VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D434/2007

CATCHWORDS

Domestic Building List; Major domestic building contract; Whether structure had reached lock-up stage; Whether alleged failure to attain frame stage necessarily meant structure could not reach lock-up stage; Whether absence of roller door on garage attached to house or ability to climb over stud wall through open gable end prevented house attaining lock-up stage; Damages for defects; Owners' wrongfully refused to pay lock-up stage claim; Repudiated contract; Builder entitled to be paid lock-up claim for further works and damages and interest

1ST APPLICANT	Rod Brown
2ND APPLICANT	Wendy Brown
1ST RESPONDENT	Paul Cardona
2ND RESPONDENT	Lauren Brownscombe
THIRD RESPONDENT	Lipska Pty Ltd (ACN 005 530 370) t/as Capeview Building Products
WHERE HELD	Melbourne
BEFORE	M.F. Macnamara, Deputy President
HEARING TYPE	Hearing
DATE OF HEARING	1-5, 8-9 December 2008, 5-6 and 8 May 2009
DATE OF ORDER	26 May 2009
CITATION	Brown v Cardona & Ors (Domestic Building) [2009] VCAT 910

ORDER

1 By consent proceeding withdrawn against third respondent.

2 Within 14 days of this day the parties must bring in short minutes to give effect to the attached reasons.

3 Adjourned to further hearing 9.30 am, 11 June 2009 at 55 King Street Melbourne, estimated duration one hour.

4 Costs reserved.

M.F. Macnamara
Deputy President

APPEARANCES:

For Applicants	Mr R. Edmunds of Counsel
For 1st & 2nd Respondents	Mr Bruce Miller of Counsel
For 3rd Respondent	Ms Luisa Alampi of Counsel

REASONS

BACKGROUND

1 Mr Paul Cardona and Ms Lauren Brownscombe who are respondents in this proceeding were looking to construct a house on their property at Lot 9 Bunderra Drive, Boolarra. They obtained architectural and engineering drawings for the proposed residence from a drafting service known as All Development Services. Mr Greg Dyer, a civil engineer was one of the principals of this organisation. He attended to the engineering though not the architectural elements of the project.

2 In mid-2005 Mr Cardona submitted the drawings and a soil report which had been prepared by All Development Services to a number of builders seeking quotations. One of those builders was Mr Rod Brown, a local builder in the Boolarra area who is the first applicant in this proceeding. He carries on a building business in partnership with his wife, Mrs Wendy Brown. Mr Brown said that he submitted a number of oral quotations, presumably based upon various options. Ultimately Mr Cardona on behalf of himself and Ms Brownscombe accepted one of those quotations for a price of $245,245.00 which entailed constructing the proposed dwelling with a rock face blockwork finish, water tanks and a pump. Mr Brown prepared a contract based on the HIA Plain English Contract for Domestic New Homes October 2004 and the relevant specifications. The parties executed the contract which is dated 8 March 2006. Private Building Surveyor, Mr Roger W. Kidd issued a building permit for the project dated 19 April 2006. Mr Brown is shown as the *'owner's agent'* and the owner is shown as Mr Cardona.

3 The plans as drawn by the drafting service called for double glazing on certain windows. Mr Brown informed the owners that *'comfort glass'* would be sufficient and would provide an equivalent effect. Hence the specifications provided for *'comfort glass'* in lieu of the double glazing where identified in the plans. As part of the permit process a *'four star'* energy rating certificate had to be obtained. During that process the certifying consultant required double glazing to be substituted for the *'comfort glass'*. Mr Brown made the substitution but without at that stage informing the owners that this issue had arisen. This matter ultimately became the subject of a contested claim for variation.

4 In the course of his preliminary inspection of the site which was part of a recently completed subdivision, Mr Brown observed an electricity supply pit at the frontage or adjacent to the frontage of the owner's allotment. He concluded that an electricity supply had been connected to the site, a reasonable assumption given that the allotment was part of a recent subdivision. On the other hand, a more careful observation would have disclosed that the electricity poles were on the far side of the street and there was no evidence of any link from the pole to an underground crossing

connecting to the pit. The lack of immediate power to the site at the commencement of building work would become the subject of another contested variation claim.

5 At this preliminary stage, Mr Cardona asked if the plans could be *'flipped'* such that the building as constructed would be the mirror image of the plans on which Mr Brown quoted. Mr Brown agreed and *'mirror image'* plans were obtained and furnished to Mr Brown. Whilst Mr Brown did not seek to vary his quoted price he said:

> Additional cost and expenses were incurred as a result of a change in floor plan. That additional expense related to the re-submission of the new Plans, planning and building permit approval, having the elevations prepared and arranging for the Energy Report together with administration costs. I estimate that the total cost was not less than $600.00 which was not charged out to the owner.

6 According to Mr Brown, building approval was granted in September 2006 with building work commencing immediately. The foundations were poured. In the middle of October Mr Brown's sub-contracting electrician installed an underground cable to the house. He told Mr Brown however that there was no power supply in the electricity supply kit. Mr Brown told the owners to make application for the connection of a supply from the local utility supplier. The supply was obtained in February 2007. Meanwhile, provided his own generator to enable building work to continue. Again, this was not a matter raised by Mr Brown with the owners at the time. It has subsequently become a disputed variation claim.

7 By late November 2006 the foundation work, base brickwork and wall frames had been erected. The roof trusses which had been manufactured by Lipska Pty Ltd trading as Capeview Building Products were delivered on site and stacked in packs on top of the wall frames. Mr Cardona was dissatisfied with the quality of these trusses. He says that on Saturday 25 November he and Ms Brownscombe visited the site and:

> We were concerned at the quality of the timber used in the trusses and at the number and size of the knots in the truss timber.

8 Mr Cardona was on-site again on 29 November finding that Mr Brown had erected five of the trusses. According to Mr Cardona he told Mr Brown that he was *'concerned that the trusses were of poor quality and had many large knots'*. Mr Cardona said Mr Brown told him that he *'felt the same and had spoken to the factory manager of the trusses manufacturer about it'*. Mr Brown according to Mr Cardona assured him that he would follow up the concern about the trusses. Mr Cardona said he told Mr Brown not to put up the trusses as *'we did not want them because of their poor quality'*. About this time Mr Cardona and Ms Brownscombe expressed concern about the differential marking on the trusses, some having one colour, others a different colour and others again with no colour marking at all. Mr Brown said he assured them that all trusses had been properly treated.

9 Meanwhile on 6 November the builder had delivered to the owners a progress claim for the *'base stage'* of the work. The owners had arranged finance through the Commonwealth Bank of Australia which paid the claim on 16 November 2006.

10 This claim was the subject of a progress claim certificate from Mr Brown dated 6 November 2006, it included a basic stage claim of $24,524.50 with additional debits of $1,750.00 for the building permit, $150.00 for the energy report and $550.00 for a planning permit yielding a total amount of $26,964.50.

11 According to Mr Brown the only issue raised by Mr Cardona with respect to the trusses by Mr Cardona related to the different colours. He denied joining in any criticism of the trusses with Mr Cardona. Capeview provided a letter explaining the situation with the different colours and according to Mr Brown:

> I believe that the issue of the roof trusses had therefore been resolved as the only issue raised by Cardona was the different coloured hues and timber treatment.

12 Mr Brown said that in early December he requested an inspection by the building surveyor for approval of the frame stage. The terms of the contract provided that the progress payment for frame stage was payable only upon completion of that stage and its approval by the building surveyor. Mr Brown issued a progress claim certificate dated 4 December 2006 claiming $36,786.75 for the stage. Mr Cardona and Ms Brownscombe placed an endorsement on a copy of the claim certificate *'happy with work completed'* forwarding this to the Commonwealth Bank which advanced the amount of the claim, a payment direct to Mr Brown under the owner's building loan.

13 In fact there was nothing which could be described as an inspection or approval until 14 December 2006. This inspection which at the time generated no written document which could be described as an *'approval'* and was carried out not by building surveyor, Mr Kidd but by one of his assistants at Mr Kidd's company, Coast to Coast Building Service Pty Ltd, a Mr Kevin Flett. Mr Flett, according to Mr Kidd was not a qualified building surveyor, but is a qualified engineer. He says Mr Flett is his *'eyes and ears'*. Mr Flett, it seems, attended the site on 14 December 2006 and purported to issue some sort of unwritten approval for the frame stage. In evidence to the Tribunal Mr Kidd conceded that Mr Flett was not a qualified building surveyor and asserted he did not have the authority to speak on Mr Kidd's behalf; nevertheless it is clear that had the major dispute about the roof trusses described below not occurred there is no reason to think that anyone from Coast to Coast would have taken any further steps with respect to the frame stage of this project. Mr Kidd took the view and both Counsel assured me that there was no requirement that building surveyor approvals be in writing. The effect of Mr Kidd's appointment of Mr Flett as his *'eyes and ears'* and the way that it operated

therefore seems to be analogous to a situation where written approvals for stages were required and Mr Kidd entrusted his assistant Mr Flett with a facsimile of his signature to be applied at the assistant's discretion.

14 It can be seen that whatever happened on 14 December and whatever authority Mr Flett might have had or whatever the propriety of his doing what he did, the claim for the frame stage by the builder was premature.

15 On 18 December Ms Brownscombe visited the site. She says she told Mr Brown that the trusses needed to be replaced because of the quality of their timber and Mr Brown said he would be *'getting in contact with Capeview regarding the trusses'*. Mr Brown contacted Capeview and spoke with his partial namesake, Mr Adam Brown. According to Mr Brown, Capeview provided *'written confirmation … that the roof trusses were to Australian Standards and tolerances'*. Capeview also wrote a letter to Mr Brown dated 20 December 2006 by facsimile transmission in which it copied a letter which it had sent to building surveyor Mr Roger Kidd. The facsimile to Mr Brown stated, inter alia:

> Roger is fine with how the roof trusses currently are. I do suggest that we may wish to laminate an extra member to the side of the bottom chord and the areas where the larger trusses are. Please note that the trusses comply with all relevant Australia standards. Should you have any questions please call.

16 The respondent owners say they did not see that letter. Mr Brown however believes that at that time this proposal was made to the owners.

17 The owners said that at this time they understood the process of lamination to be purely aesthetic in which slender slices perhaps of *'masonite'* would be attached to the trusses to cover up the unsightly knots. This, they were clear, was not an adequate response to the concerns they were raising.

18 According to Mr Cardona, Mr Rod Brown told him that he had been informed by Mr Adam Brown that the trusses *'should never have been sent like this'* and that Capeview would laminate over the knot holes. Mr Rod Brown denies saying that the trusses should never have been sent like this.

19 The owners having formed this negative opinion of what was entailed in the process of lamination wrote to Mr Adam Brown of Capeview with copies to the principal of Capeview, Mr Keith Donohue and builder Mr Rob Brown stating:

> This is to inform you that the building site at Lot 9 Bunderra Drive, Boolarra is now a closed site. Only Rod Brown (builder) and workers he requires for future tasks are to be on site unless prior approval has been sought from both Paul and Lauren and, in such instances, we will be present with our representative.
>
> On the request of an OH & S officer with whom we are currently dealing with we require a copy of the Materials Safety Data Sheet for the trusses supplied by your business by close of business on Tuesday 16 January 2007. Please fax this information to 0351696200.

> We would like to inform you that we have employed Mr Ken Brownscombe to oversee the building process for us so, we are hereby authorising Mr Brownscombe to act as a representative on our behalf.
>
> …

20 The letter was subscribed by Mr Cardona and Ms Brownscombe. They said that this letter was intended to prevent Capeview from entering the site and *'laminating'* the trusses. They remained of the view that the trusses were radically defective and should be removed and replaced.

21 On 23 January 2007 an on-site meeting was held attended by Mr Ken Brownscombe (Ms Brownscombe's father) representing the owners, Messrs Adam Brown, Keith Donohue and Mark Warren representing Capeview, the first applicant Mr Rod Brown, Allen Collier and Tony Lane of Aus Pine, Mr Phil Rogers of Carter Holt Harvey and representatives of Koppers Arch. Mr Ken Brownscombe acted as the owner's representative and spokesperson. He stated the owners' position, namely that the trusses were unsatisfactory and should be replaced. The others at the meeting seemed to have maintained that the criticisms of the quality of the timber used in the trusses were unjustified. Mitek Australia Limited designed the computer program on the basis of which Capeview manufactured the trusses. In a letter dated 31 January 2007 Mr Ashton, the State Engineering Manager of Mitek said:

> Trusses GT2 and GT3 were held down with tie-down strap fixed to the side of studs. The original design called for two cyclone tyres wrapped under the top plate. Additional hold down will be required.
>
> It is observed that speed brace was not wrapped under the top plate in accordance with AS44402004. It is recommended that blocking be added in accordance with the end fixing at heel to top plate (alternative) in AS4440-2004.

22 In Mr Ashton's view subject to these adjustments being carried out and subject to confirmation of timber grading by Aus Pine the trusses would be satisfactory.

23 Building Surveyor Mr Roger Kidd carried out an inspection in person on 17 January 2007. He wrote on 12 February to Mr Cardona and Ms Brownscombe stating that on the basis of the report from Mitek, Carter Holt Harvey and Koppers Arch, the trusses met standard and regulatory requirements subject to the recommendations of Mitek. The letter continued:

> The above items [that is the Mitek recommendations] have now been adjusted accordingly. Your builder has all reports and recently advised me that he had carefully read all reports and made all adjustments to the said areas of concern to satisfy the building regulations.

24 Mr Kidd continued:

> I now wish to advise that the overall frame for this project is approved.

25 In his evidence in the Tribunal Mr Kidd stated that he reached this conclusion based upon assurances provided to him by Mr Brown that the Mitek recommendations had been implemented. He had not as at the date of this letter carried out any further inspection. In a subsequent letter to the owners' solicitors, Mr Kidd stated that he carried out a further inspection of the site on 13 March 2007. According to Mr Kidd this revealed that all adjustments had been made to the roof trusses in accordance with the Mitek recommendation.

26 Mr Brown served a Progress Claim Certificate for the lock-up stage of the residence dated 13 February 2007. Mr Cardona and Ms Brownscombe received this document on the afternoon of the 14th. The total claim for lock-up was $85,835.75. The Claim Certificate required payment be made by 27 February.

27 On 23 February Mr Cardona and Ms Brownscombe inspected the property. The owners sought to bring Mr Brownscombe and Mr Cardona senior on the inspection. Mr Brown refused to allow the fathers on-site. The owners alleged, inter alia that one of the walls in the property was not straight but was bowed. Mr Brown felt that Mr Cardona's use of a string allegedly to demonstrate the *'bow'* did not employ the appropriate technique. According to the owners they requested Mr Brown as a qualified builder to employ what he said was the correct technique in using the stringline in which Mr Brown declined to do.

28 The owners wrote a letter to Mr & Mrs Brown dated 24 February 2007. Mr Brown says this letter was delivered to him on Sunday evening, presumably 25 February. The letter was headed *'lock-up stage payment'*. The owners said they noted:

1. Unsatisfactory windows.
2. Bowed interior wall frame.
3. Missing dividing wall frame.
4. Entry door unit.
5. Rear garage door frame.

They continued:

> We are writing to inform you that upon inspection of the building we have concluded that your request for payment has been sent through to us prematurely based on your failure to complete these tasks as per the contract specification. There are a number of issues that we have identified which need to be rectified **before** you submit another request for the lock-up stage progressive payment, which is then to be dated from the time that they have been completed. [Emphasis in the original]

29 The letter alleged with respect to the windows that the vast majority were not level or straight. Specific criticism was made of the window in the kitchen, the lounge room windows and the window in the study and all windows in the master bedroom etc. The letter commented:

> There is a variation in the degree to which some of these windows are 'out', a number very apparent to the eye – so you could very well appreciate how this will be exacerbated when the plaster has been installed.

30 The letter renewed the allegation about the *'bow'* in one of the interior walls, namely the one running through the centre of the house *'which divides the living area and the bedroom/bathroom and toilet'*.

31 Next they complained that the wall between the lounge and family area was not constructed. They noted that during the planning stages they advised they did not require a full height wall but the half height wall then agreed on had not been constructed. Next, they alleged that the front door despite assurances given by the builder on 8 February 2007 by telephone, was not 1800mm wide. They referred to the project specifications at page 12 which stipulated the door as being 20100 by 1800. Finally they complained that the rear garage door was specified to be a metal frame 20100 x 900. They said *'you have installed a timber frame. This needs to be corrected'***.** They then complained about the roof trusses remarking:

> Although you were notified of our dissatisfaction with the trusses prior to erecting the remaining trusses (only having erected five trusses at the time) you continued to install a product that we were and continue to be unhappy with.

32 The final paragraph of the letter stated:

> We require that upon completion of these corrections we be advised, at which time we will again inspect the quality of workmanship. If the quality of workmanship is that of a professional builder you can then submit your Progressive Payment account and accordingly we will instruct the bank to make the payment. We wish to reinforce to you that it is **our** $245,000 that is being spent on this home and we are the people who need to be satisfied. [Emphasis in the original.]

33 Mr Brown took exception to this letter stating that it contained personal attacks on his professionalism and workmanship. He responded in a letter dated 5 March 2007. That letter included a statement:

> We require that our privacy be respected and that [clients and their families] refrain from coming onto our private property unless invited. We ask that you, your families and your representatives honour this requirement indefinitely.

34 As to the five matters referred to in the owner's letter, Mr Brown responded:

1. **Unsatisfactory Windows**

   All windows are within the standards and tolerances Guidelines 2006 and meet the AS2047 Windows in Buildings and Selection Installation.

   The way in which these were determined by you to be unsatisfactory and the equipment used, was not up to the standard and quality required to make this determination.

2. **Bowed Wall Frame**

   Has been dealt with accordingly, and would have been before plastering, as already explained. The stringline you used to determine the degree of tolerances was not applied correctly.

3. **Half Dividing Wall**

   Was feature requested by you and was not required to be constructed at this stage. This has been dealt with accordingly, and would have been before plastering, as already explained.

4. **Entry Door Unit**

   Opening of 20100mm by 1800mm between the Brickwork with a recessed door unit, for simplicity in the future so as Universal replacement of that size can be sought if the need should ever arise as stated in your letter dated 29 January 2007. This has already been explained to you.

5. **Rear Garage Door Frame**

   Has been replaced with metal frame.

6. **Roof Trusses**

   As no written proof has ever been produced by you or any professional qualified in the area in question to support your claims, construction continued accordingly.

35 Mr Brown said that none of the items referred to *'relate to the Progress Payment Schedule 3, Lock-up stage, page 10 of New Homes Contract'*. He said therefore that payment was due and payable. He enclosed a notice of suspension of works. He also asked for *'all variation forms be returned signed or unsigned, as requested on several occasions'*. The notice of suspension of work was dated 6 March 2007. The grounds stated for suspension was *'had not made progress payment of $85,835.75 was due on 27 February 2007'*. The builders appointed Littleton Hackford & D'Alessandro as their solicitors and the owners Simon Parsons & Co. In a letter to Simon Parsons & Co dated 5 April 2007 returning to the five matters raised in the owner's letter of 24 February and the roof trusses, the solicitors gave in substance the same response as Mr Brown had in his own letter though using different words, asserting that the progress payment claim was validly made they then made a claim for interest at the rate of $47.03 per day from 28 February 2007 on behalf of their client, the builders. The letter continued asserting that there were works carried out

beyond the lock-up stage for which the builders would seek payment and they would also make a claim for delay damages at the rate of $150.00 per week unless all amounts demanded were paid within 10 days court proceedings were threatened *'without further notice'*. The letter concluded:

> Needless to say that no further work will be carried out until this matter is resolved but my client remains willing and able to complete the Contract upon the remedy of the breaches set out herein.

36 Simon Parsons & Co responded in a letter dated 26 April 2007 stating that the front door frame was almost 70mm narrower than the 800mm width which the owners said was specified for the contract. The letter stated:

> It is requested that the builder replace this frame with the correct size frame **prior to the completion of the works**. [My emphasis.]

The letter continued that the builder was required to ensure that *'prior to completion of the works'* the window frames were properly secured and *'plumb and square'*. As to the back door of the garage, the letter conceded that a metal frame had been substituted for the wooden one but:

> The door frame to the garage door at the entry verandah also needs to be replaced with a metal door frame as the project specification requires that 20100 by 900 door frames to the garage to be metal. It is requested that the builder ensure that this garage door frame is also changed to a metal frame as required by the specification.

The letter quoted the definition of *'lock-up stage'* from the building contract and noted that:

> As yet the builder has not installed the two roller doors or the two 820mm doors to the garage. Until these doors are installed the home has not reached the lock-up stage and consequently the builder is not entitled under Clause 29.0 of the building contract to make a claim for the lock-up stage payment.

37 Simon Parsons & Co then asserted that their clients receiving the claim on 14 February 2007 assuming its validity, had until 28 February 2007 to make payment and the demand that payment be made on 27 February was invalid. The letter continued:

> Clause 35.0 entitled the builder to suspend the works if the Owners do not make a progress payment within seven days after it becomes due. Consequently, if the progress payment was due, the Builder would not have been entitled to suspend the works until 8 March 2008. The builder pursuant to the Notice of Suspension of Works suspended the works on 6 March 2007, two days prior to when he would have been entitled to do so had the lock-up stage been completed.

38 Accordingly said Simon Parsons & Co, the builder was in breach of the contract in suspending work. They suggested the builder return to the site *'immediately and continue the works'*. Once the lock-up stage had been completed they said their clients would advise the bank to make payment.

39 They then said that since the framing to support the timber decking to the covered area and the floor to both the front verandah and the rear deck had not been completed, the framing stage had not been properly completed. They continued:

> We request that your client also carry out this work before making a further claim for lock-up.

40 They alleged that aside from this the claim for payment on the frame stage was premature because it was only on receipt by the owners on a letter from the building surveyor dated 12 February 2007:

> That they received confirmation that he had finally approved the frame. The approval did not occur until sometime in February 2007, when the building surveyor received various reports referred to therein.

41 The letter then rejected a claim which had apparently been made for $1,885.40 for a plumbing price adjustment. This adjustment they said was rendered illegal by Section 15 of the *Domestic Building Contracts Act* 1995 where the contract price was less than $500,000. Finally they referred to the builder's estimate for the cost of the building permit at $1,000.00 as against a claim made for the base stage Progress Claim $1,750.00. The letter concluded:

> The builder is requested to provide documentary evidence to the owners to justify the 75% increase in the amount claimed for this item compared with the reasonable estimate provided at the time of entry into of the building contract.

42 Whilst this correspondence was going on Mr Brown referred to his trade organisation, the Housing Industry Association Limited the question whether it was necessary for the achievement of lock-up stage on this project for him to provide doors temporary or permanent on the garage. He received a response dated 3 May 2007 from Reno Zulini, Manager Industrial and Legal Services of the HIA which stated, inter alia:

> A garage is not (sic) considered part of the home for the purposes of [the] definition [of] lock-up stage in the building contract unless access is necessary and obtainable through the garage without provision of any other doors. External decking is not mentioned as part of that stage and the builder may regard that as part of fixing or completion stage.

43 Littleton Hackford then wrote a letter dated 11 May 2007. It was marked *'without prejudice other than as to costs'* but both parties waived privilege and the letter was placed before me. Littleton Hackford said that whilst their client remained of the view that the front door frame as installed was in compliance with the specifications, as a goodwill gesture and conditional upon other matters, the builder would fit *'a replica 1800 wide replacement of the hinge in question prior to completion'*. As to the windows Littleton

Hackford said they accorded with the relevant standard but *'any deflections in reveals are dealt with when architraves are fitted'*.

44 Littleton Hackford appeared to contemplate that there might be a refitting of a metal door frame subject to other matters being agreed. They denied that the garage doors are part of the lock-up stage. This was because they said the garage was not part of the home. External decking was appropriately done, they said, at the fixing or completion stage. Accordingly they said the builder was entitled to suspend work because the progress claim for lock-up stage was validly made and not paid by the owners. They also denied that external decking or verandahs needed to be completed as part of the frame stage. They asserted the builder's entitlement to default interest on moneys outstanding at 20%. Even if the suspension of work was premature contrary to their primary contention they said:

> Then it is clear that your clients are in default and have been in default since 8 March 2007.

45 Accordingly Littleton Hackford proposed that the progress claim for lock-up be paid with interest at 20% per annum and delay damages. They continued:

> If payment is not made by 17 May 2007 (which should be sufficient time for the bank) then my client will not return to the site and court proceedings will be commenced without further notice.

46 Finally the letter requested the return of a number of variation forms which had previously been forwarded. An amended variation form for the windows claim was included together with a tax invoice for use of the generator employed by the builder pending the connection of the power supply in February 2007. The tax invoice was said to be *'due and payable within 14 days'*. The window variation would be included in the next progress payment. The letter concluded:

> My client is anxious to resolve the matter and is ready willing and able to return to the site and complete the works **SUBJECT** to the matters set out in clear terms herein.

47 Simon Parsons & Co replied by letter dated 23 May 2007 stating the owners would make the lock-up stage payment *'as soon as the dwelling is in fact at that stage'*. They denied liability for any variation to the windows for double glazing. According to Simon Parsons & Co the long delay in obtaining a power connection was caused by problems of communication between the utility provider, SP Ausnet and the builder and his electrician. The debate on the meaning of *'lock-up'* continued and in a letter dated 25 May Littleton Hackford returned to that theme. They continued to assert that the builder was *'ready, willing and able to return to the site to continue works'*. The letter concluded asking Simon Parsons & Co if they had instructions to accept service. The lengthy debates as to meanings of lock-up stage, Australian standards and so forth were beginning to peter out.

Simon Parsons & Co wrote to Littleton Hackford by letter of 15 June 2007 noting the lack of further correspondence. They concluded:

> Our client's (sic) report the builders attended the site removed some material, but not done any work on the building.
>
> Are your client's (sic) going to complete the stage and contract, or not?

48 Littleton Hackford replied in a letter dated 18 June 2007 professing a willingness on the part of the builder to continue the works subject to the payment of the progress claim and penalty interest. Simon Parsons & Co then wrote directly to Mr & Mrs Brown by letter dated 20 June 2007 and copied to Littleton Hackford. The letter said that the builder's action in requesting payment for the frame stage prematurely, seeking payment for the lock-up stage prematurely, wrongly suspending work, refusing to return to the site and proceed with the works competently and diligently constituted a repudiation of the building contract. The letter stated that Mr Cardona and Ms Brownscombe *'hereby accept your repudiation of the building contract'*. The builder's licence to attend the site was *'cancelled'*. Mr Cardona parked a vehicle immediately inside the gateway of the site to prevent the builder having further access. Littleton Hackford on behalf of the builders filed the application which commenced this proceeding on 3 July 2007.

49 Throughout this period the owners and Ms Brownscombe's father, Mr Ken Brownscombe, sought to raise their grievances as to the quality of the roof trusses in any forum which they could find. They made complaints to a conciliation service known as *'BACV'* and to the Building Commission. They threatened to take the matter to the media including a number of television current affairs programs. In fact no publicity on any such program seems to have eventuated. Whether this was because the matter was not taken to the media or that the media were approached but did not display interest, is not disclosed by the evidence. Mr Ken Brownscombe sought to raise the issue with a number of State and Commonwealth politicians.

BUILDER'S CLAIM

50 In their amended Points of Claim dated 12 June 2008 the builders claim damages in the sum of $94,020.44; interest in the sum of $85,835.75 accruing at the rate of $47.03 per day; costs of the variation for double glazing in the sum of $945.80, the cost of the use of a generator $720 and the cost of additional work after lock-up stage $21,799.08. Alternatively they claimed an amount on a quantum mererit on the sum of $100,517.30; delay damages at the rate of $150.00 per week and statutory interest. According to this pleading the claim for $85,835.75 under the building contract for works to the lock-up stage was validly made, none of the matters urged by the respondent owners impeached the validity of that claim and it was pleaded by writing the letter of 24 February 2007 the

owners breached the contract and evinced an intention to repudiate. The pleadings said the notice of suspension of work was lawfully given. It was alleged that the letter written by Simon Parsons & Co on behalf of the owners dated 20 June 2007 was a further repudiation of contract. Loss and damage in the sum of $94,020.44 was claimed made up of the lock-up stage claim, interest at 20% per annum on that claim for 123 days and delay damages in the sum of $150.00 per week for 16 weeks. Post lock-up stage works were costed at $21,799.08. The quantum meriut claim in the sum of $100,517.30 was made up as follows:

costing of works as built $168,424.00;

insulation and decking on site $3,058.00;

double glazing variation $945.80;

generator use $720.00;

warranty insurance $918.00;

flywire screens $550.00;

front ventilation $1,650.00;

half builder's clean $275.00;

sub-total $176,540.89;

less payments made $76,023.50

total $100,517.30.

OWNER'S DEFENCE

51 By their amended Points of Defence, the owners alleged that the claim made by the builder for the frame stage was premature on the basis that the wall frame between the family room and the lounge had not been constructed and the framing support for timber decking areas outside the covered area had not been completed. They said the frame stage was not approved by the building surveyor until February 2007 whilst the frame stage claim was made on 4 December 2006.

52 They said the demand for the lock-up stage payment was also premature and invalid because the frame stage had not on 14 February 2007, when the claim for lock-up stage was made, been completed and lock-up works had not been completed in that the roller doors and the two orthodox doors had not been fitted to the garage. Accordingly, they said Mr Brown's suspension of works was in violation of the contract. They said that the claims for variations made by the builder were not in accordance with the requirements of the *Domestic Building Contracts Act* 1995.

53 Next, they alleged defective work by the builder evident in cracked brickwork above windows, front door frame wrong size, the garage doors and finally an allegation that the roof battens were not at the spacing specified in the contract. According to the owners the premature requests

for two stage payments, namely framing and lock-up, the ensuing suspension of work and refusal to complete constituted a repudiation which the owners said they accepted by their letter of 20 June 2007. They said that they suffered loss and damage by reason of the repudiation calculated at $148,780.00 consisting of costs of rectification and cost to complete works together with damages for delay. These damages they sought to set off against the claim made by the applicants leaving a balance due to the applicant builders in the sum of $20,441.50.

54 At the outset of the hearing I asked Mr Miller why his clients had not paid this sum. He replied that their bank would allow no further draw down on the building facility unless either it was an entire stage payment or the amount determined by the Tribunal.

THE ROOF TRUSSES

55 On the application of the builders, Capeview as joined as third respondent. On the first day of the final hearing of the proceeding the matter was stood down to enable negotiations to proceed. The result was that the builders and Capeview reached a settlement, the effect of which was that the roof trusses were to be strengthened in accordance with the proposals of consultant engineer, Mr Yttrup who carried out an inspection of those trusses at the request of the Building Commission. The roof trusses whilst a major and perhaps the major bone of contention between the owners and the builder now have ceased to be an issue in this proceeding.

THE DISPUTE

56 What remains in dispute as I have described it is relatively narrow in compass. It stands in stark contrast from the disputes which customarily lead to long hearings in this List where *'Scott schedules'* of inordinate length have to be adjudicated upon. Here, the alleged defects are relatively minor and were made more minor by the announcement at the outset of the hearing that a claim with respect to roof battens being spaced other than in accordance with the plans and specifications is not being pursued. This removed some $18,500 from the amount of the owners' claims for defective work as pleaded.

57 The loss here is caused largely by the cessation of work. If this house is to be completed by another builder there will be an inevitable additional impost caused by the change in builder. When I come to examine the evidence as to cost to complete in due course I will say more about the nature of these additional costs. I shudder to think what the costs of conducting this hearing have been. Evidence tendered toward the end of the hearing indicated that the respondents had been billed some $123,000 to the end of the sixth day of the nine day hearing. What the final three days cost them remains unknown as does the cost to the applicants. The result is that of the two families which are protagonists here, both of whom seem to be of relatively modest means, one or perhaps both are threatened with

financial disaster. I expressed my misgivings briefly at the commencement of the hearing. Neither side seemed daunted. Given that it is the Tribunal's function to hear and determine the disputes brought before it, I felt I should say no more. The hearing proceeded.

LOCK-UP STAGE

58 As appears above, the point of rupture which led first to the suspension of work on site and eventually to the termination of the contract was the dispute as to whether the work done by the builder brought the structure to lock-up stage or not. Section 40 of the *Domestic Building Contracts Act* 1995 which regulates this contract limits the ability of a builder to claim and retain progress payment. Sub-section (2) provides for the following progress payments under a major domestic building contract (which the present contract was) where the contract provides for the erection of all stages of a house:

Base stage	10%
Frame stage	15%
Lock-up stage	35%; and
Fixing stage	25%

The balance is payable on completion. These stages are defined in Section 40(1):

> (1) In this section—
>
> ***base stage*** means—
>
> (a) in the case of a home with a timber floor, the stage when the concrete footings for the floor are poured and the base brickwork is built to floor level;
>
> (b) in the case of a home with a timber floor with no base brickwork, the stage when the stumps, piers or columns are completed;
>
> (c) in the case of a home with a suspended concrete slab floor, the stage when the concrete footings are poured;
>
> (d) in the case of a home with a concrete floor, the stage when the floor is completed;
>
> (e) in the case of a home for which the exterior walls and roof are constructed before the floor is constructed, the stage when the concrete footings are poured;
>
> ***frame stage*** means the stage when a home's frame is completed and approved by a building surveyor;
>
> ***lock-up stage*** means the stage when a home's external wall cladding and roof covering is fixed, the flooring is laid and

external doors and external windows are fixed (even if those doors or windows are only temporary);

fixing stage means the stage when all internal cladding, architraves, skirting, doors, built-in shelves, baths, basins, troughs, sinks, cabinets and cupboards of a home are fitted and fixed in position.

59 It will be recalled that in their letter to the Browns dated 24 February 2007 the owners demanded satisfaction on some five points as a pre-condition to their making the lock-up stage payment sought by the Browns. Of these five matters only the third *'missing dividing wall frame'* was relied upon by Mr Miller in his closing submissions on behalf of the Browns as justifying his clients' refusal to make the lock-up stage payment.

60 Mr Miller also contended that frame stage was yet to be properly completed because of the missing dividing wall frame and the non-completion of framing by way of bearers and joists for decking areas outside the house.

61 Mr Miller said that the failure to fit the roller door on the garage for the premises which is located under the house roof line and also the failure to seal off an open gable end which with the assistance of a ladder or some other structure to climb on, would enable a person to pass through the gap into the ceiling area above the main residential portions of the house meant that the house has not reached lock-up. Mr Miller said that since the garage was part of the building envelope and was located under the same roofline as the house proper it should be regarded as part of the house for the purposes of the application of the statutory definitions of stages referred to above.

62 Mr Miller said that Section 3 of the *Domestic Building Contracts Act* 1996 *'home'* to mean:

> Any residential premises and includes any part of a commercial or industrial premises that is used as a residential premises …

63 He said that the *Oxford English Dictionary* defined home as:

> A dwelling house, house, abode, the fixed residence of a family or household.

and also as

> Used to designate a private house or residence merely as a building.

64 Mr Miller submitted that the building contract defined its subject matter as *'brick veneer dwelling'* and in judging whether lock-up stage had been attained, one must consider:

> The brick veneer dwelling shown on the plans and referred to in the building contracts and specifications [including] the garage which is part of the dwelling as well as the covered area, the verandah and the deck to the family room.

65 Mr Miller relied on a decision of Senior Member Young in *Bobo's Fashion Pty Ltd v MJF Property Developments Pty Ltd* [2004] VCAT 1090 [13] and [14] where he said:

> The Tribunal determined that the owner was justified in not making a lock-up stage payment when a unit had not been secured against entry as the garage doors had not been installed.

66 He said that Mr Musgrove, a building consultant called on behalf of the Browns agreed that at lock-up premises had to be secured against access (T/S 211) though he conceded that another consultant called on behalf of the Browns, Mr Perry Setford expressed the opposite opinion. Mr Miller said:

> The expression lock-up stage suggests that [it is] the intention that the premises be locked-up and access gained by unlocking the doors. That is why the external walls, including doors and windows, roof and floor need to be complete. Further the lock-up definition permits the use of temporary windows and doors. There would be no point in permitting their use unless the premises were to be secured.

67 Mr Miller noted that Mr Setford had conceded that roller doors were fitted to garages built under the roofline of residences in inner-suburban areas as part of the lock-up stage.

68 Mr Miller said that insofar as there was evidence of building practice contrary to his arguments, such evidence could not be used to modify the clear terms of Section 40 of the *Domestic Building Contracts Act*. Mr Miller noted that Section 40(4) of the Act permits the parties to modify the standard stages referred to earlier in the section but he said no attempt to modify the standard stages as defined had been made in the present case. The statute was intended he submitted to protect owners:

> Who generally only enter into a building contract once in their lifetime and are consequently inexperienced …

He continued:

> It is thus imperative that the Tribunal require the builder to fully comply with the requirements of the lock-up stage definition before making a claim.

69 Mr Miller referred to a Tribunal *Pratley Constructions v Racine* [2004] VCAT 2035 [4.6] another decision of Senior Member Young where the learned Senior Member found that the fixing stage required the completion of the walls inside a store room and workshop located under the building line of the house but accessible only by an external door to be completed before the structure could be regarded as having its fixing stage complete. He said that according to *Pratley Constructions v Racine* [4.3] and [4.4] one required:

> Effective and satisfactory completion of the required stages and … not … substantial performance as an option.

70 According to Mr Miller the structure had failed to attain frame stage because the stud wall between the lounge and family room had not been completed (this was the wall referred to by the owners in their letter) and the bearers and floor joints to support timber decking on the covered area and deck to the family room had not been completed. He continued:

> And further the rectification work required to the trusses as set out in the Mitek Australia Ltd report dated 31 January 2007 … was not inspected and approved by the building surveyor until 13 March 2008. Consequently the actual frame work carried out by the builder had not been approved by the building surveyor at the time of the request for the lock-up stage progress payments.

71 Hence said Mr Miller:

> The owners would be entitled to refuse to make payments for the lock-up stage on the basis that the frame stage must be completed and approved by the building surveyor before payment for the lock-up stage can be required.

72 He cited no authority for this proposition. Mr Miller said that the framing work yet to be completed was costed by one building company, Considine and Johnston at $8,000. Mr Miller said that it could not be argued that because the building surveyor had approved the frame, the frame stage was complete because:

> If the building surveyor just inspects the work carried out and approves that as being satisfactory, he does not make an assessment as to whether all of the framework required under the building contract has been completed. It is the responsibility of the builder to complete the frame stage work, the building surveyor can only inspect the framework carried out at the time of his inspection and give approval to that.

73 As to the missing stud wall between the lounge and family room, Mr Miller said the fact that it is not a structural wall did not deprive it of the character of being part of the frame of the dwelling.

74 According to Mr Miller even were it concluded that the garage was not part of the home:

> Then the wall between the garage and the remainder of the house becomes in effect an external wall and requires to be completed all the way up to the roof to prevent access. This has not occurred as this wall only goes to ceiling level, leaving the gable end open and accessible, allowing access to the home. It is submitted that the concept of lock-up requires access to be prevented except by unlocking the doors. That is why lock-up requires the floor, roof and walls, including eaves lining, doors and windows, to be completed. It is irrelevant to allege, as the builder has, that you would need a ladder or some other assistance to climb over the wall between the garage and the rest of the house as the same situation would apply to the completion of the roof. In this situation the builder has still not

> achieved lock-up and is not entitled to payment of the lock-up stage progress payment.

75 Mr Edmunds, Counsel for the Browns, referred to a similar definition of *'home'* in the *Oxford English Dictionary* as was relied upon by Mr Miller, he also referred to a definition of garages being:

> A building for the storage or re-fitting of motor vehicles.

76 He submitted that a garage therefore was different from a home.

77 The first question I consider is whether it is correct to reason as does Mr Miller that failure to attain frame stage necessarily entails failure to attain lock-up stage. To take a practical example of the interaction of the various stages to completion referred to in Section 40 of the *Domestic Building Contracts Act* were a non-structural internal wall not framed up it is difficult to see how a structure could be regarded as having reached fixing stage because the *'internal cladding'* in the form of the plaster boards to be attached to that wall would not have been fixed. They could not be fixed if the wall itself had not been framed up. Mr Miller's submission however went beyond this sort of analysis. He saw the interaction between the various stages by analogy for instance to birthdays. A failure to attain one's 20th birthday necessarily entailed the conclusion that one had not attained one's 21st birthday. I reject that analysis. The stages have their own separate definitions which might or might not necessarily entail that one stage may not be attained until the completion of the previous stage. The is not a simple numerical progression. Whether this structure has reached lock-up stage requires us to consider the words used in the definition in Section 40 of the Act. Clearly the external wall cladding and roof covering of a house could be fixed, its flooring laid and its external doors and windows fixed without for instance the construction of an internal non-structural wall or the construction of external bearers or external decking.

78 It is unnecessary for me to make a finding as to whether the *'frame stage'* was completed.

79 I accept Mr Edmunds' submission that the garage here does not form part of the home. Clearly many garages are completely separate from the homes which they serve. There may be cases where garages are so completely integrated with the home proper that they are to be regarded as part of it. A necessary pre-condition in my view for such full integration would be the ability to access the home through the garage. This does not exist in the present instance.

80 In the *Bobo's Fashion* case not only was there no outer door on the garage in question but there was no stud wall separating the garage from the residence proper. It was unsurprising therefore that Senior Member Young concluded that the house had not reached lock-up stage. The learned Senior Member did not have to consider the fact situation which confronts me. The *Bobo's Fashion* case is distinguishable and provides no guide here.

81 As to Mr Young's decision in *Pratley Construction* I respectfully agree with it. The storeroom and workshops were in my view part of the house in a way which the garage was not and this is so even although they were accessible only from the outside and not directly from the inner portions of the house proper.

82 There is nothing in the definition of lock-up in the Act which requires a structure at lock-up stage to be impregnable nor on the face of it does an owner have any particular interest in having an impregnable structure at lock-up stage. The structure may and sometimes is used to store materials and prime cost items; but those materials and items are at that stage at the builder's risk not the owners' risk. The definition of lock-up stage appearing in the Act does not mention the concept of locking-up at all, hence there seems some plausibility in the view expressed by Mr Setford that a structure could have reached lock-up stage if secured by door fixed not by a lock but merely by a bent nail. If I regard the definition of lock-up stage from its very name as necessarily importing some concept that the structure has been locked, this does not in my view carry us the distance of requiring the structure to be impregnable except via access through a locked door.

83 In ordinary speech an open air compound surrounded by say a 2.5m cyclone fence could quite properly be regarded as locked up if the gate to the compound was secured by a chain and padlock. It would not cease to be regarded as so locked because the compound might be capable of being accessed by someone climbing over the cyclone wire fence with the assistance of a ladder, by standing on a tall barrel or by scrambling up the face of the cyclone wire without any further assistance. In my view this house had reached lock-up stage when the builder made his lock-up claim.

SUSPENSION OF WORK

84 Mr Edmunds on behalf of the Browns conceded that the Notice of Suspension of Works given on 6 March 2007 was premature. Clause 35 of the building contract provides as follows relative to the subject *'suspension of work'*:

> 35.0 The **Builder** may suspend the **Building Works** if the **Owner**:
>
> - does not make a **Progress Payment** that is due within 7 **Days** after it becomes due; or
> - is in breach of this contract.
>
> 35.1 If the **Builder** suspends the **Building Works**, the **Builder** must immediately give notice in writing by registered post to the **Owner**. The **Owner** must remedy the breach within 7 **Days** after receiving the notice. The **Builder** must recommence the **Building Works** within 21 **Days** after the **Owner** remedies the breach and gives notice of this to the **Builder**.

35.2 The date on which the **Building Works** are to be completed is changed and extended to cover the period of suspension.

85 The scheme of the section is to give the builder an entitlement to suspend work if a progress payment is not made within seven days after it becomes due. The parties were agreed that subject to the issue as to whether lock-up stage had been attained or not the progress claim was payable on 28 February. Within seven days after it was due, unless payment was made by virtue of Clause 35.0 the builder was entitled to suspend work and was required forthwith to give notice by registered post to the owner. The effect seems to be that the builder suspended work one day prematurely or perhaps two days depending upon how one makes the calculation. Mr Edmunds conceded that Mr Brown had contrary to established principle, failed to omit the first day of the relevant period from calculation. See my decision of *Industrial Services Pty Ltd v 52-64 Latrobe Street Pty Ltd* [2007] VCAT 918 where the relevant authorities are considered. The result then is that the builder prematurely suspended work and prematurely served the notice. This would appear to constitute a breach of contract; but there is nothing in the language of Clause 35 that would have the consequence that if a builder wrongfully suspended work on day six he would be disabled from rightfully suspending work on day eight. Given that I have found that the builder was right in his view that lock-up stage had been attained and that he was entitled to payment of his lock-up stage claim and the owners were wrong in refusing to make that claim, it would be altogether artificial to say that since the builder was a day or two premature in his suspension the ultimate right which clearly accrued to him should be denied. At least in theory the owners might have a claim for damages for the premature suspension of work for say 24, 48 or 72 hours. There is no evidence which could assign any particular loss to that prematurity. In the circumstances I do not regard it as material.

WHICH PARTY REPUDIATED?

86 At Clause 16 of the applicants' points of claim the builder alleged that the owners by their conduct *'evinced an intention to no longer be bound by the terms of and have thereby repudiated the domestic building contract'*. The particulars to this allegation included a repetition of a lengthy series of allegations from paragraphs 3 to 14 of the points of claim. At paragraph 30 of their amended points of defence the owner alleges as follows:

30 The Applicants by:

a) requesting payment of the Frame Stage progress payment prior to the frame being completed and approved by the building surveyor

b) requesting payment of the Lock-up Stage progress payment prior to the completion of the Lock-up Stage works

c) suspending the carrying out of the works otherwise than in accordance with Clause 35 of the Building Contract

d) their refusal and/or failure to return to the site to complete the works

e) their failure to proceed with the works competently and diligently so as to complete the works within the building period

repudiated the Building Contract and evinced an intention not to be bound by the Building Contract and/or an intention not to comply with their obligations under the Building Contract.

87 Mr Miller on behalf of the owners relied upon a decision of Giles J as he then was, sitting as a Trial Judge in the Supreme Court of New South Wales in *Kennedy v Collings Constructions Company Pty Ltd* (1991) 7 BCL 25 at 39 where His Honour referred to and summarised the relevant authority:

> The question then is whether the Collings had repudiated the contract. By that is meant the evincing of an intention not to be bound. That may take the form of straight-out refusal to perform the contract, or may be found if the party shows that he intends to fulfil the contract only in a manner substantially inconsistent with his obligations (Shevill v Builders Licensing Board ((1982) 149 CLR 620 at 625-626)) or only if, or as and when, it suits him (Carr v J.A. Berriman Pty Ltd ((1953) 89 CLR 327 at 351)); Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd ((1989) 63 ALJR 372 at 376)). In the lastmentioned case, Deane and Dawson JJ pointed out (at 387) that repudiation turns upon objective acts and omissions, not on uncommunicated intention, and that it is sufficient that, viewed objectively, the conduct of the relevant party has been such as to convey to a reasonable person, in the situation of the other party, repudiation or disavowal either of the contract as a whole or of a fundamental obligation under it …

88 I respectfully adopt His Honour's summary of the relevant principles.

89 Upon these principles can it be said that the builder repudiated the contract? Putting the allegation in paragraph a or Clause 30 of the owners' defence to one side for the moment, the findings that I have made relative to the progress of the structure to lock up stage necessarily entail me rejecting the allegation in Clause 30(b) of the defence. Clause 30(d) seems to be a re-statement of paragraph (b) and must be rejected for the same reason.

90 As to Clause 30(a) it is clear that on any view the request for payment for the frame stage was somewhat tangled web of Mr Kidd and Mr Flett's dealings with frame stage approval need not be rehearsed but no element of it at all had occurred when the frame stage payment claim was made. Further, there are arguments which I have at least to this stage in my reasoning found it unnecessary to determine to the effect that even after the resolution of the issue relative to the trusses the frame stage was not complete.

91 It is clear that not every breach of contract even of a significant term of a contract constitutes a repudiation. In *Shevill's* case the High Court of Australia held that a failure to pay an instalment of rental or even a small number of instalments of rental on time did not in itself constitute a repudiation of the relevant lease. Assuming without deciding that the frame stage remains incomplete because the decking areas have not been framed (in this respect I note the arguments put by the builder and by some of the building experts that it would be most inconvenient to construct the brickwork exterior walls of the house (part of the lock-up stage) with these decking areas framed and creating an obstruction) that frame stage had not been reached for this reason, I would not regard it as repudiatory for the builder to ask for the frame stage payment. He may be adjudicated to have been wrong ultimately but in the circumstances there were some arguments in favour of the interpretation which he put. Moreover, the owner met the frame stage payment.

92 The builder's failure to complete the building seems to have been caused by the impasse over whether it had or had not reached lock-up stage. In light of the determination which I have made which upon the evidence of the building experts before me accords with industry practice, the house had reached lock-up stage. What caused the contract to break down was the owners' refusal to pay the claim for lock-up. They were unjustified in so doing, they persisted with an unjustified attitude in this regard over a period of months. In my view it is the owners who are to be regarded as having repudiated the contract and not the builder.

VARIATIONS

93 The builder claimed for a number of variations none of which was documented in the sense of having been made the subject of an agreement signed by both parties.

94 I deal first with the claim for some $720.00 representing the cost of hire for a generator operating on site from 1 November 2006 to 1 February 2007. The project specification indicated that electricity was *'available'* by connection from the local supply authority. When the builder sought to avail himself of the electricity supply which he believed was in the pit immediately outside the allotment he discovered that whilst the power was carried by a pole across the road it had not been connected to the pit. Clause 3.2 of the specification further provided that:

> If electricity supply is not available adjacent to the allotment, that is required, the owner shall arrange with the electricity supply authority for the extension of the authority's assets to a point of supply nominated by the supply authority and shall pay the costs of this extension as required by the authority.

95 As soon as they were requested to do so the owners applied to the authority for the connection to be made. In fact there was a substantial delay before connection was made, the precise reason for which was not explained. A

request by the builder for the owners to sign a variation allowing for the expense of his generator was refused and the variation was not signed. At T/S 127 Mr Miller cross-examining the builder Mr Brown, put it to him that it would have been obvious to anyone looking at the pole across the road from the pit whether power had been connected because as Mr Miller put it:

> You'd be able to see if there was a line coming down the pole in the vicinity of the residence?
> (lines 13 and 14)

96 Mr Brown's response at lines 14 and 15 was *'I wasn't looking at power poles'* and at line 19 he said *'I assumed the power was there'*. The specifications were prepared by the builder. The builder was the one with the experience in dealing with these utility connection matters. He made the assumption that the power was connected because there was a power supply pit outside in the road adjacent. He could have checked either by looking in the pit or by looking at the pole whether a power line was actually connected. He did not bother. With the variation undocumented whether one were to regard it as a variation initiated by owner or by builder, by virtue of Sections 37 and 38 of the *Domestic Building Contracts Act* the amount in question would be payable only if there were exceptional circumstances and it would not be unfair to the owner for the builder to recover the money. Given that this problem arose from a mistake or inadequate enquiry on the part of the builder it would be unfair in my view to make the owners liable for this amount. The claim for the $720.00 fails.

97 The next variation claim was made with respect to double glazing. This was a claim for a variation of $945.80 because the energy report necessary to obtain the required energy rating for the building required double glazing rather than the comfort glass which appeared in the relevant variation. The builder said that he had been told by his supplier that *'comfort glass'* which is less expensive would be sufficient in the circumstances. Section 9 of the *Building Act* 1993 and Regulation 109 of the *Building Regulations* 2006 adopt and give legal force to the *Building Code of Australia*. I was not taken in detail to the provisions of the *Building Code of Australia* dealing with the *'energy rating'* issue. Mr Edmunds, Counsel for the builder however accepted that the need for the double glazing was imposed by a regulatory requirement viz. one having the force of law. Clause 11 of the building contract includes as express terms of the agreement the statutory warranties imposed by the *Domestic Building Contracts Act* 1995. One of those warranties is as follows:

- The **Building Works** will be carried out in accordance with, and comply with, all laws and legal requirements including without limiting the generality of this warranty, the *Building Act* 1993 and the regulations made under that Act.

98 Clause 16.0 of the contract provides for a hierarchy of contract documents. The hierarchy is as follows:

- These Contract conditions
- The Specifications;
- The **Plan**

99 The effect then is that the conditions override both the plans and the specifications. The construction of this house to comply with legal requirements necessitates the provision of double glazing. This obligation is created by the conditions by virtue of the statutory warranty which is expressly set out at Clause 11. The result then is that applying the hierarchical provision of Clause 16, the contract requires the builder within the fixed price laid down in the contract to provide double glazing. Hence the builder has no entitlement to claim extras for double glazing. This claim therefore fails.

CLAIM FOR *'EXTRAS'*

100 In the builder's amended points of claim at Clause 24 the builder made a claim on an alternative basis upon a quantum merit. This included the double glazing variation and the claim for generator use which I have already considered and rejected. Another element in the claim is a claim for warranty insurance in the sum of $918.00. In Schedule 1 of the contract warranty insurance is specifically excluded from the matters covered by he builder's fixed price. If one viewed this as an entirely unregulated contract, the contract has made clear that the cost of warranty insurance is not to be regarded as comprised within the fixed price. Mr Miller relied upon Section 24(2) of the *Domestic Building Contracts Act* to oppose the allowance of this amount. Section 24 of the *Domestic Building Contracts Act* provides as follows:

> **24 Builder may exclude certain items from contract price**
>
> (1) This section applies if a builder wishes to exclude from the contract price the amount any third person is to receive in relation to the work to be carried out under a domestic building contract—
>
> (a) for the conveying, connection or installation of services such as gas, electricity, telephone, water and sewerage; or
>
> (b) for the issue of planning or building permits.
>
> (2) The builder may exclude any such amount by stating in the contract immediately after the contract price first appears in the contract—
>
> (a) that the cost of the work or thing to which the amount relates is not included in the contract price; and
>
> (b) a reasonable estimate of how much the amount is likely to be.

101 According to Mr Miller to rely upon Section 24(2) a builder must set out the relevant information in the contract immediately after the contract first appears in the contract. He submitted that since these provisions were not in the right place in the contract they were void pursuant to Section 132(1) of the *Domestic Building Contracts Act* 1995. For present purposes I need not consider whether the relevant provisions are in the correct place and if they are not in the correct place whether they are rendered void. Section 24 would appear to have no application to the issue of warranty insurance. It refers to payments to third parties for the connection of utilities or for building and planning permits seems to be beside the point as far as warranty insurance is concerned. There does not appear to be any express provision in the contract which would render the owner liable for warranty insurance. Assuming without deciding that it is properly to be characterised as excluded from the contract price, there is no obligation on the owner to pay the builder in any clause in the contract. The builder of course is obliged by the terms of the *Building Act* to carry the insurance. Mr Miller correctly characterised this cost as part of the builder's overheads. Given that the contract does not oblige the owner to pay the warranty insurance fee and the *Building Act* imposes the obligation to take out the policy on the builder there is no unjust enrichment in the owner in requiring the builder to bear this outlay. The claim to recover the cost of the warranty insurance whether on contractual or restitutionary grounds therefore fails.

PLANNING AND PERMIT FEES

102 Mr Miller contended that the builder should be precluded from recovering the fees payable for planning and building permits. Clause 18 of the building contract places a *prima facie* liability upon the builder to pay the fees for these permits without additional charge, that is, for those fees to be regarded as included in a contract price. In Item 1 of Schedule 1 however these fees are expressed to be excluded from the contract price. The intent of the contract is clear enough.

103 Mr Miller's contention is that these provisions in the contract are void by virtue of the operation of Sections 24 and 132(1) of the *Domestic Building Contracts Act*. Mr Miller submits that since the exclusionary provision does not appear in the contract '*immediately*' after the place where the contract price first appears as required by Section 24(2) the requirements of Section 24 have not been met. Next he relied on Section 132 of the Act which provides, inter alia:

> (1) Subject to any contrary intention set out in this Act—
>
> (a) any term in a domestic building contract that is contrary to this Act, or that purports to annul, vary or exclude any provision of this Act, is void; and
>
> (b) any term of any other agreement that seeks to exclude, modify or restrict any right conferred by this Act in

> relation to a domestic building contract is void.
> …

104 Mr Miller points out that whilst the contract price and the exclusionary provision appear on the same page as Schedule 1 of the contract rather than the exclusionary provision occurring immediately after the contract price, it appears immediately before it. I was not taken to any cases on the meaning of the phrase *'immediately after'*. Without investigating this issue it is difficult to imagine that the phrase can possibly mean *'immediately before'* or any variation of it. Mr Miller's contention that the layout of this form of contract does not comply with Section 24 of the Act appears to be correct. The balance of Mr Miller's argument on this point however suffers an immediate grammatical embarrassment. Section 24 on its terms is facultative, it does not expressly state that resort to its structure is the only means whereby a builder may exclude the amount of planning and building permit fees from being regarded as being part of the contract price. Sub-section (2) could have read *'the builder may exclude any such amount **only** by …'*. The word *'only'* is not included. Nevertheless I believe that the word *'only'* should be implied in the first line of sub-section (2) because to do otherwise would render the section entirely pointless. Conceptual and drafting considerations will in almost every case provide a variety of structural and linguistic means whereby a draft of a contract can achieve a particular result. Why would Parliament intend for no apparent reason to state one of those methods is effective leaving a builder. at large to adopt any other means which structurally and linguistically had the same effect? Not to imply the word *'only'* into Section 24(2) would offend the principle laid down by Section 35 of the *Interpretation of Legislation Act* 1984 that a statute should be construed in a manner which advances its purposes. The primary purpose of the *Domestic Building Contracts Act* as set out by Section 1(a) is:

> To regulate contracts for the carrying out of domestic building work.

105 To construe Section 24(2) as not including the word or concept *'only'* would render it incapable of achieving any regulatory effect at all. The very technical point relied upon by Mr Miller has little general appeal, however for reasons already explained it would give effect to what I regard as the true meaning of Section 24 of the *Domestic Building Contracts Act*. The claim for the planning and building permits fees by the builder therefore fails.

ALLEGED DEFECTS

106 The owners claim damages for alleged defects as follows:

A.	Cracked and loose brickwork	$920.00
B.	Front door frame not 180mm wide	$810.00

C.	Existing metal garage door frame not the correct size and brickwork above incomplete	$560.00
D.	Existing timber garage door frame to be replaced with metal frame and brickwork under to be completed	$215.00
E.	Roof battens not at the specified spacing	$374.00
F.	WC window cracked and requires refitting	$90.00

107 I put to one side for the moment the issue of the cracked and loose brickwork.

108 The front door frame was not 1800mm wide. This seems to have come to attention because the frame as installed does not meet the brickwork. A beading infill has been employed. The builder's case in effect is that the beading once fitted should be regarded as part of the front door frame and with the beading installed the front door frame complies with the contract. Without the beading it is common ground the door frame is 1730mm wide.

109 Mr Setford, building consultant who gave evidence for the builder said that normal building practice would have frames such as the front door fitted before the brickwork is erected. This would ensure that the brickwork met the frames exactly. What has happened here indicates that the brickwork was erected before the frame. Had the frame been of the appropriate size it would nevertheless have fitted in. The matter seems to have come to the owners' attention because of the combination of first, a departure from the usual order of construction fitting the frame only after the brickwork has been complete and secondly, from the fact that the existing frame is not of the appropriate dimensions. No explanation was given on behalf of the builder as to how or why these events occurred. It was not suggested for instance that a frame of the appropriate dimensions could not be obtained or manufactured nor was it explained why the brickwork was constructed before the frame was fitted. The builder's case appears to be *'near enough good enough'*. I see no reason why the contract should not have been complied with in this respect having regard to the modest cost of fitting the appropriate door frame and the ability to do so at this stage of construction with minimal disruption. I allow this defect claim.

110 The claim for the existing metal garage door frame appears to be in the same category. Mr Power who seems likely to be engaged by the owners to rectify and complete the premises said that there was an appropriate metal garage door frame which was wide enough to cover the brickwork completely but this correct size had not been chosen. It may seem petty on the part of the owners to insist on the correct size but likewise it may be

thought petty on the part of the builder not to supply and fit the correct size. This defect is also allowed.

111 The timber garage door frame does not comply with the contract which stipulates a metal frame. The same considerations as related to the previously mentioned doors and doorways lead to the conclusion that this defect should also be allowed.

112 The roof battens as installed comply with all legal requirements of the *Building Code of Australia* nevertheless the plans stipulate for additional battens and a slightly lesser span between them. Mr Miller on behalf of the owners conceded that it would not be reasonable to demand reconstruction so as to achieve conformity with the plans. He submitted however that a deduction or credit should be allowed to the owners which he calculated $374.00 to allow for the fact that the builder did not supply what the contract required.

113 The usual alternative to ordering reconstruction is to award damages indicating the difference in value between what has been constructed and what should have been constructed. In a circumstance such as the roof battens and in many other situations there could be no credible argument that the value of the house is materially affected. The result then would be that the builder has violated the contract and cut a corner but is subject to no liability at all. In those circumstances I think it appropriate to award the owner damages calculated as the $374.00 has been by reference to what the builder has saved. This defect is also allowed.

114 The final defect claimed is *'WC window cracked and requires refitting'*. This window has been cracked though the precise causation is uncertain. It has been observed that the reveals are not properly in position, the implication being that the cracking has occurred because of pressures imposed on the glass because the window frame is not plumbing true. The part completed structure has been under the control of the owners for some years now. There must be a possibility that the breakage occurred after the builder left the site. The most likely cause however is some minor impact caused by one of the sub-contracting trades working on site. I find it is more likely than not that this is the cause of the breakage. It would normally be incumbent upon a builder to rectify a breakage occurring in those circumstances, accordingly I likewise allow this defect.

115 The most contentious of the alleged defects relates to what has been described as cracked and loose brickwork. This defect was described by Mr Miller as follows:

> The owners' engineer, Greg Dyer (page 556) gave evidence that the cracking above some of the windows was due to insufficient gap having been left between the top of the window frame and the underside of the lintel supporting the brickwork over the window. Following the shrinking of the concrete brickwork the lintel is now bearing on the window frame. There is only one course of brickwork

> above the windows and the cracking to this brickwork is consistent with Mr Dyer's contention. Consequently the brickwork above some of the windows requires relaying. In addition there are some sill bricks which are quite loose and require to be re-laid. The quotation by Mr Power for this work is $920.00. It includes re-laying loose sill bricks and patching up the cracked brickworks above the windows. It has been suggested on behalf of the builder that pressure on the windows may be relieved by lowering the relevant windows but no allowance for this work was included in Mr Power's quotation.
>
> [Mr Power gave evidence on behalf of the owners as to the cost of completion and rectification of the existing structure.]

116 Mr Setford who was initially retained jointly by the parties but gave evidence on behalf of the builder, said that the brickwork here consisted of concrete masonry whose tendency is not to expand but to shrink. In his view the cracking was no more than hairline and was within proper tolerances. It should not be regarded as a defect, he said, rather it should be given, at most, attention by way of minor repointing.

117 I find the resolution of a conflict of interest on this point difficult. Both Mr Setford and Mr Dyer gave their evidence convincingly. The photographs did not so far as I could observe them, give a clear and incontrovertible interpretation one way or the other. With some hesitation I prefer the evidence of Mr Dyer on this point to that of Mr Setford. It is clear from the evidence which I rehearsed earlier about the frames not meeting the brickwork in a number of instances that there had been some anomalous practices engaged in building the structure relative to the interface between frame and brickwork. In that context I prefer the interpretation of Mr Dyer. This defect is established.

COST TO COMPLETE

118 In light of the findings that I have made on the issue of repudiation the owners are not entitled to recover the cost to complete from the builder. It is convenient however should the matter go further that I express my views on the issue of cost to complete. The owners relied upon evidence from a Mr Sauvarin from builders Considine and Johnston of a cost to complete of $142,296.00 and evidence from a Mr Gary Power of Power Family Homes in the sum of $138,486.00. The builder relied upon the evidence of Mr Setford. There are some issues of detail with Mr Setford's calculation. Mr Miller agreed that flywire screens which were allowed for had been supplied and that the price for prime cost items was inclusive of Goods and Services Tax and therefore there had been a miscalculation of $2,000.00 hence according to Mr Miller, the costings for completion made by Mr Setford should be read as amounting to $103,952.00.

119 Mr Edmunds on behalf of the builder cross-examined Mr Sauvarin at great length. He obtained extensive concessions from Mr Sauvarin, the effect of which when put together was an acceptance by Mr Sauvarin of the

reasonableness of Mr Setford's costings and hence a drastic cut in the cost to complete from the one calculated in his evidence in chief. The effect of those concessions was according to Mr Edmunds that Mr Sauvarin's cost to complete should be read at $98,874.00 allowing for builder's margin and Goods and Services Tax. It was clear to me however that Mr Sauvarin was not saying that his company would carry out the work for that amount. He did not as I understood his evidence step back from the quotation which his company had given. It is only the willingness of a builder to carry out the completion works for the alleged price that would make a particular price reasonable. Accordingly I attach little if any weight to the extensive cross-examination of Mr Sauvarin.

120 Mr Setford was giving his evidence solely as a consultant. He is no longer in the building business himself. He was not offering to complete the structure for the cost which he estimated. He was unable to explain how he reached his base costings to which he added a margin and GST (T/S 82, 5 May 2009).

121 I found Mr Power an impressive witness, his evidence had the advantage of coming from someone who is actually willing to carry out the work for the prices which were being quoted. There were a number of respects in which Mr Power's quotation provided for higher standards or better quality items than were provided for in the contract or failed to allow for work already done such as piping constructed from garage to water tanks. There were also a number of items which Mr Power did not allow for such as additional insulation material, connection of power to pumps, supply and installation of pump and a handrail to rear deck. These matters were calculated by Mr Miller as follows:

The additional items to be included in Power quotation were:

(a)	The supply of additional insulation material being 4 bags of R2.0 and 6 bags of R3.3	$500.00
(b)	Power to pump	$400.00
(c)	Supply and install pump	$475.00
(d)	Handrail to rear deck	$350.00
Total		$1,725.00
Plus 10% profit and GST		$2,078.00

Items to be deleted or reduced in the Power quotation:

(a)	All for existing drainage from garage to water tanks	$350.00
(b)	Reduce cost of roller doors	$800.00

(c)	Reduce cost of 6 internal doors and jambs (6 x $60.00)	$360.00
(d)	Halve cost of downpipes as required to be PVC	$740.00
(e)	Delete ceiling to covered area	
	Labour	$2,640.00
	Material	$2,010.00
	Scaffold	$ 360.00
Total		$7,260.00
Plus 10% profit and GST		$8,784.00

Calculation of Power's cost to complete taking account of rectification works, additional items and deleted or reduced items:

Quoted price	$141,081.00
Less rectification costs	$ 2,595.00
	$138,486.00
Plus additional items	$2,087.00
	$140,573.00
Less deleted or reduced items	-$ 8,784.00
Adjusted quotation	$131,789.00

THE ADJUSTED QUOTATION

122 According to these calculations for Mr Power is $131,789.00. Had it been necessary for me to make a finding as to the cost of completion that is the figure which I would have adopted. I would have accepted the submission made by Mr Miller that the cost to complete should be calculated at today's costs. *Perry v Sidney Phillips and Son* [1982] 1 WLR 1297, 1307; *Bevan Investments Limited v Blackhall and Struthers (No 2)* [1978] 2 NZLR 97, 108, 117.

LIABILITY OF OWNER

123 The owners are liable to pay the lock-up claim in the sum of $85,835.75. They are liable for interest on that sum of money at the contractual rate of 20% per annum until the termination of the contract which is the date of the commencement by the builders of this proceeding. Thereafter the builder's entitlement to interest is at the rate laid down in the *Penalty Interest Act*. This is the approach adopted by Senior Member Young in *Darvale Homes Pty Ltd v Pham* [2005] VCAT 1100 [34]. They are liable for damages for delay at the rate of $150.00 per week. This amount should be allowed on

and from 8 March and not from 6 March (as claimed by the builder) however until 20 May 2007.

124 The builder claims for additional works $21,799.08. From this figure should be excluded the cost of warranty insurance which is not claimable. I also accept the contention put by Mr Miller that the cost of sub-floor insulation $1,344.20 and plumbing rough in should not be treated as post lock-up stage works. I also accept that the allowance for insulation should be for 12 packs for walls and 15 packs for ceiling $1,078.83 not $1,244.27. No allowance for variations for the generator or the double glazing should be allowed. There would then be an entitlement to interest at the rate laid down by the *Penalty Interest Rates Act* on the cost of the additional work.

125 I will direct the parties to bring in short minutes to give effect to these reasons and defer pronouncing final orders.

COSTS

126 I have heard no submissions on the question of costs and so will reserve them.

MFM:RB