

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## CIVIL DIVISION

### BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP436/2018

#### CATCHWORDS

*Domestic Building Contracts Act 1995* – s.8 - implied warranties – existing walls and ceilings to be replastered, whether builder responsible to ensure replastered walls and ceiling were within tolerance - standard of work required - builder refusing to rectify defective work - whether contract repudiated by the builder - signed variations - whether signed under compulsion – delay claim by builder for defective work - no delay allowed for work required to be redone - plans provided by owner - builder not responsible to allow for work not shown in contract documents - owner disputing variation after payment made variation signed and work done – whether payment recoverable from builder - termination of contract – rights already accrued under contract unaffected – damages for breach of contract – how assessed

<b>APPLICANT</b>	Hummel Homes Pty Ltd (ACN: 152 788 746)
<b>RESPONDENT</b>	Tracey Mitchell
<b>INTERESTED PARTY</b>	Luke Carlson
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member R Walker
<b>HEARING TYPE</b>	Hearing
<b>DATES OF HEARING</b>	13, 14 and 15 May 2019; 7, 8, 9 and 12 August 2019 Submissions by 25 November 2019
<b>DATE OF ORDER</b>	10 December 2019
<b>CITATION</b>	Hummel Homes Pty Ltd v Mitchell (Building and Property) [2019] VCAT 1960

#### ORDER

1. The application is dismissed.
2. Order on the counterclaim that the Applicant pay to the Respondent \$246,367.19.
3. Costs are reserved for further argument.
4. Direct that the proceeding between the Respondent and the Interested Party be listed for directions before Senior Member Walker at a date and time to

be fixed by the Principal Registrar.

R Walker  
**Senior Member**

**APPEARANCES:**

For Applicant

Ms M. McAuley, Solicitor

For Respondents

Mr R.A. Harris of Counsel

## REASONS

### Background

- 1 The Respondent (“the Owner”) is the Owner of a house in Lilydale (“the House”) which she purchased in 2010. At the time of purchase, it was an old solid brick house with a brick veneer extension that had been added at the rear some years earlier.
- 2 She and her husband decided to renovate the house by modernising it, reconfiguring the rooms and adding extensively to the living area. They had plans prepared and, in October 2015, they contacted the Applicant (“the Builder”) to seek a quote for the works.
- 3 On 18 December 2015, the Owner entered into a contract with the Builder to carry out the work for a price of \$326,117.36. The form of contract used was the HIA Alterations, Additions and Renovations Contract. There were six pages of specifications prepared by the Builder and six sheets of plans and seven sheets of engineering drawings supplied by the Owner.
- 4 During the course of the works, the Owner became dissatisfied with the Builder’s workmanship and in particular, the quality of the plastering. The Builder suspended work, following which the Owner terminated the contract and engaged a replacement Builder to complete the construction.
- 5 The Builder has brought this proceeding to recover what it claims is due to it under the contract and the Owner has counterclaimed, seeking damages for the cost of completing the work and rectifying the alleged defects.

### Hearing

- 6 The proceeding came before me for hearing on 13 May 2019 with eight days allocated. Ms M. McAuley, Solicitor appeared for the Builder and Mr RA Harris of Counsel appeared for the Owner.
- 7 Because a draft witness statement for the Applicant’s witness, Mr Hummel, was not served until the morning of the hearing, the proceeding was adjourned following opening submissions to allow time for Mr Harris to read the material.
- 8 The hearing resumed on site at 9.30 am on the following day, Tuesday, 14 May 2019, when the Tribunal was informed by Ms McAuley that Mr Hummel was in hospital. The on-site inspection proceeded in his absence but in the presence of Ms McAuley and another person who accompanied her. The hearing was then further adjourned to 10.00 am the following day.
- 9 When the hearing resumed the following day, it appeared that Mr Hummel was still unwell and so it was further adjourned to 10.00 am on 7 August 2019, with three further days allocated.
- 10 At the adjourned hearing, I heard evidence from Mr Hummel for the Builder. For the Owner, I heard from the Owner and her husband, Mr Mitchell. In addition, evidence was given for the Owner by:

- (a) Mr Peter Mackie, a building consultant;
- (b) Mr Michael Lombardi of Lombardi Homes Pty Ltd (“Lombardi Homes”), the Builder that rectified and completed the work; and
- (c) Mr Dean Powell, the plasterer who rectified the defective plastering work.

- 11 When the hearing concluded I gave directions for the filing and service of written submissions. Submissions were received from the Owner’s solicitors but the Builder’s solicitor, Ms McAuley, complained that there was delay in obtaining the recording of the evidence from the Tribunal and, on 20 September 2019, she sought an extension of time for the filing and service of submissions. On 26 September 2019, I extended the time for the Builder to file and serve its submissions to 15 October 2019 and directed that the Owner file and serve submissions in reply by 22 October 2019.
- 12 Thereafter, due to her own personal difficulty, the Builder’s solicitor sought a further extension for the filing and service of submissions to 31 October 2019. The Owner’s solicitors wrote objecting to any further extension. Regardless of whether it was appropriate to grant a further extension, no submissions were received from the Builder’s solicitor before I went on leave on 1 November 2019.
- 13 The matter came before me again on 15 November 2019, when I directed that any submissions on behalf of the Builder that were received by 22 November 2019 would be considered. The Builder’s submissions were not received until 25 November 2017. Notwithstanding this non-compliance, I determined that I should consider them, and I have done so. I made an order in chambers allowing a further seven days for the Owner to reply if she wished to do so. No further submissions were received from the Owner but a further submission dated 2 December 2019 was received from Ms McAuley. I have not considered that final submission.

### **Construction**

- 14 In order to provide accommodation for the Owner and her family during construction, there was a side agreement between the parties that the Builder would convert the garage of the house into a temporary residence by framing and plastering three bedrooms, a kitchenette and bathroom/laundry for an additional charge of \$46,700.00, which the Owner paid. There does not appear to be any dispute in regard to that aspect of the work.
- 15 Otherwise, construction of the house started on 4 July 2016. The construction time specified in the contract was 119 days. Consequently, the work was due for completion on 31 October 2016. Liquidated damages for late completion by the Builder were fixed by the Contract at \$250.00 per week.
- 16 Dealings between the Builder and the Owner were conducted on the Owner’s behalf by her husband, Mr Matthew Mitchell, who had previously

worked as a plasterer. In his evidence, Mr Mitchell made numerous complaints concerning the Builder's performance, saying that a number of errors occurred and decisions to alter the work were made by Mr Hummel unilaterally without consultation and some of the work was not done in accordance with the contractual documents.

- 17 There were a number of variations requested by the Owner or suggested by the Builder which the Builder carried out, and there were many more claimed by the Builder which the Owner disputed. The Owner paid some of these, "and claims that she did so under protest", and she did not pay others. Those that she did not pay form part of the Builder's claim.
- 18 The relationship between the parties became progressively more strained and eventually things came to a head in regard to the plastering. Mr Mitchell said that, having previously been a plasterer he was in a better position to assess the quality of the Builder's plastering work than he was to assess the quality of the work performed by the other trades.
- 19 The plastering commenced in December 2016 and Mr Mitchell made complaints about it in early January. Various discussions took place, including claims by the Builder for variations, but the issue was not resolved to the Owner's satisfaction.
- 20 The problems with the plastering had still not been addressed when, on 3 May 2017, the Builder sent a claim for the fixing stage by email, claiming an amount of \$81,589.24. That claim was not paid. It was resubmitted by the Builder on 13 July 2017 but has still not been paid because the Owner contends that the fixing stage was never reached.

### **Suspension and Termination**

- 21 On 25 May 2017, the Builder sent to the Owner a notice of suspension of works, alleging non-compliance by the Owner with the contract, as follows:

"1. Non-payment of the fixing stage as per invoice No. 279 dated 3/5/2017.

The fix is completed as far as it can be. You have failed to remedy the problems with the ceiling being out of square and not level in all the original home areas. This is out of the builder's control and contract obligations.

2. No notice was given to the builder of the absence the owner, Matt Mitchell who is currently overseas and is not available in a suitable time to remedy and sort the items above.

3. Non directives of that required to make good the ceiling of all the original areas. (Direct fix not suitable by owner with no contract provision nor variation to fix. Even after the builder identified the problems with Matt by a third party plasterer). No fix directions have been addressed by the owner since this date as mentioned in previous correspondence.

As per the contract, all breaches have seven (7) days to remedy, either by mutual agreement or in full." (sic.)

- 22 Mr Mitchell responded to this notice, stating that the fixing stage had not been reached and suggesting that he meet with Mr Hummel on his return from overseas.
- 23 Mr Hummel made a without prejudice offer that the Owner rejected. A meeting occurred on 5 July 2017 between the parties at which an “in principle” agreement was reached as to some matters, although the scope of works required for the plastering was still to be agreed. Pursuant to this in principle agreement, the Owner paid the Builder \$20,000.00 on account of the fixing stage. The Builder agreed to return to the site and complete construction within seven weeks and provide plumbing and electrical certificates for the work in the garage. The amount of \$20,000.00 was paid by the Owner but the plumbing and electrical certificates were not supplied and the Builder did not resume work.
- 24 Thereafter, there appears to have been an impasse when no agreement could be reached as to the plastering.
- 25 In October 2017, the Owner engaged a building expert, Mr Mackie, who provided a preliminary report on 20 November 2017, stating that the fixing stage had not been reached and identifying plastering issues and a number of significant defects. The Owner also engaged a plasterer, Mr Powell, to inspect the plastering and provide a quotation to rectify the faults. His quotation was subsequently received on 1 December 2017 in an amount of \$51,095.00.
- 26 In December 2017, the Builder sought conciliation with Domestic Building Dispute Resolution Victoria but deferred the conciliation until after Christmas. On the day of the conciliation, which was unsuccessful, an intruder entered the House and removed all of the power points, the site power supply, the ceiling fittings and the switchboard. Mr Mitchell complained about this removal to the Builder, suggesting that perhaps the items had been removed by its electrician, but received no response. It now appears from the Builder’s submission that at least some items were indeed removed by the Builder’s electrician.
- 27 On 2 March 2018 the Owner served upon the Builder a notice of default pursuant to Clause 46 of the contract asserting that the Builder was:
- “...in substantial breach pursuant to Clause 46.2, in the following respects:
1. You have failed to proceed with the building works competently and diligently in that you have:
    - (a) failed to complete the building works within the construction period of 119 days or at all;
    - (b) not completed the building works within a reasonable time;
    - (c) failed to supply adequate materials and/or labour to complete the works; and
    - (d) carried out defective works including plastering works. Refer attached report of Mr P Mackie dated 20 November 2017.

2. You are otherwise in substantial breach of the Contract in that:
  - (a) you have wrongly suspended work due to concerns that I raised in relation to plastering works since 25 May 2017;
  - (b) you have failed to comply with the agreement reached at Mediation on 11 July 2017 in that you have failed to provide, or agreed to, an adequate or appropriate plaster rectification specification, despite me paying a part payment of fixing stage payment to you of \$20,000.00; and
  - (c) you have claimed the fixing stage payment when that stage has not been reached, i.e. numerous items referred to in Mr Mackie's report including cladding, architraves, skirtings, doors, built-in shelves, troughs, sinks, cabinets, and cornices have not been installed, and the plaster work is defective and incomplete."

28 The Builder made no reply to the notice and, on 14 March 2018, the Owner served a further notice terminating the contract. Termination was said to be in accordance with Clause 46 of the contract or in the alternative, it was said that the Builder had repudiated the contract and the Owner accepted the repudiation.

### **The plaster dispute**

- 29 The major issue in the case concerned the plastering work and precisely what the Builder was required to do in that regard. Apart from the contract, there were two variations signed by the Owner, enlarging the scope of the plastering works.
- 30 In the old front section of the house, the walls were hard plastered and some of them were not level. They were to be straightened by adhering plaster sheets to them. Some of the ceilings throughout the house were also out of level.
- 31 The specification makes the following provisions about the plaster to be supplied and installed by the Builder:

“Standard 2700 mm ceiling height – need to work with heights and levels as a result of plaster ceiling overlay in existing area.”
- 32 The provision as to internal linings is as follows:

“The Builder will use 10 mm plasterboard with water resistant board to wet areas of any showers and baths in accordance with Australian Standards. In relation to ceilings, the Builder will use Hi-span plasterboard 10 mm sheet fixed to the underside of the roof trusses which will be flush joined and sanded down.”
- 33 Towards the end of the specification there is the note:

“Ceiling to be left as is and new plaster laid over the top”.
- 34 The Builder contends that it was not required to level the ceilings. Mr Hummel said that all that it was required to do was fix new sheets underneath. When this approach was challenged during construction by the

Owner, the Builder sought a variation to laser-level the ceilings and walls at an additional cost.

- 35 Mr Hummel said that he and his employee, Mr Carlson, had recommended to Mr Mitchell that the rooms in dispute be lasered but that Mr Mitchell did not agree to it and told him that the new plaster in the kitchen and family room should be attached to the existing battens. He said that, when the old plaster was removed, Mr Mitchell agreed to remove the nails in order to save money. Mr Mitchell denied that he was ever told, either by Mr Hummel or by his employee, Mr Carlson, that the ceiling in the rumpus room needed to be lasered and he denied that he refused to pay the cost of doing so.
- 36 On 7 December 2016, the Builder prepared an Owner's variation for plastering the window reveals and levelling of the old ceiling for a total of \$4,895.00. The variation was accepted by the Owner on that day. The Owner's evidence is that she signed the variation under protest because Mr Hummel would not otherwise have proceeded with the work but she alleges that, in any case, the work was done defectively and had to be redone by Mr Powell and Lombardi Homes.
- 37 On 12 May 2017, Mr Hummel wrote to the Owner and Mr Mitchell, saying that the plaster in the old section of house was to be fixed to the old plaster sheets, that the plasterer had said that the only way to achieve the result that they wanted was to laser the ceilings and that Mr Mitchell did not want to do that. He said that his carpenter, Dave, and the plasterer had advised him that the Owner could not expect a straight ceiling with a 50 mm drop in the trusses and that it was not possible to prop up the old trusses.
- 38 Following the Owner's expression of dissatisfaction with the plasterwork, the Builder obtained a quotation from a plasterer called Ali of AAA Plastering. Although the document is referred to as a quotation, the author says in the text that the labour and material costs are estimated, depending on "Owner standards" and "Owner satisfaction". He said that, as all walls were out of square and not straight, he could only do the best he could with the time that he had in the old sections of the house. The document does not appear to be an assessment of the quality of the work done already by the Builder. Rather, it quotes an amount of \$17,340.00 to finish the plastering, doing the best that the author could in the circumstances.
- 39 Upon receipt of this "quotation" from Mr Hummel, Mr Mitchell sent an email to the Builder on 22 May 2017, the first two paragraphs of which were as follows:

"Thanks for forwarding through your new plasterer's quote for rectification of the plastering issues. Whilst we feel the scope still does not address all of the issues and do not agree with some of the methods of rectification it does illustrate the scale of the problem and your new plasterer's significant concerns regarding what has been done so far. Much of this was evident at our site meeting when he found more and more problems everywhere he looked.



All of the work described is rectification of poor quality workmanship performed by your previous contractor and it is your responsibility to replace it”

- 40 Mr Mitchell said that Mr Hummel had told him that the quality of the plastering would reflect the age of the house. Despite this, Mr Hummel said in his witness statement that he had always maintained that the plastering needed to be lasered.
- 41 The quotation from AAA Plastering was not accepted by the Builder and no further plastering work was done before the contract was terminated. The author of the quotation, Ali, was not called to give evidence.
- 42 Mr Powell gave evidence that he inspected the plastering work at the house in October 2017 and measured the ceiling levels and squareness of the walls, doors, reveals and windows using a laser level.
- 43 He said that a considerable number of the walls, doors, reveals and windows were significantly out of plumb. In addition, he said that the quality of the plastering work was very poor in that:
- (a) there were holes in the plaster;
  - (b) walls were not straight and plumb and joints were grossly overfilled;
  - (c) ceilings were grossly out of level, up to 80 mm throughout the main living area;
  - (d) the window reveals were short of reaching the aluminium sections; and
  - (e) the plaster sheets that the Builder had attempted to stick onto the existing masonry walls in the old part of the house were not prepared properly and they had come away from the walls.
- 44 Mr Powell also said that:
- (a) according to the Guide to Standards and Tolerances (“the Guides”), the allowable tolerance for levels of a ceiling is 5 mm over 1.8 m.;
  - (b) if he had been engaged by the Builder to do the plastering, he would have ensured that the ceiling was plumb by installing battens and laser levelling, before laying plaster sheets over the top of the existing plaster on the ceiling;
  - (c) he was engaged to repair and complete all of the plastering under the supervision of Lombardi Homes and for that he was paid the contract sum of \$47,300.00 inclusive of GST. This amount is included in the total paid by the Owner to Lombardi Homes.
- 45 In his oral evidence he said that, in order to adhere sheets of plaster to a hard plastered wall, it is necessary to grind the wall to remove the paint so that the adhesive will stick to it. He said that this was not done by the Builder and so some of the sheets the Builder had affixed had become detached. He said that one wall in Bedroom 4 was out level by 45 mm and he described how he levelled it. He said that it was not practicable to level ceilings otherwise than with a laser although it was possible to do it using a string line or another type of level.

- 46 In cross-examination he said that his quotation had been for a greater sum but that Lombardi Homes had done some of the work included in his quote which accounted for the difference.
- 47 Mr Mackie inspected the house on 18 and 30 October 2017. He lists the following defects in the plaster:

Family room

Left hand side corner out of plumb by 8 mm, right-hand side out of plumb by 5 mm, cornice goes in a further 13 mm and comes back out; doorways 14 mm out of plumb; window out of wind, with no two sides parallel and twisted by 19 mm; reveal in right-hand window bowed in the middle by 10 mm; reveal at south door too short; section of plaster ceiling cut out to try to remove downward bow, exposing underside of truss; large hole in the ceiling exposing an obstruction under the truss.

Toilet

Plastering incomplete; cornice poorly installed and dags not removed.

Bathroom

Damaged plaster in north wall.

Bedroom one ensuite

Bolt protruding through plaster; poor installation around cut out; plaster incomplete; plaster ceiling not installed in the toilet.

Bedroom one

Cornice not installed.

Bedroom two

Plaster not installed above robe.

Bedroom three

Plastering to robe incomplete.

Bedroom four

Plaster on the robe return too short.

Billiard room

North end ceiling trusses exposed and metal furring channels flattened to try and achieve a straight ceiling.

Kitchen

Holes and damaged plaster over laundry door to kitchen architrave.

Laundry

Plaster ceiling too short.

Unidentified bedroom

Cornice complete dags and nails protruding.

### Sitting room

Downward bow in window reveal.

He included photographs of the above defects in his report.

- 48 As to the Builder's suggestion that the quality of the plasterwork was a result of the condition of the existing house, Mr Mackie said, in his second report:

"It is possible when installing plasterboard to meet the requirements of Australian Standards and manufacturer's installation instructions.

Unacceptable substandard installation of plaster board has ignored Australian Standards and both GTek and USG Boral brochures."

He referred to the permitted deviation in levels permitted by the Guides and said that a Level 4 finish is the default level of finish for plasterboard unless specified otherwise.

- 49 As to the absence from the contract documents of any performance specifications, he said:

"The Builder should have notified the Owner of the problems with the datum points and dealt with this as per contract as soon as possible. A competent builder should have referred to installation instructions if not known how to deal with the problem of levels and plumb."

- 50 In regard to fixing plaster to irregular wall surfaces, he referred to the application and finishing direction in the relevant Australian Standard, being AS/NZ S258 9.1.1997, which states:

"Wall surfaces with high/low spots over 50 mm or out of plumb by more than 15 mm will need to be straightened with a series of levelling pads or by using furring channels."

- 51 He also referred to the oral guidelines and installation manual to the effect that the frame should be thoroughly checked by the Builder to ensure that it is plumb, level and square for installation and the "Gtech technical brochure" to a similar effect. He concluded in the second report that the Builder's poor building practice and disregard of the Australian Standard and the installation instructions of the manufacturers, that the deviations on both ceiling and wall plaster were unsightly and outside the requirements and that the existing defective plaster should be replaced.

- 52 I do not accept the Builder's claim that the Owner was not entitled to have straight walls and ceilings because of the age and condition of the House. Mr Hummel was aware of the condition of the House when the Builder entered into the contract. There is nothing in the contract that says that the walls and ceilings are not to be straight. If the Builder accepts responsibility to replaster an existing house, it must be done in a proper and workmanlike manner in the absence of a specific term in the contract stating otherwise. How the Builder achieves a straight wall or ceiling is for the Builder to

determine. If it is necessary to use a laser then that is within the Builder's scope of works.

- 53 It is quite clear on the evidence that the quality of the plaster work that was done by the Builder was so bad that it had to be replaced.

### **Was fixing stage reached?**

- 54 By Schedule 3 of the contract, the fixing stage means:

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

- 55 Mr Mackie said in his first report that the internal cladding was incomplete, doors had not been fitted and some that were fitted were badly fitted, skirtings and architraves were missing, cornices had not been installed, robe shelving was missing, the shower niche had not been lined, the shelves in the pantry were not fixed in position and cabinetry doors were missing.
- 56 The Builder said in its notice of suspension that the fixing stage was completed as far as it could be, given that the Owner had, it was claimed, failed to remedy the problems with the ceiling being out of square and not level in all the original home areas. Mr Hummel asserted that this was out of the Builder's control and contract obligations. That is not the case. It was not for the Owner to prepare the walls and ceilings for plastering. That was the job of the Builder and it was not done.
- 57 Mr Mackie said in his first report that the fixing stage and had not been reached and I find that to be the case.

### **Termination**

- 58 The three grounds upon which the Builder purported to suspend works were:

- (a) the failure of the Owner to pay the fixing stage claim;
- (b) Mr Mitchell's departure overseas; and
- (c) the failure of the Owner to rectify the problem with the out-of-level ceilings and walls.

- 59 The fixing stage was not reached for the reasons given, Mr Mitchell's departure overseas did not excuse the Builder from continuing with the work and it was not for the Owner to rectify the problems with the out of level ceilings and walls.

- 60 As a consequence, the suspension was not justified and the subsequent failure of the Builder to progress the works and its refusal to return to the site and complete the construction was a failure on its part to proceed with the building works competently and diligently.

- 61 By Clause 46.0 of the contract, the Builder would be in substantial breach of the contract if it suspended the carrying out of the work otherwise than in

accordance with Clause 38 of the contract. Clause 38 only entitled the Builder to suspend work if a progress payment was not made in seven days after it became due or if the Owner was otherwise in breach of the contract. Notice of any such suspension was required to be given to the Owner.

- 62 In the present case, the suspension was not in accordance with Clause 38 because the fixing stage progress payment upon which it was based was not due. Further, no other subsisting breach by the Owner is referred to in the Notice of Suspension, nor is it proven that the Owner was in breach of the contract at the time the notice was given. Consequently, the Builder suspended work otherwise than in accordance with Clause 38 and so it was in substantial breach of contract.
- 63 By Clause 46.2, if the Builder was in substantial breach of the contract, the Owner was entitled to give the Builder a written notice to remedy the breach, specifying the substantial breach and requiring it to be remedied within 10 days after the notice was received by the Builder, and stating that, if the substantial breach was not remedied as required, the Owner intended to end the contract. If the Builder did not then remedy the substantial breach stated in the notice within 10 days of receiving the notice, the Owner would become entitled to end the contract by giving a further written notice to that effect.
- 64 I find that the grounds for the notice of default served upon the Builder by the Owner are made out. I find that the Builder failed to comply with the notice and that the Owner was entitled, by the second notice referred to above, to bring the contract to an end.

### **Repudiation**

- 65 Mr Harris submits that the contract was repudiated by the Builder and the repudiation was accepted by the Owner.
- 66 Repudiation is established if it can be shown, objectively, that the other party has shown an intention no longer to be bound by the contract or has indicated that it will only fulfil it in a manner substantially inconsistent with its obligations (see *Cheshire & Fifoot Law of Contract* 9<sup>th</sup> Australian Edition para 21.12 and the cases there cited).
- 67 In *Shevill v. Builder's Licensing Board* [1982] HCA 47 Wilson J said (at para.8):
- “Repudiation of a contract is a serious matter and is not to be lightly found or inferred: *Ross T. Smyth & Co., Ltd. v. T.D. Bailey, Son & Co.* (1940) 3 A11 ER 60, at p 71. In considering it, one must look to all the circumstances of the case to see whether the conduct "amounts to a renunciation, to an absolute refusal to perform the contract": *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.* (1884) 9 App Cas 434, at p 439.”
- 68 In the present case the Builder suspended work upon quite untenable grounds. It must have been obvious to Mr Hummel that the fixing stage had not been reached and that the quality of the plastering work was very bad

and needed to be redone. He must also have been aware that it was not the Owner's responsibility to prepare the walls and ceilings to receive plaster. Yet the Builder refused and persisted in refusing to fix the substandard work, insisting that it was the Owner's responsibility and it continued to demand a fixing stage payment to which it was clearly not entitled.

- 69 Having suspended work without any reasonable justification, the Builder then refused to carry out any further work for a period of 10 months. By so doing, it has shown objectively that it was only prepared to continue with the contract in a manner substantially inconsistent with its obligations.
- 70 I therefore find that, at the time the second notice was served by the Owner's solicitors, the Builder had repudiated the contract. By the terms of that notice the Owner accepted the repudiation and, quite apart from any termination under Clause 46, the contract came to an end.

### **Payments made by the Owner**

- 71 Altogether, the Owner paid a total of \$256,042.44, being progress payments due with respect to all stages up to and including lock up, plus a further \$24,066.12 with respect to variations and a "commencement payment" of \$3,128.75 and \$20,000 on account of the fixing stage. Since fixing stage was not reached, neither the fixing stage nor the final stage payments were due.

### **The respective claims**

- 72 By its Points of Claim, the Builder claims an amount of \$95,104.00, comprised of the contract price, plus variations, less the total of the amounts paid by the Owner. I have been unable to calculate that amount from those other figures.
- 73 In his witness statement, Mr Hummel said that the claim was for \$109,347.01, comprising the balance of the fix stage claim, which he said was \$61,529.34, and a number of variations, the claims for which are dealt with below. The Owner agrees that she is liable for some of the variations but disputes most of them.
- 74 The Builder also claims interest at the rate specified in the contract from 23 July 2017.
- 75 The Owner claims damages against the Builder for breach of contract, including the cost of completing the construction and rectifying the defects in the Builder's workmanship, and also for various other sums, altogether totalling \$254,757.72. She also claims liquidated damages and delay costs and various other amounts plus damages for physical inconvenience, distress and loss of amenity.

### **The claim for variations**

- 76 The Builder claimed the following variations, which are not disputed and have all been paid:

<u>Description</u>	<u>Amount</u>	<u>Delay allowed</u>
Building permit	\$3,128.75	Nil
Subfloor ventilation	\$1,155.00	Nil
Verandah removal	\$1,698.00	Nil
Window and door levels	<u>\$ 880.00</u>	Nil
Total	\$6,861.75	

- 77 The remaining variations are disputed. Some of them have already been paid by the Owner and she now seeks to recover those payments back from the Builder. I have included the payments that she made for all these variations in the total payments used to calculate the adjusted contract price. The issue is whether she is entitled to seek a refund. The difficulty about that is that, in most instances, the rectification and completion damages that she seeks are calculated on the basis that the scope of works has been increased by the variation in question. Consequently, if the damages that she seeks are to be allowed, the variation itself must first be taken into account.
- 78 For some of the variations that have not been paid, the Builder prepared written variations which the Owner signed. Her explanation for signing variations which she now disputes is that she felt that she had no choice and that she needed to keep Mr Hummel “on side” in order to get the work completed. She said that she signed them under protest and some of the variation forms have, after her signature, the words: “Subject to previous correspondence”, which was a reference to an earlier email that she sent disputing responsibility for a variation.
- 79 If she had disputed liability for a variation then she ought to have refused to authorise it. Although I accept that Mr Hummel was quite aggressive in his assertions as to what was within the Builder’s scope of works and what was not, the evidence in this case does not establish that she signed any of the variations under any compulsion or in circumstances which would have deprived her act of its voluntary nature. Having signed the variation form and the Builder having carried out the work, she must pay for it.
- 80 There are two aspects to each variation. The first is a claim for the money and the second is a claim by the Builder for an extension of time with respect to the variation. I shall deal with the two claims together.

**Asbestos removal** Allowed \$2,190.00 Delay nil

- 81 This is one of a number of variations that do not appear in the summary attached to Mr Hummel’s witness statement because it has been paid by the owner. The owner now seeks to recover the payment.
- 82 The variation claimed was \$2,490.00 for asbestos removal. The Owner accepted the quote and signed the authorisation on 1 September 2016. However, she claims that the work was incomplete, in that the heater flue

was left and she had to have it removed by someone else at a cost of \$300.00.

- 83 Mr Hummel agreed that the flue had been left and said that he had agreed that he would remove it at the end of construction as part of the site tidy up. A photograph was produced showing that the flue was still in place after the Builder had left the site. The amount of the variation will therefore be reduced by \$300.00.

<b>Engineering / Structural beams</b>	Allowed	\$2,009.61	Delay	nil
		\$10,818.80	Delay	nil

- 84 These variations also do not appear in the summary attached to Mr Hummel's witness statement because they have been paid by the Owner. She now seeks to recover the payments.
- 85 The Builder claimed a variation of Engineer's fees, being \$2,009.61, that it incurred in the redesign of the structural beams supporting the roof over the kitchen and living area following the removal of the internal walls. It also claimed \$10,818.80 for supplying and installing the necessary beams in accordance with the new design.
- 86 The engineering drawings referred to in the contract were provided by the Owner. They provided only for a single beam from south to north, directly under the hip at the western end of the roof. There was no provision to support any loads that were previously supported by the internal walls that were to be removed as part of the works. It does not appear that the engineer who drew this design inspected the roof cavity before preparing the plan. Had he done so, he would have seen that the roof was not built from trusses but rather, from individual timbers.
- 87 Mr Hummel said that Mr Mitchell asked him in an email of 11 September 2016 to go ahead and get his engineer to do the engineering work. He said that Mr Mitchell approved the extra for the beams by a further email on 27 September 2016. Both emails are referred to as being attachments to his witness statement but neither has been produced.
- 88 Amended plans were prepared by the Builder's engineer, VC Gallagher Pty. Ltd which provided for additional supporting beams in the roof. It is not disputed that the additional beams were required or that they were installed by the Builder.
- 89 The Builder had quoted \$450.00 plus GST for the engineer's fees in an email dated 13 September 2016 which Mr Mitchell accepted. Then, on 26 September 2016 the Builder sent an invoice it had received from the engineer for \$2,009.61 for the design work. The following day, the Owner received the invoice for \$10,818.80 for the installation of the additional beams. There is no breakdown of the figure claimed in either invoice but the account from the engineer has been produced which shows that the engineer charged the Builder \$1,320.00, inclusive of GST, for the site inspection and design.



- 90 Mr Harris submitted that the Builder ought to have inspected the roof space before quoting on the job and allowed for any additional beams that would be required. I do not accept that submission. The contract provided that the engineering drawings were provided by the Owner and the Builder was required to construct the renovation in accordance with those drawings. I am satisfied that the roof could not have been constructed in the manner originally designed and that this additional expense was properly incurred.
- 91 The Owner now seeks to recover these payments. It seems to me that they were paid voluntarily without any mistake on her part or any compulsion that would have robbed the payments of their voluntary nature.

**Showerhead and mixer upgrade** Allowed \$186.00 Delay nil

- 92 This is another variation that has been paid by the Owner.
- 93 The Builder claims \$186.00 for upgrading the shower head and mixer. There was no variation form issued by the Builder in regard to this and the items were never supplied but, since the cost of completion has been assessed on the basis of Lombardi Homes providing equivalent fittings, the variation must be allowed in the first instance.

**Garden demolition** Allowed \$1,133.22 Delay nil

- 94 This is another variation that has been paid by the Owner.
- 95 There were three garden beds at the front of the house which had to be demolished. Mr Mitchell had intended to do this himself but, in an email of 1 November 2016, he accepted the Builder's quote of \$1,700.00 to remove the three beds. The Owner complained that one of them was not removed and that the amount of the variation should be reduced accordingly. The Builder claims a variation of \$1,700.00. Since one third of the work was not done, I shall allow \$1,133.22.

**Shower niche** Allowed \$340.00 Delay nil

- 96 During the course of construction, the tiler suggested to Mr Mitchell that a niche be created in the plaster wall of the shower recess. This was to be tiled so as to create a shelf to accommodate soap, shampoo or the like.
- 97 The Builder cut a section of plaster out between two studs and trimmed them on the top and bottom with framing material but the area created was not waterproofed or tiled.
- 98 Mr Mitchell said that the Builder's tradesman informed him that he would carry out this work at no charge. The tradesman was not called by the Builder to contradict this evidence.
- 99 However, the Owner signed a written variation for it on 8 December 2016, agreeing to pay \$340.00.
- 100 The Builder claimed one day's delay for completing the building works. There is no evidence to justify a delay for such a trifling amount of work, particularly when so little of it was done.

**Plastering window reveals/ceiling levelling** Allowed \$4,895.00 Delay nil

- 101 The Builder claims a variation of \$4,895.00 to plaster the window reveals and level the ceilings. The Owner disputes liability for this variation on the ground that the work was only rendered necessary by the inability of the Builder's contractors to carry out the plastering work. She also complains that the work was carried out defectively.
- 102 Since damages are sought by the Owner to rectify the defective work in regard this variation the variation itself must first be allowed in regard to the windows. I find that providing a level ceiling was part of the contract scope of works. However, that was disputed by the Builder and the Owner signed a variation for this work on 8 December 2016.
- 103 The Builder claims an extension of time of "approximately one week". The extent of the work involved is unclear. Since plastering is on the critical path, it might well have caused a delay of five days but, since the work was so defective that it had to be redone, no extension of time is warranted.

**Insulation of walls** Allowed \$703.00 Delay nil

- 104 The Builder claims a variation of \$703.00 to insulate a number of the walls. The Owner claims that this work was not done and that appears to be the case. Since the provision of insulation to the walls is part of the rectification and completion work carried out by Lombardi Homes, the variation must be allowed in the first instance. The work was not done and so no extension of time is warranted.

**Insulation of the ceiling** Allowed \$4,150.00 Delay nil

- 105 This is another claim by the Builder that is not included in Mr Hummel's summary attached to his witness statement but it is nonetheless claimed.
- 106 The Builder claims \$4,150.00 to insulate the ceiling of the kitchen and living area. The Owner claims that replacement insulation was only necessary because the ceiling had to be removed in order to facilitate the levelling of the ceiling. Replacement of the insulation was not within the Builder's scope of works and the Owner has signed a variation accepting the quote. No extension of time was claimed with respect to this variation. The new insulation was never installed by the Builder but, since providing new insulation forms part of the Owner's plastering claim, the variation must be allowed in the first instance. The work was not done and so no extension of time is warranted.

**Electrical switchboard relocation** Allowed \$1,150.00 Delay 1 day

- 107 The Builder claims a variation of \$1,150.00 for moving the switchboard from the existing location to the pantry. The Owner disputes a variation, alleging that the location according to the plans was to be in the pantry. In this instance, she did not sign a written variation.
- 108 I cannot see any indication in the plans as to where the switchboard was to

be located. Exhibit D is an electrical plan prepared by Mr Mitchell showing the location of power points, lights and other electrical components but does not mention the switchboard. This was a renovation rather than a new build and so there would have been a switchboard to serve the existing house.

- 109 Mr Hummel said that what Mr Mitchell asked for was a sub-board to be located in the pantry. If, as Mr Mitchell suggested, the switchboard was to be moved to the pantry, which was part of the new construction, that was not within the contractual scope of works. If it is a sub board, as suggested by Mr Hummel, it would be additional to the existing switchboard. In either case, the claim for a variation would appear justified. Since work would not be able to continue without power the delay of one day claimed is probably justified.

**Shower seat** Allowed \$360.00 Delay 2 days

- 110 The Builder claims a variation of \$360.00 for a seat that was boxed out in the ensuite shower recess at the request of Mr Mitchell.
- 111 The Owner claims that the seat was shown in the plans and is not a variation. I cannot see it in the plans. A variation form dated 8 February 2017 has been signed by the Owner on that date. The Builder claimed two days delay which is in the form the Owner signed.

**Plastering walls** Allowed \$3,960.00 Delay nil

- 112 The Builder claims a variation of \$3,960.00 for plastering work done to satisfy the Owner's complaints. It also claims five days delay. The Owner denies liability to pay any sum and says that the work would not have been necessary but for the Builder's bad workmanship.
- 113 At the time this variation was raised, there was a dispute as to the scope of works in regard to the existing plastering. The Owner has signed the variation agreeing to pay what was claimed to be additional work and the work was then done, albeit defectively. Further, since rectification of that work is now being allowed on the counterclaim, the variation itself must be allowed in the first instance. I am satisfied that the work was done so defectively that it had to be redone, so no delay is justified.

**Jack hammering** Allowed \$1,012.00 Delay nil

- 114 This is not included in Mr Hummel's final summary but is nonetheless claimed by the Builder.
- 115 The Builder claims a variation of \$1,012.00 for jack-hammering the front facade of the house in order to prepare it for cladding. The Owner signed a variation agreeing to the amount.
- 116 Although this was not within the contractual scope of works, the Owner claims that the Builder ought to have identified that it would be necessary to carry it out at the time the contract was entered into. I think the evidence falls short of that. The work was not performed but, since a claim is made

against the Builder for the cost of having the work done by Lombardi Homes, the variation must be allowed in the first instance if the counterclaim for this item is to be allowed.

**Tiling** Allowed Nil Delay nil

117 The Builder claims a provisional sum adjustment of \$2,608.37 for tiling beyond the amount allowed for in Schedule 2 of the contract. The contractual provisions in regard to provisional sum and prime cost adjustments are detailed below.

118 This claim cannot be allowed because:

(a) there is no figure provided for tiling in the Schedule to the contract, only the letters: "TBA". Consequently, there is no figure to be adjusted and nothing for the provision to operate on; and

(b) although the tiles were purchased, they were not laid. The Builder subsequently removed them from site and resold them.

119 Mr Mitchell said that he and the Owner chose tiles from those shown to them by the Builder's preferred supplier. In any case, since the tiling was not done and the tiles were not supplied, no variation or delay can be claimed.

#### **Further claims by the Builder**

120 In the summary attached to Mr Hummel's witness statement, there are listed the following three further claims:

(a) Extra electrical work \$11,602.20;

(b) Merbau decking \$1,290.00;

(c) Wet seal bathroom \$480.00.

These claims were not established.

#### **Adjustment of provisional sums and prime cost items**

121 Clause 36.4 of the Contract made the following provision concerning provisional sums and prime cost items:

"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 of the relevant margin or excess stated in Schedule 2 applied to that difference is added to the contract price payable with the progress payments to which the amount for that item or work included."

122 The Prime Cost and Provisional Sum allowances made under the contract are set out in Schedule 2, which states:

“The parties agree that the following allowances are included in the contract price. The allowances included in the contract price by the Builder for Prime Cost Items or Provisional Sum Items must be a reasonable estimate of the price for the supply of the item and/or work to be performed, in accordance with Sections 20, 21 and 22 of the Domestic Building Contracts Act 1995.”

**Cabinets and joinery** \$20,390.10

- 123 There was a prime cost allowance in the contract of \$13,400.00 for the kitchen, laundry and bathroom cabinets, plus a further \$2,500.00 for the cabinets in the bar area. The Builder claims that the amount was exceeded and that a further \$20,389.10 is due to it.
- 124 According to Mr Hummel, the Owner substantially upgraded the kitchen from what was previously contemplated. A form of variation was presented to the Owner for signature to claim the extra of \$20,390.10. Although described in the document as a variation, this was in fact a claim for a prime cost adjustment.
- 125 The Owner signed the document, stating that she accepted the “variation”, adding the words “Subject to previous correspondence”.
- 126 The Owner said that the scope of works always included Ceaserstone kitchen benches and kitchen and that the provisional sum allowed by the Builder was unreasonably low and in breach of s.21 of the Act and the notation at the beginning of Schedule 2.
- 127 Mr Harris submitted that the Owner and Mr Harris had made clear to Mr Hummel what they wanted in terms of the cabinetry joinery and that no adjustment should be allowed.
- 128 In order to accurately assess a prime cost figure, it would have been necessary for the Builder to know what was intended to be supplied and it does not appear from the evidence that there had been any final decision as to the cabinetry and joinery at the time the contract was entered into.
- 129 The cabinetry and joinery were supplied at a cost that exceeded the provisional sum. If the Owner disputed liability for a provisional sum adjustment that ought to have been raised at the time. Having signed the document she accepted liability and the Builder, having supplied the items on the faith of that, is entitled to the adjustment.
- 130 The Builder now claims an extension of time of 30 days. The written variation the Owner signed does not state the effect the variation would have on the building works and there is no evidence that the upgrade of the kitchen caused a delay, whether of 30 days or any other period.

**The Builder’s claim for delay**

- 131 The Builder claims an entitlement to an extension of time of 441 days. Those claimed with respect to variations have been dealt with above and amount to only 3 days.

- 132 In addition, the Builder claims an extension of 42 days with respect to a suspension of work on 14 November 2016. A notice suspending work due to non-payment of the lock up stage was served on that day. The payment was made by the Owner on 21 November 2016. By Clause 38 of the contract, if the Builder should suspend work, it was required to resume work within 21 days after the Owner remedied the breach. It would see from Mr Hummel's witness statement that he returned to work on 24 November 2016. The Builder is therefore entitled to a further extension of time of 10 days.
- 133 The Builder also claims an extension with respect to suspension of work on 25 May 2017 but that suspension was not justified.
- 134 In total, the Builder is entitled to an extension of 13 days, which extended the completion date to 13 November 2017.

### **The Owner's claims**

- 135 Clause 47.0 of the contract provides:

"If the Owner brings this contract to an end under Clause 46, then the Owner's obligation to make further payments to the Builder is suspended for a reasonable time to enable the Owner to find out the reasonable cost of completing the building works and fixing any defects."

- 136 Clause 47.1 of the contract provides:

"The Owner is entitled to deduct that reasonable cost calculated under Clause 47.0, from the total of the unpaid balance of the contract price and other amounts payable by the Owner under this contract if this contract had not been terminated and if the deduction produces:

- a negative balance – the Builder must pay the difference within seven days of demand; and
- a positive balance – the Owner must immediately pay the difference to the Builder."

- 137 The Owner makes no claim for any sum falling due under Clause 47 of the contract. Rather, she claims damages for breach of contract. Since she has accepted a repudiation of the contract by the Builder, she is entitled to claim damages at common law for the loss of the benefit of the contract.

- 138 As to the assessment of damages, the High Court said in *Tabcorp Holdings v. Bowen* [2009] 253 ALR 1 (at p.6):

"The "ruling principle"... confirmed in this Court on numerous occasions..., with respect to damages at common law for breach of contract is that stated by Parke B in *Robinson v Harman* (1848) 154 ER 363 at 365):

"The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed."

139 Damages sought by the Owner for rectifying and completing the construction are as follows:

Cost of completing and rectifying the work	\$247,800.00
Cost of rectification of defective work	\$ 76,033.08
Building surveyor's fees and insurance	<u>\$ 7,880.95</u>
	\$331,714.03
less balance due under contract	\$ 76,956.31
	<u>\$254,757.72</u>

140 In addition, the Owner claims the following further damages:

- (a) Liquidated damages at the contract rate of \$250 per week for 72 weeks, to the date of termination, being 14 March 2018, amounting to \$18,000.00;
- (b) Delay losses, comprising storage costs, to 8 September 2018 amounting to \$8,284.56;
- (c) Damaged household items \$15,000.00;
- (d) Cost of replacement of fixed materials removed from site by the Builder, including electrical, cabinetry, dishwasher panel and hardware, site toilet and site power \$12,000.00;
- (e) Repayment of disputed variations that she had already paid for, being \$2,490.00 for asbestos removal, \$2,009.61 for engineering fees, \$10,818.80 for structural beams, \$186.00 for an upgrade of the shower head and mixer and \$1,700.00 for demolition of the front garden beds;
- (f) Unquantified damages for physical inconvenience, distress, loss of enjoyment and loss of amenity;
- (g) Damages, being interest payable by the applicant to her bank on the damages claim amount of \$254,757.72.

141 The disputed variations are discussed above. As to the other items claimed, the evidence is as follows.

### **Cost of completion**

142 On 29 March 2018 the Owner entered into a contract with Lombardi Homes to complete the work for a price of \$247,800.00. The scope of works described in this contract is that required by the existing building permit and, subject to what follows, it is identical to what was required to be done by the Builder.

143 Mr Lombardi said that the work commenced in April 2018 and was completed around 8 December 2018.

144 Invoices for payments made by the Owner to Lombardi Homes totalling \$247,800.00 have been tendered. I am satisfied that the amount paid by the Owner has been proven in that sum.

145 It was suggested that the scope of works carried out by Lombardi Homes was not equivalent to that which was required to be carried out by the Builder. Insofar as that suggestion is justified, some adjustment to the figure paid to Lombardi Homes will have to be made. In that regard, it is suggested that there was some betterment to the Owner with respect to the following items:

(a) Installation of fencing for the swimming pool Adjustment nil

This is not in the contract to Lombardi Homes. I am satisfied that the Owner paid the cost of the pool fencing herself.

(b) Tiling of entrance way Adjustment \$1,000.00

The scope of works required the entrance way to be made of merbau. Instead, the Builder prepared for tiling. Mr Lombardi's evidence was that the substrate tiling laid by the Builder was defective and needed to be rectified. He said that the difference in cost between merbau decking and tiling would be approximately \$1,000.00.

(c) Change of lighting Adjustment \$1,000.00

Although the Owner contends that the Builder was required to supply LED lighting, the contract documents provided for the installation of bayonet lighting only. Lombardi Homes installed LED lighting and consequently, this was an upgrade. According to the evidence of Mr Lombardi, to install 60 LED lights would cost approximately \$1,200.00, whereas to install 20 bayonet fittings would cost approximately \$200. The adjustment should therefore be \$1,000.00.

(d) The sink in the bar Adjustment nil

It was suggested that Lombardi Homes installed a more expensive sink but I am satisfied that the sink that was installed was the one on site that had been provided by the Builder.

(e) Straightening the bedroom wall Adjustment nil

Lombardi Homes charged \$2,430.00 to level a wall in Bedroom 3. The Builder claimed that this was not within its scope of works and that consequently, it is a betterment. I do not accept that claim. I am satisfied that it was the obligation of the Builder to level the walls.

(f) Pool retaining wall render Adjustment nil

I am satisfied that the Owner paid for the pool retaining wall to be rendered herself.

(g) Agricultural drains Adjustment nil

The Builder claimed that Lombardi Homes installed agricultural drains at additional cost. According to Mr Lombardi's evidence, the only work done by Lombardi Homes on the agricultural drains was to rectify those drains that were incorrectly installed by the Builder. This issue is dealt with under defects.



- (h) Upgrade to the shed Adjustment nil  
It was suggested that a shed behind the garage had been upgraded as part of Lombardi Homes' works but Mr Lombardi said that no work was done on that shed.
- (i) Frameless shower screen Adjustment \$800.00  
The Builder's scope of works required a semi-frameless shower whereas Lombardi Homes installed a frameless shower at additional cost. Mr Lombardi said that the additional cost was \$800.00 and that sum must be allowed.
- (j) Front wall and metre box Adjustment \$400.00  
Lombardi Homes constructed a metre box for the house which was not in the Builder's scope of works. Mr Lombardi said that the additional cost of the meter box was \$400.00.
- (k) Cat 5 cabling Adjustment \$300.00  
The electrical plan prepared by Mr Mitchell included Cat 5 cabling throughout the house. This document was prepared after the contract was signed and it does not appear that this was part of the scope of works. There is no evidence as to the additional cost of this. An electrician is a licensed trade and if I were to allow half a day (four hours) at the rate normally allowed in these cases, that would amount to \$300.00.
- (l) Plaster ceiling and walls Adjustment nil  
I do not find that there was any betterment involved in the plastering work that was done. It was the duty of the Builder to carry out the work initially in a proper and workmanlike manner. This aspect of the case is dealt with above.
- (m) Balustrading and retaining wall Adjustment \$3,000.00  
In order to obtain an occupancy permit, the Owner had to bring the balustrading on the front balcony into compliance. The verandah was demolished by the Builder as a variation for an agreed cost of \$1,698.00. When it was rebuilt, the balustrading had to be made compliant with the current building regulations. This was done by Lombardi Homes at an additional cost of \$3,000.00. The Builder submits that, since rebuilding the balustrading was not within the contractual scope of works, this additional cost should not be claimed against it. I think that is right. Had the Builder completed the work it would have been entitled to a variation for this additional cost.
- (n) Rendering of chimney Adjustment nil  
The Builder submitted that the rendering of the chimney by Lombardi Homes was additional work but the contract required the Builder to render exterior of the house.

The other items referred to, being blinds and curtains, the asphalt driveway, the heating and air conditioning, the landscaping and the garage works were carried out by the Owner not by Lombardi Homes.

- 146 Deducting the \$6,500.00 adjustments from the completion cost charged by Lombardi Homes, the allowance to the Owner is reduced to \$241,300.00.

### **Separate work**

- 147 Mr Lombardi said that, as well as the work comprised in the original scope of works, his company carried out the following additional works that amounted to upgrades from what was originally specified:

(a) External tiling on the front veranda	\$12,134.00
(b) Timber flooring upgrade	\$ 4,000.00
(c) Carpet upgrade	\$ 4,919.00
(d) Internal tiling upgrade	\$ 2,500.00
(e) Wardrobe upgrades	\$ 6,125.00
(f) Appliances upgrade	<u>\$ 6,335.00</u>
	\$40,175.45
GST	\$ 4,017.55
Total	<u>\$44,193.00</u>

- 148 These items are not included in the claim against the Builder.

### **Rectification of defects**

- 149 Mr Lombardi said that he carried out the following rectification work, totalling \$76,033.08, as detailed in his invoice of 8 December 2018. The various items are as follows:

(a) Replacement of floor to dining area	\$ 7,300.00
(b) Structural framing to roof	\$ 4,470.00
(c) Structural framing for the subfloor	\$ 6,885.00
(d) Removal and replacement tile underlay	\$ 2,210.00
(e) Rectification of floor in dining area at sliding door	\$ 2,762.00
(f) Screw down timber flooring and sand ready for finishes	\$ 1,685.00
(g) Remove and replace architraves, skirtings and doors	\$ 3,650.00
(h) Floor levelling to hallway and bedrooms	\$ 4,250.00
(i) Reinstall all windows and doors	\$ 2,960.00
(j) Level bedroom three wall	\$ 2,430.00
(k) Reinststate ducted heating vents	\$ 2,860.00
(l) Wall insulation	\$ 2,760.00
(m) Termite protection	\$ 1,450.00

(n) Financial rough in	\$ 4,280.00
(o) Plumbing rough in	\$ 3,600.00
(p) Prepare external walls for cladding	\$ 2,410.00
(q) Remove and replace cabinetry to facilitate works	\$ 2,379.29
(r) Rubbish removal from under house	\$ 920.00
(s) Floor levelling to bathroom to prepare floor finishes	\$ 1,250.00
(t) Floor levelling toilets to prepare for finishes	\$ 620.00
(u) Agricultural drains not completed, water under subfloor	\$ 3,400.00
(v) Remove a section of living room floor and reinstall	\$ 3,230.00
(w) Cabinetry	\$ 4,961.79
(x) Relocate and rough in hot water service	\$ 963.00
(y) Rectify the linings	\$ 1,422.00
(z) External expansion joints	\$ 925.00
Total	<u>\$76,033.08</u>

150 The builder contended, and it was put to Mr Lombardi in cross-examination, that this alleged rectification work was in fact work that fell within the scope of works under the Lombardi contract. Mr Lombardi denied that that was the case and said that his contract price did not include rectification of defects.

151 There was little contrary evidence from Mr Hummel concerning these alleged defects and I prefer Mr Lombardi's evidence concerning them. I find that the amounts claimed are established.

**Building surveyor's fees and insurance** \$7,880.95

152 Mr Mitchell gave evidence that, as a result of the breach, the Owner incurred building surveyor's fees and insurance premiums totalling \$7,880.95, details of which are set out in the following invoices, which were tendered:

(a) Contract Works insurance: \$4,895.00;

(b) Building surveyor's fees:

Date	Invoice No.	Amount	Details
20 March 2018	15588	\$550.00	Stop work order
29 March 2018	15668	\$550.00	Amendment fee
21 May 2018	15989	<u>\$440.00</u>	Extend permit
Total		\$1,540.00	

(c) Domestic building insurance \$1,445.95.

**Liquidated damages** \$16,714.30

- 153 Liquidated damages are claimed at the contract rate of \$250 per week for 72 weeks, from 29 October 2016 to the date of termination, being 14 March 2018, amounting to \$18,000.00. As to the first date, work commenced on 4 July 2016. The construction period specified in the contract is 119 days. Consequently, work ought to have been completed by 31 October 2016, not 27 October. With the additional 13 days to be allowed, the required completion date became 13 November 2016.
- 154 The period of liquidated damages to be allowed is therefore 468 days which, at \$250 per week, is \$16,714.30.

**Storage costs** \$1,214.30

- 155 Delay losses, comprising storage costs, are claimed from 29 October 2017, being the date upon which the Owner claimed the work ought to have been completed, until 31 August 2018, when she and her family moved into the House.
- 156 Since liquidated damages have been claimed for the period from 29 October 2017 to 14 March 2018, no further damages can be claimed for that period. From and including 15 March 2018 until 31 August 2018 is 170 days. The receipts produced prove storage costs of \$50.00 per week, so \$1,214.30 will be allowed for the further period.

**Damaged household items**

- 157 The applicant claims that personal items, including furniture, books and clothing which were stored under the house were damaged by water which, she claimed, was the fault of the Builder.
- 158 During construction, the Builder failed to provide temporary downpipes to the pops in any of the gutters, as a result of which water ponded next to the House and some was observed by the Owner and Mr Mitchell flowing under the House to the subfloor. The period during which this occurred was limited because the observation was made not long before the belongings were removed and found to be damaged by moisture and mould.
- 159 Although I accept that the items in question were damaged, the subfloor area in which they were placed was damp and poorly ventilated and was not a suitable place for the Owner and Mr Mitchell to store items that might be affected by damp.
- 160 It is not possible to attribute this loss to the Builder.

**Materials removed from site by the Builder** \$4,246.40

- 161 The Owner seeks the cost of replacement of fixed materials removed from site by the Builder, including electrical, cabinetry, dishwasher panel and hardware, site toilet and site power. The amount claimed under this head in the Points of Counterclaim is \$12,000.00.

162 In his witness statement, Mr Mitchell said that the cost of replacing the various items was \$4,246.40, being \$1,040.40 for bar doors and panels, \$2,643.00 for kitchen, bedroom and laundry doors and panels and \$563.00 drawer bodies for the kitchen cabinets and the powder room. He produced evidence of payment of the sum.

163 Ms McAuley submitted that the items had been removed to avoid them being damaged and that they could have been returned by the Builder and its cabinet maker if a request had been made. That is no answer to the claim. The Builder should have returned the items immediately following termination.

**Damages for loss of amenity**                      \$3,000.00

164 The Owner seeks unquantified damages for physical inconvenience, distress, loss of enjoyment and loss of amenity and asks me to fix an appropriate figure.

165 In general, damages for breach of contract are for financial loss (*Sunley v. Cunard White Star* [1939] 2 KB 791 at 799). However physical inconvenience and discomfort suffered by living in cramped and uncomfortable circumstances may be compensable where it is substantial (see for example *Bailey v. Bullock* [1950] 2 All ER 1167; *Watts v. Morrow* [1991] 1 WLR 1421).

166 Such damages have been awarded by the Tribunal in a number of cases. In *Anderson v. Wilkie* [2012] VCAT 432, the applicants were awarded \$5,000.00 damages for loss of amenity for having to live in a wet house for two and a half years. In *Harmonious Blend Building Corporation v. Ibrahim* [2014] VCAT 1084, the applicants were awarded \$6,000.00 compensation for physical inconvenience and mental distress.

167 In the present case, the Owner and her family had to live in a converted garage for almost 2 years instead of the three-month period in which the contract works ought to have been completed. Although the conditions were cramped and they were deprived of the enjoyment of their renovated home, the level of discomfort does not appear to be at the same level as the cases referred to. I think an appropriate award of damages would be \$3,000.00.

**Interest on the Owner's borrowings**                      \$5,894.10

168 The Owner seeks compensation for the interest that she had to pay to her bank on the amount of \$254,757.72 that she had to borrow in order to rectify and complete the work.

169 There is no provision in the contract entitling the Owner to interest of this nature. However, damages in the nature of interest can be awarded under s.53 of the Act, the relevant parts of which are as follows:

“53. Settlement of building disputes

(1) The Tribunal may make any order it considers fair to resolve a domestic building dispute.

- (2) Without limiting this power, the Tribunal may do one or more of the following –
- .....
- (b) order the payment of a sum of money -
- (ii) by way of damages (including exemplary damages and damages in the nature of interest);
- (3) In awarding damages in the nature of interest, the Tribunal may base the amount awarded on the interest rate fixed from time to time under section 2 of the Penalty Interest Rates Act 1983 (Vic) or on any lesser rate it thinks appropriate.”

170 I considered how this provision should be applied in *Quinlan v. Sinclair* [2006] VCAT 1063, where I said (at para 9 et seq.):

“9. There is nothing in the *Victorian Civil and Administrative Tribunal Act* 1958 that empowers this Tribunal to award interest or damages in the nature of interest. In domestic building disputes there is the power in s.53(2)(b)(ii) of the *Domestic Building Contracts Act* 1995 referred to and there is a similar power in s.108(2)(b)(ii) of the *Fair Trading Act* 1999 in regard to claims brought under that Act. In the present case I can only have recourse to the former section and that allows the award of damages in the nature of interest.

10. In the Supreme Court there is a statutory entitlement to interest “unless good cause is shown to the contrary” (see *Supreme Court Act* 1986 s.58(1), s.59(2) and s.60(1)) and the sum awarded becomes part of the damages awarded. It is an additional head of damages (see *Williams v Volta* [1982] V.R.739 at p.746). In domestic building disputes the Tribunal “may” award damages in the nature of interest (s.53(1) & (2)). There is no requirement for the unsuccessful party to show “good cause” why they should not be awarded but the use of the permissive “may” would suggest that they will not necessarily be awarded in all cases. There is no guidance in the Act as to the circumstances in which such damages should be awarded, apart from s.53(1) which indicates that it must be “fair” to do so.

11. It cannot be “fair” to make any order that is not in accordance with the evidence and established legal principles. The Tribunal cannot make an award of damages in the nature of interest simply because the section confers the power. Before awarding damages in the nature of interest the Tribunal should satisfy itself that it is appropriate as a matter of law to do so in order to compensate the other party, wholly or partly, for loss and damage suffered as a result of the offending party’s breach of the contract. Damages in the nature of interest are damages suffered because the successful party has been deprived of the use of the money but whether an award of such damages is “fair” must be determined in each case.”

(See also *Glenrich Builders Proprietary Limited v. Modonesi* [2013] VCAT 543 to a similar effect).

- 171 What is sought by the Owner in this case is compensation for the loss that she has sustained by reason of having to borrow additional money to make good the Builder's breach of contract. If there had been no breach, she would not have needed to borrow this money and pay that interest. That is a loss she has suffered by reason of a breach of contract. As the innocent party, she is, so far as money can do it, to be placed in the same situation, she would have been in with respect to damages, as if the contract had been performed. In order to do that, she should be compensated for the interest that she would not otherwise have paid. It is therefore fair to make an order for payment of interest under s.53.
- 172 The claim will therefore be allowed from the date of termination, being 14 March 2018. The rate of interest paid by the Owner, up to and including 26 September 2018, was 3.85% per annum thereafter, it is 4.01% per annum. The calculation should be on the adjusted cost of rectification and completion paid to Lombardi Homes that I have found to be payable by the Builder, less the balance of the contract price, which is \$207,417.14.
- 173 I calculate the interest to be \$5,894.10, as follows:
- 15 March to 26 September 2018 (197 days) @ 3.85% = \$4,310.00
- 27 September 2018 to 3 December 2019 (69 days) @ 4.01% = \$1,584.10.

### Summary

- 174 For the foregoing reasons, the damages to be awarded to the Owner are assessed at \$246,367.19, as follows:

Adjusted cost of completion		\$241,300.00
Rectification of defects		\$ 76,033.08
Building surveyor's fees and insurance		\$ 7,880.95
Liquidated damages		\$ 16,714.30
Delay costs		\$ 1,214.30
Materials removed from site by Builder		\$ 4,246.40
Damages for loss of amenity		\$ 3,000.00
Interest		<u>\$ 5,894.10</u>
		\$356,283.13
Contract price	\$326,170.00	
Agreed variations	\$ 6,881.75	
Allowed additional variations	<u>\$ 32,907.63</u>	
Adjusted contract price	\$365,959.38	
<u>less Total paid by the Owner</u>	<u>\$256,042.44</u>	
Balance of contract price	<u>\$109,915.94</u>	<u>\$109,915.94</u>
Loss suffered		<u>\$246,367.19</u>

**Orders to be made**

- 175 As the Builder's entitlements under the contract are taken up in the counterclaim, the claim will be dismissed. There will be an order on the counterclaim that the Builder pay to the Owner \$246,367.19.
- 176 Costs will be reserved for further argument.
- 177 Direct that the proceeding between the Respondent and the Interested Party be listed for directions before Senior Member Walker at a date and time to be fixed by the Principal Registrar.

R Walker  
**Senior Member**