VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D844/2009

DOMESTIC BUILDING LIST

CATCHWORDS

Extension of time claims; delay damages, liquidated damages.

APPLICANT	Hallmark Projects Pty Ltd T/A Hallbury Homes (ACN: 083 199 624)
RESPONDENT	Emily Jean Reid
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Small Claim Hearing
DATE OF HEARING	4 May 2010
DATE OF ORDER	26 May 2010
CITATION	Hallmark Projects Pty Ltd trading as Hallbury Homes v Reid (Domestic Building) [2010] VCAT 970

ORDER

1. The Respondent is to pay the Applicant $903.10 on the Applicant's claim.
2. The Applicant is to pay the Respondent $1,196.70 on the Respondent's counterclaim.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicant:	Mr Hall, director of the Applicant
For the Respondent:	Ms Reid in person

REASONS

THE PROCEEDING

1. This proceeding comprises a claim by the applicant builder, Hallbury Homes (**'Hallbury'**), against the respondent homeowner, Ms Reid, and a counterclaim by Ms Reid against Hallbury. The claims can be summarised as follows:

   (a) As against Ms Reid, Hallbury claims $11,045.84, made up as follows:

      (i) $7,712.50 in respect to the *additional* cost of constructing a driveway.

      (ii) $1,542.50, constituting Hallbury's margin on the *additional* cost of constructing the driveway

      (iii) Interest on late payments of progress claims amounting to $1,683.75

      (iv) Delay damages for the period 29 June 2009 until 5 August 2009, amounting to 37 days at $28.57 per day totalling $1,057.09.

   (b) As against Hallbury, Ms Reid claims $9,405 made up as follows:

      (i) $5,805 being the cost to partly demolish, re-design and then rebuild a verandah and deck to an adjoining dwelling (also owned by Ms Reid and known as Unit 1); to ensure that the contracted works complied with regulatory requirements. This amount was said by Ms Reid to be made up as follows:

         (A) $1,800, being the cost to partly demolish the verandah and deck to Unit 1.

         (B) $3,750.00 being the cost to rebuild the verandah and deck to Unit 1.

         (C) $90, being the cost to engage a draughtsman to consult on the proposed remodification of the verandah and deck to Unit 1.

         (D) $165 being the cost of an application for dispensation of the as constructed works.

      (ii) $3,600 comprising a claim for liquidated damages for delay under the contract.[1]

[1] The original amount claimed by Ms Reid was reduced to $3,600 during the course of the hearing.

BACKGROUND

2. Sometime in 2007 Ms Reid contacted National Builders Group to discuss a proposal to construct two residential dwellings at the rear of her property. To that end, Ms Reid gave National Builders Group a sketch plan setting out the preliminary design of the two units. The two units were to be located at the rear of an existing dwelling.

3. National Builders Group subsequently prepared a quotation dated 5 November 2007, which stated that the cost of constructing the two units was to be $300,201 (**'the Quotation'**). Attached to the Quotation was a document entitled *CLIENT QUOTATION ACCEPTANCE*. It appears that Ms Reid signed that document on that same date. That document stated:

> *I / ~~We~~ hereby authorise National Builders Group to organise the preparation of final town planning plans, including a feature survey plan, and lodgement for town planning permits…*

4. National Builders Group then arranged for Ms Reid to meet with I K O Building Design Group to prepare town planning drawings for the proposed building project.

5. On or about November 2007, I K O Building Design Group prepared the town planning drawings, which comprised five sheets. Ms Reid stated that she contracted directly with IKO Building Design Group for the work undertaken by it.

6. On 10 January 2008, Kingston City Council granted town planning approval for the proposed works.

7. National Builders Group subsequently arranged for Ms Reid to meet with the Hallbury.

8. On 26 March 2008, Ms Reid entered into two separate building contracts with Hallbury for the construction of the two residential units (**'the Works'**), known as Unit 2 and Unit 3. The combined contract price of both building contracts was $300,201, which was commensurate with the price stated in the Quotation.

9. On 19 April 2008, Hallbury or its agent prepared working drawings for the Works (**'the Working Drawings'**), which generally accorded with the town planning drawings.

10. On 15 August 2008, the registered building surveyor issued a building permit for the proposed building works.

11. On 28 September 2008, the building works commenced.

12. By letter dated 20 March 2009, the registered building surveyor advised Hallbury that the as-constructed works infringed clause 3.7.1.3 of the *Building Code of Australia* because the front external wall of Unit 2 was located too close to the existing Unit 1 verandah and deck. That letter

further stated that the Works were therefore contrary to the Working Drawings.

13. In that regard, Ms Reid contended that the Working Drawings showed a greater distance between Unit 2 and the existing Unit 1 to what was constructed. By contrast, Mr Hall, who gave evidence on behalf of Hallbury said that both the town planning drawings and the Working Drawings failed to accurately depict the extent to which the verandah and decking of Unit 1 extended towards Unit 2.

14. A solution was eventually suggested by the building surveyor to cut back the verandah and deck of the existing Unit 1 so that there was at least 1.8 metres clearance between those building elements and the external wall of Unit 2, as required by clause 3.7.1.3 of the *Building Code of Australia* 2008.

15. Ms Reid then organised for the work of cutting back the verandah and deck to Unit 1 to be undertaken at her own expense. Mr Hall stated that this work delayed the issuance of the occupancy permit over the period 29 June 2009 until 5 August 2009.

16. On 5 August 2009, an occupancy permit was issued for the Works.

ISSUES

17. The central issues to be determined are:

    (a) Is the cost of constructing the driveway a provisional sum entitling Hallbury to increase the contract price?

    (b) Who is responsible for the cost of modifying and reconstructing the verandah and deck of the adjourning dwelling being Unit 1?

    (c) What is the adjusted date for completion of the works?

    (d) What amount, if any, of interest is payable on late payments of progress claims?

HALLBURY'S CLAIM

Driveway

18. Mr Hall (company director) gave evidence on behalf of Hallbury. He contended that the contracts made a provisional sum allowance of $6,400 for the construction of the driveway and further, that the contracts only allowed for 75 sq metres of coloured concrete driveway. In that regard, Mr Hall relied on Item 13 of the Quotation, which stated (and was set out in the contracts) as follows:

		Debit	Credit
13	Provide 75m2 of coloured concrete driveways and path to front entry of each unit, as per client sketch. Note: Includes builder's margin.	$6,450	Provisional Sum

19. Mr Hall said that he discussed the construction of the driveway with Ms Reid at a site meeting approximately two weeks after signing the contracts, where he advised her that the cost of the driveway would be more than what the contracts allowed for. Ms Reid denies having had such a conversation, although she admits that the site meeting took place to discuss other matters relating to the building project.

20. Ms Reid contended that the building contracts required that the whole of the driveway as depicted in the Working Drawings was to be constructed by Hallbury, although she conceded that there was a provisional sum allowance in the amount of $86 per square metre for that work. Ms Reid contended that the provisional sum allowance was calculated on the basis that the Quotation, which was incorporated by reference into the contract documents, expressly stated that the provisional cost of a 75 square metre driveway was to be $6,450. Accordingly, the amount per square metre was therefore $86 per square metre.

21. Mr Hall gave evidence that the actual cost of the driveway was $13,247.30. He tendered in evidence an invoice from *Peninsula Stencil and Slate* dated 21 May 2009, which he said verified that expenditure. Mr Hall also gave evidence that his approximate calculation of the area of the driveway was 180 square metres, including the footpath. He calculated this by measuring the area of the driveway from the Working Drawings. I accept Mr Hall's evidence on those two points. Accordingly, that would mean that Hallbury has paid approximately $73.60 per square metre for the construction of the driveway and footpath.

22. If I accept Ms Reid's understanding of item 13 of the Quotation, no adjustment to the contract price is to be made for the construction of the driveway because the provisional sum allowance of $86 per square metre has not been exceeded. On the other hand, if I accept Mr Hall's interpretation of the item 13 of the Quotation, $6,847.30 plus builder's margin on that amount is to be added to the contract price.

23. In my view, the contracts are unclear as to the manner by which they deal with the provisional sum allowances. In particular, clause 33.4 in each of the contracts states:

> In relation to each **Prime Cost Item** and **Provisional Sum Item**, if the actual price of supplying the item or providing the work is
>
> - less than the allowance, the difference is deducted from the **Contract Price**; or
> - more than the allowance, the total of the difference plus the relevant margin or excess stated in Schedule 2 applied to that difference is added to the **Contract Price** and is payable with the **Progress Payment** in which the amount for that item or work is included.

24. In the present case, however, Schedule 2 in both contracts has been left completely blank. There is no reference to any item of work or even the

Quotation. I note that the contracts were prepared and executed nearly 5 months after the date of the Quotation. Accordingly, it is unclear to me whether the contracts even provide for a provisional sum allowance in respect of the driveway. In other words, whether the parties ever intended to provisionally cost the driveway or whether the cost of the whole driveway was included in the contract price.

25. Even if I accept that the contracts do provisionally cost the construction of the driveway, the question remains how does one construe item 13 of the Quotation, being the only document relied upon by the Hallbury as evidence of a provisional sum allowance for the driveway? In particular, the difficulty with the wording of item 13 is the reference to the *75 m^2*. It seems to me that if I were to adopt the interpretation advanced by Hallbury, then the reference to *75m^2* is superfluous. It is superfluous because the area of the driveway is irrelevant in calculating any adjustment to the contract price, if Hallbury's interpretation of item 13 is adopted. What is relevant would be limited to the provisional sum amount ($6,450) and the actual cost of constructing the driveway ($13,247.30). On the other hand, if I accept the interpretation advanced by Ms Reid, then the reference to *75m^2* assumes some importance because it becomes integral in calculating what rate is to be allowed for the construction of the driveway, irrespective of its area.

26. In my view, the interpretation given to item 13 by Ms Reid is to be preferred. I am reinforced in that view by further evidence given by Ms Reid that the *client sketch* referred to in item 13 showed the driveway having substantially the same area as shown in the Working Drawings, rather than being limited to the construction of a 75 m^2 driveway. That being the case, it makes no sense to state that the driveway is limited to 75m^2, whilst also stating that it is *as per client sketch*, in circumstances where the area depicted on the *client sketch* is closer to 180 m^2. Indeed, none of the other contract documents tendered in evidence purport to limit the construction of the driveway to 75m^2. Accordingly, the reference to *75m2* can only make sense if the interpretation given by Ms Reid is adopted.

27. Moreover, item 13 was a clause drafted by or on behalf of Hallbury. As such and to the extent that there exists an ambiguity as to its meaning, that ambiguity ought be construed *contra proferentum*, that is against the party by whom it was formulated or put forward.[2]

28. That being the case, I find that even if there was an agreement to provisionally cost the construction of the driveway, there would be no adjustment to the contract price, given that the actual cost per square metre (approximately $73.60 per m^2) is less than the provisional sum allowance of $86 per m^2.

[2] *GL Nederland (Asia) Pty ltd v Expertise Events Pty Ltd* [1999] NSWCA 62 at [27].

29. Hallbury's claim for $7,712.50 plus margin in the amount of $1,542.50 is therefore disallowed.

Delay

30. Hallbury contends that it has made various extension of time claims pursuant to clause 34 of the contracts. Those extension of time claims can be sorted into the following categories:

    (a) Delay resulting from late payments of progress claims: 39 days (in relation to both building contracts but concurrent).

    (b) Delays resulting from inclement weather: 15 days (in relation to both building contracts but concurrent).

    (c) Delay resulting from delay in the supply of building materials: 7 days (in relation to both building contracts but concurrent).

31. Hallbury's application states that Ms Reid did not dispute any of the extension of time claims. Hallbury asserts that this is in some way deems that the extension of time claims are valid.

32. The relevant parts of Clause 34 of the contracts state:

> 34.0 The date for **Commencement** is put back or the **Building Period** is extended if the carrying out of the **Building Works** is delayed due to:
>
> - Inclement weather…
> - Anything done or not by the **Owner** or by an agent, contractor or employee of the **Owner**;
> - A delay in getting any approval, provided that it is not the **Builder's** fault. Refer to clause 19;
> - Any other cause that is beyond the **Builder's** direct control.
>
> 34.1 The **Builder** is to give the **Owner** a written notice informing the **Owner** of the extension of time. The written notice must state that cause and the extent of the delay.
>
> 34.2 To dispute the extension of time the owner must give the **Builder** a written notice, including detailed reasons why the **Owner** disputes the claim, within 7 **Days** of receiving the **Builder's** notice.
>
> 34.3 If there is an extension of time due to anything done or not done by the **Owner** or by an agent, contractor or employee of the **Owner**, the **Builder** is, in addition to any other rights or remedies, entitled to delay damages worked out by reference to the period of time that the **Building Period** is extended and the greater of $250 per week or that amount set out in Item 12 of Schedule 1. Delay damages will accrue on a daily basis.

33. I do not accept that a failure to dispute an extension of time claim made by a builder pursuant to clause to 34 thereby deems that the builder is entitled to the time claimed. Clause 34 does not expressly state that. Moreover, there is no clause in the contract that expressly states that time is to be extended in those circumstances. In my view, there is nothing in the contracts that relieves Hallbury of its obligation to prove, on the balance of probabilities, that the delay claimed actually delayed the progress of the Works.

34. In my view, clause 34.2 merely places a contractual obligation on an owner to give notice if he or she intends to contest an extension of time claim made by a builder. A failure to do so may constitute a breach of contract or give rise to an argument being raised that the owner is *estopped* from denying the claim but it does not, in my view, mean that there is contractual acceptance of the claim.

35. In the present case, there is no claim based on *estoppel* or damages sought for breach of contract resulting from a failure to dispute the extension of time claims. In fact nothing was advanced by Hallbury in that regard. Accordingly, I find that it is open for Ms Reid to require Hallbury to "prove its case' insofar it concerns the extension of time claims pursued in this proceeding.

Late payments

36. Mr Hall gave evidence that the works were not suspended by reason of any late payments but that Hallbury *pulled some of its workers off the job*. Indeed, there was no evidence of any suspension of works notice being served on Ms Reid, as would be required by clause 35 of the contracts.

37. No evidence was given as to why it was necessary to *pull some of its workers off the site* or how the flow of work was disrupted by reason of that occurring. In my view, merely *pulling some of its workers off the site* without establishing that this occurred as a direct result of an act or omission on the part of Ms Reid is not a delay that I believe can be attributed to Ms Reid nor can it be said to be a cause *beyond the builder's control*.

38. The remedy for Hallbury in circumstances where progress claims are not paid in a timely manner is to suspend the Works in accordance with the terms of the contracts. In that respect, clause 35.0 of the contracts stated:

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

39. The terms of the contracts expressly gave Hallbury a right to extend time in circumstances where the Works were suspended as a result of a late payment of a progress claim. Hallbury did not adopt that process. Accordingly, I find that there is no entitlement to delay damages for late payment of progress claims.

Inclement weather

40. Hallbury claims 15 days extension of time under each contract in respect of inclement weather. This was not disputed by Ms Reid. However, each contract made an allowance of 12 days in respect of inclement weather. In my view, that 12 day allowance must first be spent before Hallbury is entitled to any further extension of time by reason of inclement weather. Accordingly, I will allow 3 days extension of time in respect of inclement weather for each contract.

Delay to supply of materials

41. In my view, the risk of ensuring that materials are supplied in a timely manner so as to ensure continuity of work rests with Hallbury, unless there can be shown unforeseen and unusual circumstances. There was no evidence before me of unforeseen or unusual circumstances, save that Hallbury said that there was a high demand by consumers on water tanks which caused delay in the supply of that material. In my view, those circumstances are not sufficient to fall within a cause that is *beyond the Builder's direct control* because Hallbury should have ensured that there was sufficient lead time given in the ordering of that building component.

42. In my view, the risk of ensuring that building materials are delivered to site in a timely manner so as not to disrupt the continuity of work in progress rests with Hallbury, given that it had control over that aspect of the building process. Obviously, the situation may have been different if Ms Reid was responsible for the supply of the water tanks, even if Hallbury was responsible for their installation. However, that is not the situation in the present case. There is no evidence to suggest that Ms Reid played any part in the ordering of the water tanks. I therefore reject Hallbury's extension of time claims in that regard.

Delay damages

43. Hallbury claims delay damages in the amount of $1,057.09 relating to the period that it was unable to obtain the occupancy permit due to the encroaching verandah and deck of Unit 1. In Hallbury's letter dated 24 August 2009, it states:

> Liquidated damages for delays in Clause 34.3

> Client undertaking works at Unit 1 to enable issue of Occupancy Permit plus client dispensation by building surveyor.
>
> Notification from Building Surveyor 20th March '09 and our subsequent phone calls.
>
> 29/6/09 (Practical Completion) to 5/8/09 (Issue of Occupancy Permit) = 37 days @ $28.57 per day [3]

44. In my view clause 34.3 of the contracts only allows Hallbury to claim damages in respect of delays where there is an *extension of time*. In other words, a mere delay in the progress of the works will not entitle Hallbury to delay damages under clause 34.3, even if the delay is caused by an act or omission on the part of the owner. In my view, Hallbury is required to first obtain an extension of time before clause 34.3 can operate to entitle Hallbury to delay damages. That then raises the question whether a notice in the form contemplated by Clause 34.1 is a pre-condition for obtaining an extension of time.

45. In my view it is. I make this finding for a number of reasons. Firstly, the giving of a notice by the builder crystallises an owner's right to dispute the extension of time claimed. This is an important component of the extension of time claim process. Secondly, the evident purpose of the notice is to alert an owner that the works are being delayed. Such notice takes on greater importance in circumstances where the delay is caused by the acts or omissions on the part of the owner. Thirdly, the words, "is to give", used in the clause indicate that the giving of the notice is a mandatory requirement of the contracts.

46. In *Birchwood Homes Pty Ltd v Barry & Denise O'Donnell* (unreported decision of Lothian M. dated 9 April 1999) the Tribunal said of a similar clause:

> *In the HIA contract clause 34 commences "The Builder may claim an extension, but goes on to say that the builder must explain the cause of delay and how time is needed. In these circumstances I find clause 34 contemplates that the builder will make a choice about whether to claim a time extension. If it does so, the notice must expressly claim a time extension…*

47. I agree with what the Tribunal said in *Birchwood Homes*. For Hallbury to be entitled to an extension of time, it must first claim an extension of time in accordance with clause 34.1.

48. In the present case, Hallbury made a number of extension of time claims (referred to above), however, there is no evidence before the Tribunal of Hallbury ever making an extension of time claim in respect of the delay in obtaining an occupancy permit. None of the extension of time notices tendered in evidence make any reference to that delay or that period in

[3] Hallbury Homes letter dated 24 August 2009 annexed to the Builder's application filed in the Tribunal.

time. In fact, the demand by Hallbury for delay damages first arose ten days after payment of Hallbury's claim for *Completion* stage, which is almost three weeks after the delay is said to have ended.

49. In my view the pre-condition to claiming delay damages was never satisfied because no extension of time was ever claimed. Mere delay, in itself, will not crystallise a right to delay damages under clause 34.3 of the contract. I therefore dismiss this aspect of Hallbury's claim.

Penalty interest on late payments

50. Clause 30 of the Contracts states:

> 30.0 The **Owner** must pay the amount of a **Progress Payment** set in Schedule 3 within the number of **Days** set out in Item 7 of Schedule 1 after both:
>
> - The stage has been completed; and
> - The **Owner** has received a written notice for the **Progress Payment**

51. *Item 7* of *Schedule 1* of the contracts states that the: *Number of Days to make Progress payments after stage completed and notice received* is *7*. Clause 31 of the contracts stipulated that the interest payable on late payment of progress payment claims was fixed at 15% per annum.

52. Mr Hall produced a chart of business records setting out when progress payment claims were raised, paid and the amount of interest that he said was payable. Mr Hall also produced various copies of progress payment claims and receipts given by Hallbury, following receipt of payment. Mr Hall was not able to say, however, when Ms Reid received each of the relevant progress payment claims (as opposed to the date when they were sent or dated). Similarly, Ms Reid was not able to say on what date she received each of the progress claims.

53. In my view, in the absence of any contrary evidence, it is reasonable to assume that the progress claims were sent by ordinary post, given that they were addressed to Ms Reid's address for service and there was no notation stating that they were hand delivered or faxed. That being the case, I take the view that a reasonable amount of time needs to be allowed for postal delivery service and I consider that this time to be two business days after the date on which the document was posted. This allowance of two days for receipt of mail is consistent with s141 of the *Victorian Civil and Administrative Tribunal Act* 1998, which states that service a document posted by mail is to be taken to have been served *on 2 business days after the day on which the document was posted*. Accordingly, I find that Ms Reid received all progress payment claims two business days after they were posted. I further find that the progress payment claims were posted on the date stated on them.

54. Save and except for the *Completion* stage progress payment claim, there was no dispute that the other progress payment claims were legitimately made following completion of each relevant stage. Accordingly, I determine that payment in respect of the progress payments claims for *Frame stage*, *Lock-up stage* and *Fixing stage* was late.

55. With respect to the last progress payment claim, representing the *Completion* stage, Mr Hall contended that payment was 51 days late. He said that the payment was made on 14 August 2009. Ms Reid contended that the progress payment claim for *Completion* stage was submitted prematurely and was not due until after the occupancy permit had been issued and that this did not occur until 5 August 2009. She referred me to s.42 of the *Domestic Building Contracts Act* 1995, which states, in part:

> A builder must not demand final payment under a major domestic building contract until –
>
> (b) the building owner is given either-
>
> (i) a copy of the occupancy permit under the Building Act 1993…

56. In my view, payment for *Completion* stage was not due until 7 days after the occupancy permit issued, being 12 August 2009. Accordingly, I find that Hallbury is entitled to interest for a period of 2 days to cover the period 13 August 2009 until 14 August 2009.

57. Accordingly, I find that Ms Reid is liable to pay penalty interest pursuant to clause 31 of the contracts in the amount of $903.10, calculated as follows:

Invoice	**Amount**	**Date posted**	**Date received**	**Date paid**	**No of days overdue**	**Penalty interest** [4]
Slab U2	$15,046.30	6/11/08	10/11/08	14/11/08	0	0
Slab U3	$14,937.80	6/11/08	10/11/08	14/11/08	0	0
Frame U2	$22,569.45	16/12/08	18/12/08	15/1/09	21	$194.80
Frame U3	$22,460.70	16/12/08	18/12/08	15/1/09	21	$193.85
Lock-up U2	$54,069.30	26/2/09	2/3/09	18/3/09	9	$200
Lock-up U3	$54,069.30	26/2/09	2/3/09	18/3/09	9	$200
Fixing U2	$37,615.75	26/3/09	30/3/09	9/4/09	3	$46.40
Fixing U3	$37,434.50	26/3/09	30/3/09	9/4/09	3	$46.15

[4] 15% and rounded to nearest 5 cent increment.

Invoice	Amount	Date posted	Date received	Date paid	No of days overdue	Penalty interest [4]
Final U2	$13,346.30	n/a	n/a	14/8/09	2	$11
Final U3	$13,273.80	n/a	n/a	14/8/09	2	$10.90
TOTAL						**$903.10**

MS REID'S COUNTERCLAIM

Verandah and deck

58. The town planning drawings were prepared by or on behalf of Ms Reid before she was introduced to Hallbury. The town planning drawings do not show the encroaching verandah or deck of Unit 1. In fact, the town planning drawings did not accurately depict the existing verandah and deck of Unit 1 and in particular, the proximity of those building elements to the proposed Unit 2. The working drawings were prepared on or on behalf of Hallbury and substantially accord with the town planning drawings. In other words, they, like the town planning drawings, did not show the true extent of the verandah and deck of Unit 1 and their proximity to the proposed construction of Unit 2.

59. Mr Hall gave evidence that the scope of work under the contracts had nothing to do with modifying Unit 1. Mr Hall also gave evidence that the placement of Unit 2 and Unit 3 could not have been altered to overcome any difficulty with the encroachment of the verandah and deck without reducing the size of Unit 2 or Unit 3. Ms Reid did not dispute that evidence, although she contended that Hallbury breached the warranties given under clause 11 of the contracts because it failed to:

    (a) construct the Works in accordance with the Working Drawings, in that those drawings show the verandah and deck of Unit 1 different to how those building elements existed at the time that the contracts were entered into; and

    (b) comply with all laws because the as-constructed Works were too close to the existing Unit 1, which was contrary to the *Building Code of Australia*.

60. There is a discourse between the contracts and the plans, in that the contracts only refer to the construction of Unit 2 and Unit 3. Nevertheless, it is my view that it was entirely correct for the Working Drawings to show a modified Unit 1 verandah and deck because that was what the town planning drawings also showed. There needed to be consistency between those two sets of drawings. Clearly, the design of the town planning drawings contemplated that some work was required to the existing Unit 1 in order to accommodate the intended design of

Unit 2 and Unit 3 (in terms of their size and position on the building site). The question remains who was responsible to carry out that modification work to Unit 1.

61. In my view, the parties did not intend that Hallbury carry out that modification work as part of the Works under the contracts. Had that been the case then either of the contracts would have said so. Indeed, the plans only show a small section and an elevation of one side of Unit 1. There is no other reference to Unit 1; nor are dimensions given for those parts of Unit 1, which are shown on the plans. Unit 1 is not depicted in the *Ground Floor Plan* (A2). Similarly, the two contracts only make reference to Unit 2 and Unit 3, however, do not mention Unit 1.

62. The evidence of Mr Hall coupled with the fact that the contract documents make little or no reference to Unit 1 leads me to find that there was no contractual obligation to undertake any work to Unit 1. In my view, the encroaching verandah and deck of Unit 1 constitutes a pre-existing condition over which Hallbury has no contractual responsibility.

63. In other words, the cost to undertake the modification work was not part of the overall contract price. I therefore find that the obligation to alter the construction of the verandah and deck to Unit 1 rested with Ms Reid. Accordingly, I disallow Ms Reid's claim against Hallbury for the costs associated with the modification work to the verandah and deck of Unit 1.

Liquidated damages

64. I have previously determined that the Respondent was entitled to extend the date for completion of the works in respect of each contract by 3 days as a result of inclement weather. The commencement of the works in respect of both contracts was 28 September 2008.

65. The original building period for each of the contracts was 250 days, given the work under both contracts was to be undertaken simultaneously. Accordingly, the adjusted contract period was 253 days from 28 September 2009, making the date for completion of the works under both contracts 8 June 2009.

66. Clause 40 of the contracts states:

> If the **Building Works** have not reached **Completion** by the end of the **Building Period** the **Owner** is entitled to agreed damages in the sum set out in Item 9 of Schedule 1 for each week after the end of the **Building Period** to and including the earlier of:
>
> - the date the Building Works reach **Completion**;
> - the date this Contract is ended; and
> - the date the **Owner** takes **Possession** of the **Land** or any part of the **Land**.

67. Item 9 of Schedule 1 in each of the contracts stated that the amount of agreed damages for late completion of the Works was fixed at $200 per week for each contract.

68. *Completion* is defined in the contracts as:

> **'Completion'** means that the **Building Works** to be carried out under the Contract have been completed in accordance with the **Plans** and **Specifications** set out in the Contract.

69. The evidence before the Tribunal was that the Works were completed as of 29 June 2009 but that the occupancy permit could not be issued until 5 August 2009 because of the encroaching verandah and deck of Unit 1. According to Mr Hall, that was the only matter that prevented the occupancy permit from being issued. Ms Reid did not dispute that the Works were completed as of 29 June 2009, save and except for the issuance of the occupancy permit.

70. I therefore find that the Works reached *Completion*, within the meaning of that term as defined in the contracts on 29 June 2009, albeit that Hallbury was not entitled to make a claim for payment of the *Completion* stage until such time as the occupancy permit had issued.[5]

71. Accordingly, I find that the Works were 21 days late in reaching *Completion*. The amount of agreed or liquidated damages based on a 21 day delay amounts to $598.35 per contract, which totals $1,196.70. I therefore find in favour of Ms Reid for that amount.

CONCLUSION

72. For the reasons given above, I make the following findings:

(a) Hallbury's claim for the *additional* cost of constructing the driveway plus margin is dismissed.

(b) Hallbury's claim for delay damages is dismissed.

(c) Hallbury is entitled to penalty interest accruing on late payment of progress payment claims in the amount of $903.10.

(d) Ms Reid's counterclaim for the cost of and incidental to the demolition and reinstatement of the verandah and deck of Unit 1 is dismissed.

(e) Ms Reid is entitled to liquidated damages for delay in the completion of the works under both contracts fixed in the amount of $1,196.70.

SENIOR MEMBER E. RIEGLER

[5] See paragraphs 55-56 above.