the house were carried out in a proper and workmanlike manner, and that none

of the defects complained about were evident during the six or so years he lived in the house after completing the works.

8. Mr Rosvoll seeks to rely on Special Condition 25.1 of the Contract of Sale which provides:

> *The Vendor makes no representation in relation to the condition of the property and the Purchaser relies upon the Purchaser's own inquiries and inspections.*

and on Clause 5 of the Section 32 Vendor's Statement:

> *The Purchaser acknowledges that the Vendor makes no representation that the improvements on the land sold or any alterations or additions thereto comply with the requirements of the responsible authorities. The Purchaser acknowledges having inspected the property hereby sold and save as is otherwise expressly provided acknowledges that it is purchasing the property in its present condition and state of repair and that the Vendor is under no liability or obligation to the Purchaser to carry out any repairs, renovations, alterations or improvements to the property sold.*

9. Whether Clause 5 can be regarded as a contractual term, appearing as it does in the Vendors Statement and not in the Contract of Sale is problematic. In any event, I am satisfied it and Special Condition 25.1 are inconsistent with Special Condition 26(2) of the Contract of Sale which provides (with reference to the *Building Act* 1993):

> *(2) In accordance with Section 137B of the Act the Vendor warrants:*
>
> *(a) all domestic building work carried out in relation to the construction by or on behalf of the Vendor on the home was carried out in a proper and workmanlike manner;*
>
> *(b) all materials used in that domestic building work were good and suitable for the purpose for which they were used and unless specified in 26(3) those materials were new;*
>
> *(c) the domestic building work was carried (sic) in accordance with all laws and legal requirements including, without limiting the generality of this warranty, this Act and regulations under it.*

10. Special Condition 26(2) is an extract from s137C of the Act. Of more particular relevance here are s137C(2) and (3) which provide:

> (2) In addition to the purchaser under a contract to which section 137B applies, any person who is a successor in title to the purchaser may take proceedings for a breach of the warranties listed in sub-section (1) as if that person were a party to the contract.
>
> (3) 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 sub-section (1) is void to the extent that it applies to a breach other than a breach that was known or ought reasonably to have been known to the person to exist at the time the agreement or instrument was executed.

11. I am satisfied that Special Condition 25.1 of the Contract of Sale and Clause 5 of the s32 Vendor's Statement are therefore void to the extent they purport to restrict the owner's rights to institute proceedings in relation to a breach of the warranties other than a breach which was known or ought reasonably to have been known at the time the contract was entered into. Further I reject Mr Rosvoll's contention that he was not required, as an owner builder, in 1996/1997 to comply with the requirements of the Building Code of Australia and note that s137C was inserted in the *Building Act* in 1995.

The hearing

12. This was a difficult hearing where Mr Rosvoll was frequently distracted by his accusations that Mrs Beamish, her husband and Mr Heber, the rectifying builder, have been involved in fraud, tax evasion, conspiracy and collusion. He accused Mrs Beamish of having carried out what he described as detrimental works, after she moved in, for the purposes of fabricating the basis of an insurance claim. These distractions were often to the detriment

of what were otherwise appropriate challenges to Mrs Beamish's case. He made some very good points and asked some incisive questions, but then 'muddied the waters' with these distractions. As he was unrepresented I allowed him considerable latitude with appropriate cautions, being cognisant of the tribunal's obligations under s97 of the *VCAT Act.*

13. The hearing commenced on 7 November 2005. On 18 November 2005, after being advised by facsimile by Mr Rosvoll that he was unable to attend the hearing due to injury, the hearing was adjourned until 5 December 2005 with an estimated further duration of 5 days. I provided short written reasons at that time for ordering the adjournment. These set out the difficulties the tribunal had been experiencing in communicating with Mr Rosvoll because of his refusal to provide an address for service other than a Post Office Box. Mr Rosvoll advised on more than one occasion that he did not have any fixed address, nor did he have a telephone or a mobile phone and that the only means of communicating with him was by sending mail to his Post Office box.

14. Although Mr Rosvoll appeared at the further hearing on 5 December 2005, when he seemed anxious that the hearing finish by 4 p.m., he did not attend on 6 December 2005. In the absence of any communication from him the hearing proceeded in his absence, and directions were made giving him an opportunity to request the hearing be re-convened (with any such request to be accompanied by appropriate supporting material), and for the filing and service of his final submissions. I directed the principal registrar to forward copies of Mrs Beamish's Closing Submissions to him. All correspondence sent to Mr Rosvoll's post office box, which is the only address the tribunal has for service, was returned with the notation 'left

address' and 'Box/Bag cancelled'. However, Final Submissions dated 5 December 2005 were received from Mr Rosvoll on 7 December 2005.

Mr Rosvoll's evidence

15. Although I required Mr Rosvoll to take the oath at the commencement of the hearing, so that I could have regard to anything he might say during the course of the hearing, I have not heard any evidence in chief from him nor has he been cross examined. During the course of this proceeding he has filed and served copious material, much of it concerned with and focussed on what can best be described as his distractions.

16. Mr Rosvoll seemed to have some difficulty understanding or appreciating the evidence each witness could give, particularly in relation to the state of the property when it was purchased by Mrs Beamish in November 2002.

17. Mr Rosvoll was warned on numerous occasions, during cross examination of Mrs Beamish's witnesses, of the importance of relevance of his questions to the issues in dispute. He seemed to have some difficulty accepting that in making my decision I would only be concerned with the evidence insofar as it related to Mrs Beamish's application. Ancillary matters including whether a domestic building contract should have been entered into with Mr Heber, or whether permits were required for the demolition and rectification works carried out by Mr Heber, are not matters which are relevant to the issues before me. They are all matters between Mr and Mrs Beamish and Mr Heber.

18. As at the close of the day's hearing on 5 December 2005 there were a number of matters on which Mr Rosvoll had failed to cross examine Mr

Setford. I once again explained the rule in *Brown v Dunne*. Although he said he had no further questions, to ensure he was afforded procedural fairness, I suggested he re-consider the situation overnight with leave to continue cross examination of Mr Setford on the following day if he chose to do so. As noted above, he did not attend the hearing the following day, and has not been contactable since.

Mrs Beamish's loss and damage

19. Although Mr Rosvoll abandoned the hearing prior to the closing of Mrs Beamish's case, it does not automatically follow that Mrs Beamish is entitled to an order for the full amount of her claim. For Mrs Beamish to succeed in her claim I must be satisfied that she has suffered loss and damage attributable to Mr Rosvoll's breach of the statutory warranties, and that the rectification works that were carried out were reasonable and necessary in the circumstances (*Bellgrove v Eldridge* (1954) 90 CLR 613). Where I am satisfied that a defect was latent, or where it could not have been reasonably observable on inspection prior to purchase I will allow what I find to be the reasonable cost of rectification of the defect. Where I find that the works that have been carried out are essentially part of the extensive modernisation and reconfiguration works, rather than rectification of the defective work, there will be no allowance. Where I find that a defect was reasonably observable to Mrs Beamish at the time of purchase, whether or not she actually noticed the defect, no allowance will be made. This was an expensive house – the purchase price was $1.2m. Whether or not Mrs Beamish noticed the patent defects on inspection is not, in my view, relevant. If they were patent they were by definition reasonably noticeable.

20. In *Winter v HGF & Anor* [1997] VDBT 53 the tribunal considered a claim for indemnity under a guarantee from the Housing Guarantee Fund in relation to defective works which the owners became aware of defects some years after purchasing the house. The tribunal made the following observations which I consider to be equally applicable to this claim:

> In the result, the Tribunal determines that this issue ought to be construed objectively with the result that the Approved Guarantor is not obliged to extend its guarantee in a situation where the defect was generally observable in that it was visible to the eye or arose by necessary implication from something visible to the eye of any purchaser. This would be all the more so if the defect had in fact been observed by the particular purchaser.
>
> In the result, the Tribunal's view is that the observation or ready observability of a defect or defects prior to purchase does not of course render a defect not a defect. However, a prospective purchaser may have clearly observed a situation which constitutes a defect and not been offended by (indeed, may have positively accepted) the situation. In those circumstances, it would be untenable for the purchaser to later attempt to establish loss ….

21. It is submitted on behalf of Mrs Beamish that the marketing of the property with an Archicentre 'Blue Ribbon' Report is in effect a representation that the house was free of defects. However, the report was obtained by Mr Rosvoll for the purpose of arranging warranty insurance and he was required to provide a copy of it to prospective purchasers by s137B(2)(a)(iii) of the *Building Act.*

22. It was submitted on behalf of Mrs Beamish's claim that the defects were not observable prior to purchase, that I should also have regard to Mr Rosvoll's assertions during cross examination, and in copious correspondence to the tribunal during this proceeding, that no defects were apparent during the six or so years he lived in the house after completing the works. In light of many of Mr Rosvoll's otherwise unsustainable

comments and observations, I find these assertions to be unreliable, and unbelievable. Further, I note the comments of Dr Eilenberg, expert witness for Archicentre who was not called to give evidence, to which, inexplicably, I was referred by Mr Rosvoll, where at page 42 he says:

> *Indeed there is evidence of a deliberate cover-up of existing defects prior to the inspection (by Archicentre) and subsequent sale that may have occurred.*

23. As noted above, Mrs Beamish relies on the Further Updated Particulars of Loss and Damage which were prepared with reference to Mr Setford's estimates as 'qualified' by Mr Heber. Although Mr Setford allowed a margin of 30%, Mr Heber applied a margin of 9.4% to the works carried out by him which I accept is an appropriate margin. Mr Setford allowed a contingency of 10% in his estimate – the actual cost of any additional work has been claimed in lieu of the contingency. Where additional works were not carried out there was no claim for contingency. Where the actual cost of the works (not including the additional works) exceeded Mr Setford's estimate, the estimate only has been claimed.

24. In the Report to which his Pricing Calculation is attached Mr Setford made the following comments about what he considered to be the difficulties in assessing the cost of the rectification works:

> …
>
> *3. The Owner has taken this opportunity to carry out improvements and alterations to the building and as a result, the Builder's charges do not accurately reflect the price to remedy the defects.*
>
> *4. To assist the Tribunal, I have prepared a Pricing Calculation which I believe provides the quantum to rectify defects on a "like for like" basis.*
>
> …
>
> *6. It is most difficult to determine the quantum of this particular matter due*

to the alterations and additions carried out that do not form part of the Owner's claim.

7. *These matters tend to muddy the waters but I am of the opinion that, as I did see the building prior to the rectification works, I am well places to profer (sic) the "like for like" Pricing Calculation …*

25. It is unclear why Mrs Beamish has chosen to rely on the estimates proved by Mr Setford, as qualified by Mr Heber, when she apparently had access to all of the invoices relating to the works carried out by Mr Heber. A witness statement of Graham Joseph, accountant for Mr Beamish's business, setting out a reconciliation of the invoices, apparently applicable to the works carried out at the subject property by Mr Heber, and payments made against those invoices was filed ("the account reconciliation"). These invoices total $393,179.09. The account reconciliation identifies the creditor, the date and amount of the invoice.

26. In his report dated 17 May 2005 Mr Irwin confirms that in preparing his report and estimates he *'relied on Mr Setford's reports, Mr Heber's documentation, and any clarification provided verbally by Mr Setford and Mr Heber'* and *'In preparing my estimates I adopted, where appropriate, the invoiced cost of the work. For works for which I was unable to rely on invoices I measured the work involved and priced it at what I considered to be appropriate rates for the work which was executed in the latter months of 2003 and the early months of 2004.'*

27. When advised on day five of the hearing that Mrs Beamish would no longer be relying on Mr Irwin's estimates I was told it was because they referred to the actual cost of the works from which it was difficult to extrapolate the value of any betterment. However, I note that in relation to some items the invoices referred to in Mr Irwin's report are for an amount which is less

than Mr Setford's estimate – for instance in relation to the cost of replacement of the stairs. Mr Setford has allowed $5,000.00 for a new staircase, whereas Mr Irwin's report refers to an invoice to 'supply and fix staircase' in the sum of $3,250.00. The primary difference between the preparation of the estimates by Mr Irwin and Mr Setford appears to be that Mr Setford has prepared his estimate on the scope of works he identified as being necessary when he inspected the property in August 2003, and Mr Irwin prepared his estimates with the benefit of Mr Heber's advice as to the works which had actually been undertaken, and by reference to the relevant invoices. Whilst Mr Irwin's total estimate might have been significantly higher than Mr Setford's estimate and the quantum of Mrs Beamish's amended claim, the estimate for rectification of certain items was less. Where Mr Irwin's estimate is significantly less it is to be preferred.

28. Inexplicably, neither Mr Joseph nor Mr Irwin were called to give evidence. Further, having regard to the provisions of s97 of the *VCAT Act* to *'…act fairly and according to the substantial merits of the case'* I am of the view I should have regard to Mr Irwin's report insofar as it provides clarification of the actual cost of the works. It was not until day five of the hearing that there was any indication that they would not be called as witnesses. I have no alternative but to draw a negative inference from Mrs Beamish's failure to call them as witnesses (*Jones v Dunkel* (1959) 101 CLR 298). Irrespective of the findings I may make in relation to Mr Rosvolls' responsibility for the defective works, there is no doubt that Mrs Beamish's conduct of this proceeding has caused unnecessary delays and adjournments to the hearing.

29. Although Mr Rosvoll filed an expert report from Mr Gordon which included estimates for the cost of rectification works, I have not considered

them. Mr Gordon was not called to give evidence and those estimates have not been tested. Surprisingly Mr Rosvoll did not cross examine Mr Setford on his estimate of 11 November 2005, preferring to cross examine on his earlier estimate of 1 November 2004 on which Mrs Beamish had indicated she was not relying. This was notwithstanding the adjournment granted to Mr Rosvoll to enable him to consider the revised estimates, discuss them with Mr Gordon and file and serve any answering material. I accept that the estimates on which Mrs Beamish relies are therefore not challenged but refer to my earlier comments in relation to Mr Irwin's estimate and the failure to call him and Mr Joseph as witnesses.

The defects and the cost of rectification

30. In relation to each of the items I make the following comments and allowances:

31. **En-suite**

Setford	$16,956.00	Irwin:	$4,740.00
Claimed:	$12,852.00		

Although it is apparent that the ensuite has been reconfigured, and the standard of finish and fittings has been upgraded I am satisfied that extensive rectification works were necessary. I note that the amount claimed is significantly higher than Mr Irwin's estimate which as noted above was based on the works actually carried out. I will therefore allow Mr Irwin's estimate plus a margin of 9.4% (he has not included a margin in his calculations) - $5,185.56

32. **Walk In Robe**

Setford:	$1,018.00
Claimed:	$1,018.00

This claim relates to the removal of builder's rubble and refixing of the light switch. Mr Rosvoll said that the builder's rubble found under the floor in the walk in robe was left behind by the previous owner. Although the light switch may not have been secured in place, there was no evidence that it was installed by or on behalf of Mr Rosvoll. On balance I cannot be satisfied on the evidence before me that these are Mr Rosvoll's responsibility and I make no allowance.

33. **Internal Doors**

Setford $8,858.00
Claimed: $8,698.00 (includes additional claim of $1596 for replacement of door jambs and architraves due to taking up floor – if this is deleted from claim the amount claimed is $6,777.55)

The margins to the doors are generally uneven and in some instances excessive. However, these would have been clearly noticeable when the house was inspected by Mrs Beamish prior to purchase. There is no evidence that these uneven or excessive margins impact on the operation of the doors, and, whilst they may not comply with the *Building Code of Australia,* I am not satisfied that it is reasonable or necessary to allow the replacement cost of the doors and the associated works.

34. **Windows**

Setford	$79,347.00	Irwin: $45,454.00 plus $9,200.00
Claimed:	$57,780.00	exclusive of margin for repairs to the external cladding: $54,654.00

I accept that awning configured windows have been installed as casement windows and that as such they are not fit for purpose. The windows were poorly installed, in many instances without properly graded sills, causing

the windows to leak. The leaking has caused the inappropriately installed MDF architraves to explode. I am satisfied that it was reasonable and necessary to replace the windows. However, many of the windows have been replaced with windows of a superior specification. Surprisingly, neither a quotation for the replacement of those windows, nor invoices for the actual cost of the windows were tendered in evidence, although Mr Irwin refers to an invoice for the supply of timber windows in the sum of $19,395.00 which by reference to the account reconciliation I note is exclusive of GST – the invoices inclusive of GST amount to $21,334.00.

35. Notwithstanding Mr Rosvoll's assertion that MDF was not used externally, and that the owner must have carried out what he described as detrimental works by applying steam to the window trim to simulate the reaction one would expect of MDF, I accept that MDF was used. This is just one example of what can only be described as the bizarre accusations made by Mr Rosvoll during the course of this proceeding.

36. I understand that the external MDF components and trim were replaced at the same time as the windows were replaced and the cost is included in Mr Setford's estimate. I accept that additional works were required to the rear verandah when on removing the external cladding Mr Heber found the studwork was rotten. Mr Heber has estimated the cost of replacing the studwork at $1,056.00 which is claimed in lieu of the contingency and which I find to be fair and reasonable. However, I am not persuaded that Mr Setford has not allowed for the cost of rectification works to the rear verandah. I therefore allow $1,056.00 only for the additional works as set out in the Further Particulars of Loss and Damage.

37. It is difficult on the evidence before me to be satisfied as to the cost of

replacing the windows with windows of a similar specification, similarly it is impossible to compare the Setford and Irwin estimates in relation to this work. I will therefore allow the amount claimed with a reduction of $5,000 for the increased window specification - $41,240.00. The total allowance for this item inclusive of margin and GST is therefore $50,899.00.

38. **Bathroom**

Setford: $7,377.00 Irwin: $7,170.00
Claimed: $8,030.00

I reject Mr Rosvoll's assertion that any problems with the bathroom were caused by what he described as detrimental works by the owner. I accept that Mr Rosvoll had failed to ensure the wall linings were waterproof and internal flashings installed in the shower, as evidenced by the significant areas of mould. I note that Mr Irwin's estimates, although exclusive of margin, allows for all of these works. It also refers to the demolition of the external wall which I accept has not been rebuilt (as pointed out to me by Mr Rosvoll at the view) However, I note that Mr Irwin's estimate does not make any allowance for painting. I am satisfied that the amount claimed for the necessary rectification and replacement works does not include any allowance for the reconfiguration and upgraded specification and is fair and reasonable in the circumstances. I will therefore allow $8,030.00

39. **Passage Walls**

Setford: $26,114.00
Claimed: $26,114.00

Mr Setford's evidence was that the bulging and bowing of the passage walls was caused by the loads from the upstairs family room and that significant rectification works, including works to the sub-floor area were

required. Whilst I accept that Mr Setford is qualified to give expert opinion generally in relation to defective building work, expert evidence of an engineering nature was not called to support his opinion as to the effects of the loads from the upstairs family room.

40. Mr Heber gave evidence that the passage walls were packed and replastered because the walls in the new area were not aligned with the original passage walls, and that there was a large bow on one side of the new area although he was unable to recall which. Mr Rosvoll submitted, during cross examination of various of the witnesses, that the angled hallway arose because of the configuration of the extension in relation to the original house taking into account the constraints of the block.

41. It is clear that the repacking and replastering works are the only works which have been carried out, together with the installation of new flooring over the existing. I am not persuaded on the evidence before me that these works were reasonable or necessary or were required for any purpose other than to modernise the hallway – the decorative panelling and fretwork having been removed. Any mismatching in the floorboards would have been noticeable on inspection prior to purchase. I therefore make no allowance for this item.

42. **Stairs**

Setford: $12,593.00
Claimed: $9,216.00

I accept that the top three risers were non-compliant as were the balusters. Mr Heber gave evidence that the stairs had to be demolished and rebuilt so that they would comply, and further that the floor level in the upper room was altered so that the stairs 'would work' and 'to get the risers right'. Mr

Setford conceded that it may have been possible to rectify the stairs so that the risers would comply, but expressed concern as to the adequacy of the method of construction of the stairs and the materials used. He was definite in his opinion that the stairs need to be replaced.

43. The stairs have been totally reconfigured – the access to the stairs has been relocated, and a 'modern wider staircase' installed. There was no evidence about the cost of the new staircase, although I note that Mr Irwin refers to an invoice to 'supply and fix staircase' in the sum of $3,250.00. Mr Setford's estimate for a new staircase of a similar design to the previous one is $5,000.00.

44. Mr Heber has indicated that the cost of raising the floor height in the family room 'to get the risers right' was $1,504.75 and Mr Setford has estimated the cost of modifying the balustrade at $100.00.

45. However, Mrs Beamish gave evidence that the floor height was raised for safety reasons, on the advice of the builder and her husband, and also so that the new stairs which were turned around from the original would fit.

46. Mr Beamish gave evidence that he noticed the top two or three stairs seemed unfamiliar when he inspected the property prior to purchase. Although the house was purchased in Mrs Beamish's name, as noted above, the evidence of both her and her husband that it is the family home and all decisions in relation to its purchase and the subsequent works were joint decisions. I am therefore satisfied that any defects noticed by Mr Beamish prior to the purchase of the house are defects about which Mrs Beamish 'ought reasonably to have known' prior to entering into the contract.

47. Although the stairs may have been non-compliant, I am not satisfied that Mrs Beamish has suffered any loss in relation to them. Not only did Mr Beamish notice that the stairs were 'not quite right' prior to purchase, on the evidence before me I am satisfied, on balance, that the primary reason for replacement of the stairs was to suit the extensive modernisation and reconfiguration of the house. Mr Rosvoll cannot be expected to contribute to the cost of what are essentially aesthetic modifications to this house.

48. **External**

Setford: $7,235.00 Irwin: $8,754.00
Claimed: $6,089.00

This claim primarily relates to the replacement of the spouting, downpipes and some minor flashing work. At the time of the view it was apparent that there were still some leaks. Once again, I note that Mr Irwin's estimate refers to an invoice for the replacement of gutters and downpipes in the sum of $4,545.00 plus an estimate of $3,000.00 for what he describes as miscellaneous unspecified roof repairs. I will allow the amount claimed - $6,089.00

49. **Electrical**

Setford: $7,893.00
Claimed: $10,048.00

Mr Lionakis, electrician, gave evidence that he carried out the necessary works to relocate the meter box, tighten the connections on the board, the installation of circuit breakers and safety switches and installed an earthing system. The power was upgraded to three-phase to accommodate the ducted air-conditioning system. He did these works at a cost of $3,905.00 (inclusive of GST) and gave evidence that his estimate of the cost of rewiring the entire house was $14,500.00.

50. Although it may be that the meter box was inaccessible and this was not something for which Mr Rosvoll could be held responsible, I nevertheless accept that rectification works were required yo the electrical installation primarily for safety reasons. Although I was not provided with an estimate of the cost of making the new wiring and the switchboard safe I accept that it was reasonable to relocate the meter box at the time the other works were being carried out.

51. Mr Lionakis also gave evidence that the rewiring of the house was desirable because this is an old house which would need to be rewired in the next 5 to 10 years. However, whilst it might be desirable it was not work for which Mr Rosvoll could be considered responsible.

52. I will therefore allow the actual cost of the work which was carried out by Mr Lionakis which I find was reasonable and necessary in the circumstances - $3,905.00 (including GST) for the relocation of the meter box. There is no allowance for margin in relation to this item, it being the actual cost incurred by the owner.

53. **First Floor Family Room**
Setford: $37,468
Claimed: $7,902

I accept that some of this work was necessary. Mr Heber gave evidence that the work identified by Mr Setford was not carried out. He also said that the bow in the floor would have been clearly noticeable. The floor has not been rectified but has been covered by carpet. I am satisfied this is an item about which Mrs Beamish 'ought reasonably to have known'. Further, the bow has not been rectified, and was therefore not visible at the view.

The area has been carpeted as a continuation of the new carpet on the stairs, and also taking into account the raising of the height of part of the floor, so that the floor is all now one height. I cannot be satisfied that the carpet was installed for anything other that aesthetic reasons and therefore make no allowance for this item. However, I will allow the cost of removing the MDF from the balconies and checking the connections - $1,292.00 to which I have applied the margin and GST – total $1,554.79.

54. **External Finish**

Setford: $16,516.00
Claimed: $12,636.00

I accept that some painting was required as a result of the rectification works particularly in relation to the replacement of the windows and external architraves. The evidence in relation to the extent of painting was however, unsatisfactory. The painter was not called to give evidence. Mr Heber suggested that it was appropriate to reduce the total painting cost by approximately one third but no evidence in relation to the actual cost was led, although once again I note that Mr Irwin refers to an invoice for internal and external painting in the sum of $45,200 which he has reduced by $15,000.00 for enhancement works. Mr Setford's initial estimate in June 2003 to repaint inside and out was $15,100.00.

55. The house has been repainted internally and externally with a different colour scheme. There was no estimate of the cost of 'patch painting' which Mr Heber said could have been done if the paint colour had not been changed. In the circumstances, and particularly in the absence of any evidence from the painter I will allow $10,000.00 inclusive of margin and GST.

56. **Sub-floor ventilation**

Setford: $1850.00
Claimed: Nil

This claim has been withdrawn

57. **Garage Repair**

Setford: $6,000.00
Claimed: $6,619.00

Mr Heber's evidence in relation to this item was totally unsatisfactory. In his Witness Statement dated 14 November 2005 he makes the following vague comments at paragraph 44:

We demolished the garage in lieu of repairing it. There was a concrete floor, with a brick floor over it, together with brick surrounds. It took a lot of work. I hired a bobcat and two skips. My estimate of the reasonable cost of demolition is about $5,500 including tip fees'.

58. The garage has not been rebuilt - a pergola has been erected in its place. As the garage was apparently demolished so that the area could be put to a different use, I am not satisfied that Mrs Beamish has suffered a loss or incurred a cost she would not otherwise have incurred. I therefore make no allowance in respect of this item.

59. **Builders Clean**

Setford: $1,000
Claimed: $1,000

I am satisfied the amount claimed is fair and reasonable and allow $1,000.00

60. **Summary**

The amount I have assessed as being the reasonable cost of rectification of those items which I have found to be reasonable and necessary is:

Ensuite	$ 5,185.56
Windows	$50,899.00
Bathroom	$ 8,030.00
External	$ 6,089.00
Electrical	$ 3,905.00
First Floor Family Room	$ 1,554.79
External finish	$10,000.00
Builder's clean	$ 1,000.00
	$86,663.35

Is Mrs Beamish entitled to an order for the full amount?

61. Notwithstanding Mr Rosvoll's pre-occupation as to who had actually paid for the works, I am satisfied that Mrs Beamish is entitled to an order for the full amount of what I have assessed as the reasonable cost of those rectification works which I have found to be reasonable and necessary. I accept that Mrs Beamish's loss is referable to the 'cost of rectification' and not whether the works have been carried out. Further, it is the breach by Mr Rosvoll of the warranties in s137C of the *Building Act* that gives rise to the loss and the cost of rectification of the defective work that quantifies the loss, not the carrying out of the works or payment for them (*Bellgrove v Eldridge* and *De Lutis Cesare v Deluxe Motors Pty Ltd* (1997) 13 BCLJ 136). It is immaterial that Mrs Beamish has only paid $30,000.00 towards the cost of the rectification works and that payment was made by a third party (*Roman Catholic Trust v Van Driel Ltd* [2001] VSC 310). It is not unusual in building cases for an owner to seek and obtain and order for damages referable to an estimate of the cost of rectification and completion works even where no works have been carried out. It is not necessary for an owner to actually incur the cost as a precondition for an award of damages.

Settlement with Archicentre

62. Although the Terms of Settlement entered into with Archicentre are expressed as being confidential, except as required by law, relying on the powers afforded to the tribunal by s98 of the *VCAT Act* and being cognisant of the requirements of s97 to *'act fairly'* I required Mrs Beamish to produce a copy of the Terms of Settlement. Under the Terms of Settlement Archicentre agreed to pay Mrs Beamish the sum of $10,000.00 '*…in full satisfaction of the claim made by the applicant against the second respondent in this proceeding, inclusive of all interest and costs that may be claimable by the applicant from the second respondent.'*

63. The question is whether this payment should be offset against the amount I find is the reasonable cost of the rectification works. It was submitted on behalf of Mrs Beamish that it could only be offset against the rectification costs if I was satisfied there was a concurrent liability between Mr Rosvoll and Archicentre arising from the same damage. I accept that the damages recoverable from Mr Rosvoll are the reasonable costs of rectification arising from his breach of his statutory and contractual warranties. It is clear that any damages that may have been recoverable from Archicentre, had the proceeding between it and Mrs Beamish not been resolved, would have been the diminution in value of the property occasioned by Archicentre's alleged failure to identify the defects – not the cost of rectification per se. However, it is equally clear that although not the same damage, the appropriate method of assessing damages in relation to a claim for diminution in value is by reference to the purchase price less the cost of rectification (*Carborundum Realty Pty Ltd v RAIA Archicentre Pty Ltd* (1993) Aust Torts Reports 81-228). Therefore, although Mr Rosvoll and Archicentre may not have a concurrent liability if I fail to take the

settlement sum into account Mrs Beamish would effectively be entitled to a windfall.

64. I am satisfied that I should take the settlement sum into account. Obviously I am not in a position to determine what damages, if any, I may have ordered against Archicentre had the claim against it not been settled, or whether I would have been prepared to exercise the tribunal's discretion under s109(2) of the *VCAT Act* and order costs in favour of Mrs Beamish. However, having regard to s97 of the *VCAT Act* I am of the view that in all the circumstances it should be apportioned 50% as to damages, and 50% as to costs and interest. The amount I will therefore order the First Respondent to pay to the Applicant is $81,663.35.

Costs and Interest

65. I will reserve the question of costs and interest with liberty to apply. However, I refer to my comments and observations in relation to Mrs Beamish's conduct of this proceeding which are all matters which I will have to take into account in deciding whether, and if so, the extent to which it is appropriate to exercise the tribunal's discretion under s109(2) or to allow the claim for interest.

DEPUTY PRESIDENT C. AIRD