VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D790/2004

DOMESTIC BUILDING LIST

CATCHWORDS

Australian Home Warranty Pty Ltd Standard form terms of contract, "Frame Stage", "variation by Builder" repudiation, suspension of building work, validity, data for re-commencement, post contract agreement, independence of "mediator", duress, variations – application of margins, GST on provisional sums, liquidated damages where no sum entered and struck through.

[2005] VCAT 2443

APPLICANTS	Stephen Kemp and Margaret Anne Kemp trading as S Kemp Builders
RESPONDENTS	Tony Pinzone, Anika Van Hulsen
WHERE HELD	Melbourne
BEFORE	Senior Member M Lothian
HEARING TYPE	Hearing
DATE OF HEARING	10 – 14, 17 October 2005
DATE OF ORDER	15 November 2005

ORDER

1. The First Applicant's name is amended to Mr Stephen Kemp.

2. The Applicants must provide the electrical cover plates to the Respondents forthwith if they have not already done so.

3. The Applicants must provide to the Respondents forthwith the Certificates of Completion for plumbing and electricity.

4. The amount that the Applicants are entitled to is set off against the greater amount to which the Respondents are entitled. The application is therefore dismissed.

5. On the Counter-claim the Applicants must pay the Respondents $16,698.97 forthwith.

6 There is no order as to costs.

SENIOR MEMBER, M. LOTHIAN

APPEARANCES:

Applicants	In person
Respondents	In person

REASONS

1. This is an application by S and M A Kemp ("the Builders") for $28,221.51 plus interest. There is a counter-claim by Mr Pinzone and Ms Van Hulsen ("the Owners") for $20,823.00 plus interest.

2. A major domestic building contract dated 1 June 2005 ("the Contract") was entered into by the parties for renovations to the Owners' home at 43 Clarke Avenue, Wattle Glen. The Contract consisted of the Australian Home Warranty Pty Ltd Standard form, a letter from the Builders to the Owners of 28 May 2003 ("the Addendum") and seven sheets of drawings by Mr Wes Mathews, Architect. The contract sum was $115,000.00.

3. The Builders have claimed a number of variations and allowed credit variations to the Owners. Only one variation of addition was paid, and the value of most variations is in dispute.

4. The Builders say that $109,024.00 has been paid by the Owners being:

4 June 2003	Deposit $5,750.00
10 June 2003	Start $23,000.00
18 June 2003	TXU bill $803.00
14 July 2003	Base $23,000.00
24 July 2003	"Concrete/Term" $1,068.30
4 August 2003	Frame $30,521.61
8 August 2003	Frame $3,980.57
18 August 2003	"Elec" $3,650.61
25 November 2003	Lockup $17,250.00

5. In addition, the Owners proved that they had paid cash to Mr Kemp for labour to dig a trench of $391.71 and crushed rock of $200.31 which have been included in the Builders' claim for the electrical provisional sum. In the calculations regarding amounts due and paid under the contract they are omitted both from amounts paid and from amounts due. No further builders' margin and GST are payable as they have already been paid.

6. This contractual relationship has been difficult for the Builders and the Owners, from almost as soon as the Contract was signed. There have been significant misunderstandings between them, exacerbated by a failure by the Builders to abide by the Contract and the *Domestic Building Contracts* Act 1995 ("DBC Act") and significant variations to the works sought by the Owners. An important question between them is whether the parties contemplated that the Owners would continue to occupy the house during the works.

OCCUPATION OF THE HOUSE BY THE OWNERS

7. The Owners say it was always contemplated that they would live in the house while works were underway. The Builders say this was not the case and it involved them in significant extra work.

8. With the benefit of hindsight, the decision of the Owners to stay in the house was probably disadvantageous to themselves and to the Builders. However that is not relevant to the dispute. The relevant question is what was agreed before the Contract was signed.

9. Mr Kemp said that there was no agreement that the Owners would stay in the house before the Contract was signed, and that he suggested, when the possibility was raised, that they could live in a caravan on site.

10. Mrs Kemp gave evidence that the parties went through the Contract, line by line, it was signed and then the Owners said they were going to live in the house and also produced a set of drawings with many changes and notations on it. Mrs Kemp also said that the Builders told the Owners there would be an extra cost of construction for them to stay in the house which would have to be born by the Owners. She said that the Owners were told the cost would be assessed over time. Mrs Kemp also said "We brought up the

caravan again". When questioned by the Tribunal about the use of the word "again" Mrs Kemp said "It could have been the first time".

11. Mr Pinzone said that each quoting builder was told they would stay in the house and that it was mentioned to Mr Kemp when he came to the site to quote in May 2003. According to Mr Pinzone, Mr Kemp said he preferred the Owners to move out, but that he could cope. Mr. Pinzone said he asked Mrs Kemp at signing if their occupation of the site affected the contract. He reported that she looked surprised, but said no and added that there could be a short period when it might be necessary for the Owners to move out. Neither party put anything in writing about this at the time when the contract was signed. However the Owners' version of events is supported by a letter to them from Mrs Kemp on behalf of the Builders of 30 July 2003 which commenced:

> "As you are aware we are now well and truly underway with your major renovations. During initial discussions back in *May*[1] and June 2003 with yourselves, you indicated to Kemp Builders you would be taking holiday leave from your employment and vacating Clarke Avenue at an appropriate time assessed by the Builder".

12. This statement is consistent with the Builders agreeing, before the contract was signed, that the Owners would be in residence for most of the construction period. The consequence is that the Builders are not entitled to additional sums for difficulties experienced by the Builders arising from the Owners' occupation of the house.

SUSPENSION OF 6 AUGUST 2003

13. The Builders have purported to suspend the contract twice[2]. The first time was on 6 August 2003. Mrs Kemp said that there was a difficult

[1] Emphasis added
[2] The second alleged suspension was notified to the Owners on 12 January 2004, by which time the contract was coming to an end for the breaches and repudiation by the Builders.

relationship between the parties before the suspension. She said that there were difficulties getting instructions about windows and there were many variations, some given directly to sub-contractors of the Builders, on site. However that was not the basis of the first suspension notice. The relevant parts of the notice are:

> "You are hereby notified that all works at 43 Clarke Avenue, Wattle Glen are suspended as of today's date.
>
> The cause for suspension of works is due to your withholding of monies and non payment of fame stage progress payment in full to Kemp Builders.
>
> You will be notified of works recommencement date following receipt of Frame Stage Payment in full plus interest on late payment as per Contract dated 1st June 2003".

14. There are issues about whether the suspension was valid initially, and whether the Builders were obliged to recommence work earlier than they did.

- **Validity of suspension**

15. Instead of using the payment regime prescribed by Section 40 of the DBC Act the parties chose to set their own stage percentages for payment. In accordance with the DBC Act, the deposit was 5%, but then the payments were:

Start date	20%	$23,000.00
Base	20%	$23,000.00
Frame – extension	15%	$17,250.00
Frame – internal	15%	$17,250.00
Lockup	15%	$17,250.00
Fixing	5%	$5,750.00
Completion	5%	$5,750.00

16. This payment regime is heavily front-loaded, entitling the builders to 75% of the contract price by the end of the frame stage. It is acknowledged that certain works, such as painting and the provision of fittings, were the responsibility of the Owners, but even so, it is generous to the Builders. It is even generous when compared to the provisions under section 40 of the DBC Act where a builder is building to lock-up stage only and the Builders were obliged to do significantly more in this contract. In that case the builder will only have received 50% of the contract price by the end of frame stage.

17. That the percentages were front-loaded is not taken into account because it was not raised by the Owners. It is raised merely to provide context to the question of when payment (or payments) for the frame stage was due.

18. The table filled in for percentage payments in the Australian Home Warranty Pty Ltd standard form has four columns. The first is "Name of Stage", which has not been filled in at all. The second is "If this stage is not the same as a stage defined in section 40(1) of the *Domestic Building Contracts Act* 1995". The table in the printed form is defective and appears to have led the Builders into error. In accordance with the *Domestic Building Contracts and Tribunal (General) Regulations 1996* it should also have said ",what does this Stage mean". It did not, so the only definition of Frame Stage, whether extension or internal, is that found in section 40 of the DBC Act. It is "… the stage when a home's frame is completed and approved by a building surveyor".

19. The Builders invoiced the Frame Stage Payments on 15 and 24 July 2003. The building surveyor did not approve frame stage until 28 July 2003. Under clause 17.1(c) of the Contract, the Owners were obliged to pay within seven business days:

"… from the latest of:

(i) the Builder being entitled to make a claim for a progress payment; and

(ii) the Builder making a claim for a progress payment after the Builder is entitled to make the claim".

20. Again, the drafting of this standard form leaves something to be desired. Sub paragraph (ii) appears to mean that a claim made before the date of entitlement to do so is of no effect, but then the inclusion of (i) is superfluous. This is accepted as the plain meaning, therefore the Builders' claims of 15 and 24 July 2003 were of no effect. Even if the claims became effective on 28 July, the Owners had seven business days to pay.

21. If the latter interpretation applies, the Owners had until close of business on 6 August 2003 to pay. The notice of suspension was sent by facsimile at 12.39 p.m. that day. The Builders were not entitled to send the notice, and to do so was a repudiation of the Contract.

22. "Repudiation" is where a party to a contract "by words or conduct evinces an intention to no longer be bound" - *Heyman v Darwins Ltd* [1942] AC 356 at 378. It is not every breach of a contract. It is either a major breach or a series of minor breaches that collectively evince an intention not to be bound.

23. Where the repudiation is wrongful, the other party can choose to accept the repudiation and rescind the contract. The effect is that the contract is ended from the date of rescission, but in the words of Lord Wright in *Heyman*, the contract "remains alive for the awarding of damages … for the breach which constitutes the repudiation."

24. "Acceptance" can occur by an express election to accept, such as where the innocent party sends a notice to the repudiator naming the repudiation and stating that it is accepted and the contract rescinded. It can also be accepted by conduct. In the words of the learned authors Dorter and Sharkey (*Building and Construction Contracts in Australia 1.780*) "However it is submitted that it is only going to be possible to conclude that there has been an acceptance where one has, at the very least, unequivocal conduct inconsistent with the subsistence of the contract."

25. If the innocent party does not elect to rescind, both parties remain bound by the contract and the innocent party has a potential entitlement to damages.

- **Date for recommencement**

26. Following receipt of the Frame claims for a total of $34,500.00, the Owners paid the Builders $30,521.61 on 4 August 2003. The balance of $3,978.39 was deducted for what Mr Pinzone described as "my calculation of credits owing to us for the window order and for two other variations".

27. The payment was accompanied by a letter from Mr Pinzone to Mrs Kemp of 1 August 2003. He added $3,650.61 for the revised quotation for electrical work then deducted credits for windows, which were ordered and paid for by the Owners instead of the Builder, the Builders' variation for bath and toilets and a rainwater tank provided by the Owners.

28. The Owners' behaviour was reasonable. Whether it was in strict accordance with the contract has not been necessary to determine, because even if they were not entitled to make the deductions, it does not cure the prematurity of the Builders' notice.

29. The Owners paid $3,980.57 on 8 August 2003 – two days after the notice. If the notice had been valid, the Builders would have been obliged to

recommence work in accordance with Clause 21.3 of the Contract within 30 business days of payment, or by 22 September 2003 at the latest. Again, had the Builders been entitled to suspend, a failure to recommence in accordance with the Contract would have been a repudiation of the contract at that time.

30. A particular point of contention between the parties was whether it was reasonable to have plans re-stamped by the local Council in September. The Builders' evidence is accepted that there were many changes to the plans and some were of such significance that re-stamping the plans could be necessary. Neither party proved that it either was or was not necessary, but it is noted that the plans were re-stamped, and that when in doubt it is appropriate that builders err on the side of caution.

POST CONTRACT AGREEMENT

31. Mrs Kemp said that before and during the first suspension, the relationship between the parties had deteriorated into a "paper war". She said Mr Pinzone suggested mediation with Building Advice and Conciliation Victoria ("BACV") but that it would be a number of weeks before they could mediate or conciliate the dispute, and that Mr Pinzone suggested they ask the warranty insurer to assist them.

32. The Owners allege that a post contract agreement was "forced on" them in late September 2003. They say that the agreement was "mediated" by "a representative of the Builder's insurance company". The Owners alleged that "at the time, Margaret Kemp worked for Reward Insurance, a broker for Australian Home Warranty who provided both the warranty insurance and the contract for our project. It was apparent at the meeting, conducted at her office, that she had previous contact with the Australian Home Warranty representative, Mr Corey Nugent".

33. It is accepted that there was a financial arrangement between Reward Insurance and Australian Home Warranty and that Mr Nugent was Operations Manager of the latter.

34. Mr Pinzone gave evidence that Mr Kemp suggested Mr Corey Nugent be asked to mediate. Mr Pinzone's evidence is preferred and it is noted that facsimiles sent by the Builders to the Owners were sent from Reward Insurance. Mr Pinzone also said that Mr Nugent "did not act as a mediator. He tried to answer my questions and largely rebutted them". Mrs Kemp gave evidence that the Reward facsimile was used because the Builders rented a back office from Reward and it is noted that the facsimile number for Kemp builders and Reward was the same. Whatever the relationship, the association gives rise to the appearance of a lack of the independence which is vital to a conventionally conducted mediation.

35. It is clear that a meeting of some description was conducted by Mr Corey Nugent on 11 August 2003 and that on 21 August 2003 he sent a letter to Mrs Kemp and to Mr Pinzone recording his view of the "consensus … reached".

36. Had the terms set out by Mr Nugent been entered into voluntarily, they could have been a sensible means of solving the numerous difficulties between the parties, albeit a solution that was more advantageous to the Builders than to the Owners. The evidence of the Owners is accepted that they did not agree to the terms set out by Mr Nugent, and that they were forced to negotiate because of the Builders' repudiatory suspension; any apparent agreement was obtained by duress. There was no agreement and there was no valuable consideration to support the agreement. In these circumstances it is found that the terms described by Mr Nugent do not bind the Owners.

37. Further, the letter of 26 September 2003 from the Builders to the Owners, of which the "acceptance form" was signed on 28 September 2003 by the Owners, does not reflect well on either party. The last line of this letter, above Mr Kemp's signature, is:

> "We ask now that you sign the acceptance form below so as we may attend to resumption of works."

38. It was quite clear that the Builders would not recommence work until the acceptance form was signed. The letter was not simply a restatement of Mr Nugent's letter, but added other conditions. It was, as submitted by the Owners, a repudiation of the alleged agreement described by Mr Nugent.

39. Mr Pinzone signed the letter, but wrote above his signature "Also, see attached". The Owners' evidence is accepted that the "attached" is the letter from Mr Pinzone to Mrs Kemp of 10 September 2003 which commences:

> "Following discussion with Bruno Panozzo of BACV, I write to notify you that I accept under protest the conditions you have stipulated to resume work".

40. Had the letter presented for signature not been based upon multiple repudiations by the Builders, it would have been necessary to consider the effect of this signature under protest.

41. Mr Pinzone said that he signed under protest on advice from an officer of BACV, but the responsibility for the decision remained his own.

42. It is concluded that neither the letter of Mr Nugent of 21 August 2003, nor the letter of 26 September 2003 amended the contractual relationship of the parties.

VARIATIONS

43. There is a disagreement between the builders and owners about the application of margins to prices for variations. Unlike some large commercial building contracts, there is no formula for calculating variations. Nevertheless, the Contract does require all variations to be in writing and for all variations requested by the Builders, or that would add more than 2% of the contract price to the contract sum (any variation for more than $2,300.00) the Builders must also have given the Owners a notice stating the cost of variation. It is to be expected that a variation includes allowances for overheads, profit and GST whether it is a variation of addition or deduction.

44. The Owners say the Builders have claimed 19 variations and have given a further four credit variations. Only one has been paid, and the value of most are in dispute. The Owners say only six are for work requested by the Owners and allege many are for work covered by the contract, or are for rectification of the Builders' defects. In particular they say that the variations have not been authorised in writing. Variations which are not in writing were discussed by the Tribunal in *Ryan v Lowe* [2005] VCAT 2031 where it was said:

> "Contrary to section 12 of the contract and to sections 37 and 38 of the *Domestic Building Contracts Act* 1995 ("DBC Act"), none of the variations were in writing, although some were discussed. Under both sections, the Builder is not entitled to recover any money in respect of a variation which is not in writing or compliant with s38(2) of the DBC Act unless:
>
> "(3) the Tribunal is satisfied-
>
> (i) that there are exceptional circumstances or that the builder would suffer a significant or exceptional hardship ...; and
>
> (ii) that it would not be unfair to the building owner for the builder to recover the money."
>
> In *Pratley v Racine* [2004] VCAT 203, Senior Member R Young considered the effect of sub-section 3. He found that the onus is on the Builder to establish the exculpatory grounds of sub-section 3. As in Prately, no evidence was produced by

the Builder to prove that there were exceptional circumstances. The questions remaining are whether the builder would suffer "significant hardship" and whether the result would be fair to the Owners. In the interests of consistency, I find in accordance with the decision of Senior Member Young that any amount more than $200.00 is "significant". I also follow his reasoning that the Builder is entitled to the reasonable cost of each claimed variation which the Builder proves was discussed with, and approved by the Owners.

Failing to obtain written confirmation of variations is a very serious failing of some builders, and simply not getting around to completing the paperwork is not a good enough reason"

45. The Builders assert that only two variations, those concerning windows and tiles, were "requested by the Builder", but this is a misinterpretation of the Contract and the DBC Act. A variation requested by the Builder is not restricted to one that suits the builder's convenience; it is any variation that is identified as necessary or desirable by the builder.

46. The unpaid variations are:

Variation 1. Receipt of numerous revised plans, etc.

47. The Builders have charged $1,468.90 for this item. As unfortunate as it may be to receive a series of drawings, it is not, of itself, a change to the physical structure of the works and is not a variation and is not allowed as such. The administrative cost of dealing with variations is dealt with as part of the specific variation, and has been claimed by the Builders for each item. No specific sum is allowed in this instance.

Variation 2. Extra excavation, concrete and termite spray.

48. The Builders have charged $1,068.30 for this item, and it was paid by the Owners on 24 July 2003. It is regrettable that the price of the variation was not discussed before the work was undertaken, but in circumstances where the Owners made a request for the work to be done and have paid for the variation, that amount is added to the contract price in the absence of other circumstances. $1,068.30 is added to the Contract price for this item.

Variation 3. Replacement of existing rafters

49. The Builders claimed $1,046.93 for this item. The Owners' say this item was pointed out to them after the work was done. The Builders say that they assumed the roof beams would span the entire width of the building, but when they opened the ceiling, they discovered this not to be the case. Mr. Kemp said he pointed this problem out to Ms Van Hulsen and said: "We needed to do something about it right there and then". Mr Kemp said her response was "You have to do what you have to do".

50. Ms Van Hulsen's recollection was very similar. She said that there was never a discussion of extra money.

51. It is noted that I have been directed to no information in the contract documents which indicates that the rafters spanned the entire roof and the Builders did not qualify the Contract to state that they had made this assumption. Further, it has not been demonstrated that this is an assumption a builder in the position of the Builders would necessarily make. In these circumstances, the Builders bear the risk of making such an assumption. Ms Van Hulsen's response did not accede to a request for extra payment – there was no such request. There was no written notice regarding this variation and there is no allowance for it.

Variation 4. Remove exposed beams to ceiling

52. The Builders claimed $2,820.31 for this item. The Owners' evidence is accepted that had the beam been left in place it would have intruded under the raised section of the roof and that the wall which supported the south west end of the beam was removed during the renovations, so it followed that the beam had to be removed. This is an item of work which the

Builders always had to perform under the contract. The work is not a variation and there is no allowance for it.

Variation 5. Extra labour required to assist with installation of double glazed windows.

53. The Builders have claimed $470.05 for this item. The Owners say that they were not given a cost estimate before the work was undertaken. The Builders say installation of certain double glazed windows was much heavier and more difficult than installing single-glazed windows of the same size. This evidence is accepted. The Owners also say that an additional eight hours is excessive. Although the price was not agreed before the work was done, this is a variation which was requested by the Owners. It is found that an additional eight hours is reasonable. The Owners must allow the Builders $470.05 for this item.

Variation 6. Excessive Tarp Hire

54. The Builders have claimed $1,292.64. It is not a variation, but a time extension cost which the Builders' "variation notice" of 16 July 2003 claimed at $110.00 plus GST per week for tarpaulin hire due to delays the Builders allege were caused by the Owners. The Builders' claim is "August to October 11 weeks at $99.00. Even if the Owners were responsible for the time lost during suspension, which it has been found they were not, the Owners would still not be liable for this amount.

55. The Contract does not include a provision for time extension costs. Further, the Addendum to the contract of 28 May 2003 provides that "Tarp hire – to cover exposed roof during construction" is part of the contract price.

56. In the absence of a specific right to prolongation or delay costs, the Builders have no such entitlement. They cannot unilaterally alter the contract by giving the Owners a notice which purports to do so, and attempting to do so can amount to repudiation of the contract.

Variation 7. Insulation to existing residence

57. The Builders claimed $1,683.16 for this item. Sheet 2 of the contract set of plans show the note "fit R2 insulation batts into all existing walls that are being replastered". There was, without doubt, a variation requested by the Owners. The Owners say the variation refers to installing insulation in the existing ceilings only. The Builders say that it also affects insulation installed in existing walls and referred to the Addendum which lists as an inclusion "Insulation to extension". They said that the failure to mention insulation in the existing walls means that it was not part of the contract price.

58. If the Builders meant to change the obligation imposed in the drawings, they had to do so clearly. If the words in the Addendum were to have the effect the Builders sought, they would be weasel words – a less than scrupulous way of moving an obligation from the Builders to the Owners.

59. The Owners also say that the cost of installing the insulation is excessive. Mr Pinzone has calculated that the additional area was approximately 41 m^2 and the cost of materials is around 4 m^2, a total of $164.00. He was unable to provide an estimate for labour. Mr Kemp said the price was based on "accurate notes of times and costs" he kept in his site diary, but when produced, his site diary was entirely bereft of such entries. Mr Kemp's evidence was given with reckless disregard for accuracy. Mr Pinzone's evidence is accepted and the sum is doubled to take labour into account. The Owners must allow the Builders $328.00 for this item.

Variation 8. Redesign of eaves to south west wall

60. The Builders have claimed $470.05 for this item. The Owners claim that this variation was necessitated by a mistake made by the Builders. They say the unfinished eaves were 1120mm wide rather than 900mm. They agreed to reduction of the eaves to 600 mm and wrote to Mrs Kemp on 10 October 2003 to approve the variation. The letter concludes: "As agreed, no extra costs will be incurred for this charge". The Builders say that the variation was necessitated by a design error of the Owners' architect. Mrs Kemp said that she was not sure that she received this letter.

61. Mr Pinzone gave evidence that the eaves were built wider than designed and that the Owners sent the Builders the letter of 10 October 2003.

62. On the balance of probabilities, Mr Pinzone's evidence is accepted. Even if it were not, the parties agreed that the variation was suggested by the Builders, it was not in writing and an amount for the variation was not agreed. The Builders are not entitled to any amount for this variation.

Variation 9. Repair fascia and paint

63. The Builders claim $470.05 for this item. The fascia is part of the new building and according to the owners, was attached to the south west eave in July then "left exposed" until the end of the suspension in October. The Owners were responsible for painting, and when the Builders recommenced work in October they notified the Owners that the eaves should be painted as soon as possible. The Builders' evidence is accepted that they provided new fascia and left it in a rack in the car-port for the Owners to paint, however due to miscommunication, this was not done. The Builders then offered to have their labourer do it. The Owners say that the sums for painting and for repairs are too high.

64. Mr Pinzone said he estimated that the time to paint 6 meters of eaves would be half an hour. The Builders have based the cost of the variation on eight hours work. $100.00 is allowed, to represent approximately 2 hours work.

Variation 10. Move sound study wall, laundry, bookshelf

65. The Builders have claimed $940.10 for this item. The Owners say that work was done by the Builders to correct their own error which resulted in the wall being in the wrong position. The Owners' evidence is accepted. No amount is allowed for this item.

Variation 11. Supply of doors due to existing being unsuitable.

66. The Builders claim $662.93 for this item. The Builders' claim is based on the words in the Addendum: "Doors - reuse existing including door furniture". Their argument is that if any doors are unsuitable for re-use, they must be provided by the Owners.

67. If the aim of the Builders was to place the obligation for supply of doors onto the Owners, the expression of the obligation needed to be much clearer. Rather, this item responds to clause 5.1 (a) (ii) of the contract:

> "all materials to be supplied by the builder for use in the Builders' Work will be good and suitable for the purpose for which they are used and that, *unless otherwise stated in this Contract, those materials will be new*[3]"

68. The natural meaning of the addendum is that the Owners were not obliged to provide any doors, unless they had opted to vary the contract to change the doors shown on the Contract. However the understanding of the parties, particularly the Owners, of this provision is somewhat different.

[3] Emphasis added

69. The Owners say that the need for new doors was brought to their attention at the last minute – on the day they needed to be ordered. In response they sent the letter of 24 November 2003 agreeing to the variation and agreeing to pay $333.50 for this item. A letter of 4 December 2003 from the Owners resiled from that position to some degree, on the basis that the Owners said they had been misled. The response was a letter and invoice from the Builders of 30 December 2003, this time for $501.60, because the cavity slider unit for the ensuite had also been included.

70. The Owners note that the Builders claimed $501.60, then $575.77 for the same item and said: "However we calculate that we owe only $285.70 because the Builder had overlooked when quoting that most existing doors had widths which made them inappropriate for re-use". Mr Kemp confirmed that the doors required for the design were to be 2040 mm high, but most of the existing doors were only 1900 mm high. It was the Builders' obligation to check whether the doors were suitable for re-use. The Builders are allowed $285.70 because the Owners' understanding is that this amount is owed by them.

Variation 12. Entry area – change opening from bi-fold

71. The Builders claim $729.22 for this item and related to the Owners' request that a door opening be moved approximately one meter after the frame had been constructed. The Builders base their claim on 12 hours labour. The Owners' response is confusing but suggests that the amount claimed is 40% more than was claimed "in their November 15 invoice". This invoice was not provided by either party, however it is impossible to believe that the work could take 12 person hours, or anything approaching that time. One

quarter of the claim is allowed. The Owners must allow the Builders $142.00 for this item

Variation 13. Rebuild cavity slider

72. The Builders claim $874.81 for this item. The Owners say the item did not change, but at first the sliding door did not fit the space for which it was designed. The Owners' evidence is accepted. There is no allowance for this item.

Variation 14. Labour, cavity slider

73. The Builders claim $203.05 for this item. The Owners agree that they asked for a hinged door to be replaced by a cavity sliding door, but suggest that this should have involved less labour rather than more. Mr Kemp's evidence is accepted. The Owners must allow the Builders $203.05 for this item.

Variation 15. Labour to alter bathroom door to accommodate towel rail

74. The Builders claim $176.26 for this item. The Owners admit they requested the variation but they regard $176.26 as excessive. The Builders' evidence is accepted that the amount for moving the opening for the bathroom door, which had already been framed, is reasonable. The Owners must allow the Builders $176.26 for this item.

Variation 16. Extra labour to kitchen due to incorrect window and door position

75. The Builders claim $470.05 for this item. The Owners say this was not discussed with them before the work was done and they don't know what was "incorrect". The Owners' evidence is accepted. There is no allowance for this item.

Variation 17. Repair existing sub-standard brick work

76. The Builders claim $1,084.66 for this item. The Owners believe the repair was of a small area of wall – approximately 70 bricks – and that the instability was caused by the Builders' work. They say it is a risk the Builders should bear. They also say it is too expensive. Although the Builders' evidence is accepted that there was some friable mortar on the north-east side of the house, the Owners' evidence is accepted that only seventy or eighty bricks were involved. Further, the failure of the Builders to fail to obtain a variation in writing for an item they have requested means they are not entitled to anything for this item.

Variation 18. Boarding up of residence due to owners not vacating

77. The Builders claim $1,468.90 for this item. The Builders' claim is invalid in circumstances where it was found that they agreed the Owners could remain in the house during most of the work.

Variation 19. Moving and covering of household fixtures, fittings and furniture

78. The Builders claimed $470.05 for this item. The Owners say the Builders only had to move items on two occasions and it would not have taken very long. Further, the Owners say they had asked the Builders to inform them when contents needed to be moved, which the Builders failed to do.

79. Schedule item 10.1 provides, under "matters which the Building Owner must attend to before the Builder is required to start," "Relocate furniture, fixtures and fittings".

80. Removal or relocation of furniture was clearly something which was an issue for the Builders, and the mention of "removal *or relocation*"[4] is

[4] emphasis added

consistent with the view that the Owners could remain in the house, on the condition that they gave the Builders clear access to areas to be worked on. This is consistent with the Builders' letter of 30 July 2003 which requested that the Owners restrict their belongings to the southern bedrooms. This is a variation sought by the Builder and it is not in writing. There is no allowance for it.

Credit Variations

81. The Owners also say that there are a number of credit variations which have been undervalued by the Builders. They are:

- **Windows**

82. The history of the window variation is a long and tortured one. It came to a head on 15 July 2003 when the Builders wrote to the Owners about a number of matters, but primarily about amendments to the window schedule to provide that some of the windows would be double-glazed. The Owners were asked to sign a variation notice which concluded:

> "We agree to pay total extra costs in full to Kemp Builders regarding window variation. We enclose a cheque for $5,600.00 being estimated cost of variation to windows as requested by ourselves".

83. The Owners signed the notice and dated it 17 July 2003, but crossed out the last sentence.

84. On 18 July 2003 the Builders sent the Owners another variation notice which commenced:

> "Please be advised, due to delays in your finalisation of window schedule and non acceptance of quotation, Kemp Builders will credit the owners $5,442.00 being allowance made in Contract date 1 June 2003 (inclusive of builders' margin for variation) for supply and delivery of windows as per original plan. This allowance

is based on quotation received from Aspect Windows on 16 May 2003 for supply and delivery of windows to the above contract address".

85. Mr Pinzone initialled the variation notice and wrote "(received)" beside his initials.

86. Mr Pinzone gave evidence, which is accepted that, that he asked Mr Kemp why the quotation of 15 July was so high – it almost doubled the window quote. He reported that Mr Kemp said he had missed two windows in the initial quote. This proved to be the case when the drawing showing windows (drawing 3 of 7; the elevations) proved that one toilet window and the large window, second from the right on the south west elevation, had been omitted from the Aspect Windows quotation. Mr. Pinzone said Mr Kemp told him the credit would be "about $7,000.00", but Mr Kemp said in evidence "I can't quote those figures on site when I've got a nail bag on". The Aspect Windows quote was $6,556.00.

87. It is found that the reasonable amount for the variation is the cost to the Builders of the Aspect Windows quotation, plus the cost of the two windows which were left out of that quotation.

88. The Builders are not entitled to deduct a margin from the amount as "cost of variation". The Builders purported to deduct $1,114.52.

89. It is recognised that there is a cost to builders of dealing with variations, whether they are additions or deletions. However when a builder establishes a price for a contract, it includes amounts for preliminaries, profit and G.S.T. Assuming the Builders did not load their variations, it is therefore valid to assume that they attributed $7,670.52 to the cost of the windows, being $6,556.00 plus $1,114.52 for the 17% margin. To allow the Builders to deduct the $1,114.52 again, as well as to retain the sum from the

original contract price, is to allow the Builders to double-dip; to be paid twice for the same item.

90. The same pricing regime is adopted for provisional sums and prime cost items in the contract. Under clause 12.2 the builder is entitled to the difference between the allowance plus a margin when the cost of the item is greater than the allowance under clause 12.3. When the cost is less, the owner is entitled to the difference only – the builder keeps the margin on the difference and gets no additional deduction.

91. The best way to avoid such debates is for owners and builders to agree the amount of each variation before the variation is confirmed. It is noted in passing that the variation notice of 15 July 2003 breaches the contract and the DBC Act. The Builders were obliged to give the Owners a notice setting out "the cost of the variation", not the estimated cost.

92. It is found that the reasonable cost to the Builders of the two omitted windows is $660.00. The Builders must therefore allow a variation to the Owners of $7,156.00 for the windows.

- **Bath and Toilet Credit**

93. The Builders had allowed $482.97 to the Owners, but conceded $650.00 at the hearing.

- **Skylight credit**

94. The contract set of drawings showed that the Builders were obliged to provide two skylights, each of 750mm square – one in the northern passageway and one in the ensuite. Both were eventually eliminated. The first was taken out in early discussions about variations, shortly after the contract was signed. The second was deleted on 18 November 2003.

95. The Builders allowed the Owners $213.50 for one skylight. Mr Pinzone's evidence is accepted that 750mm square skylights cannot be obtained for that price, and that a reasonable sum for them is $600.00 each, which includes installation. Mrs Kemp said that the deletion of the first skylight was the only item discussed before the contract was signed and was taken into account in the contract price. The deletion of the first skylight was one of many items listed on the set of drawings given to the Builders by the Owners on the day of signing. Mrs Kemp's evidence about what happened on the day the contract was signed changed to suit the best interests of the Builders and was not reliable. Her evidence that the second skylight was to be a "Robot Trading room light" which could be obtained and fitted for $213.50 is also rejected. The Builders must allow the Owners $1,200.00 for the skylights.

- **Tiling Credit**

96. On 30 December 2003 the Builders sent the Owners a variation notice as follows;

> "Kemp Builders, hereby give notice that Contract dated 1st June 2003 will be varied as follows.
>
> Due to all tiles not being provided by owner to the builder until mid December, 2003, thus obstructing the builder's progress, the builder cannot not proceed with tiling requirements. The Builder made all due efforts to have a tiler booked on four separate occasions but due to all tiles not being onsite the contractor had to be cancelled. Our contractors are not available now and hence the owner is required to provide their own contractor.
>
> Kemp Builders will provide owner with a credit for tiling labour. This credit will be made against final progress payment. The credit will be $2,430.00 less the cost of the obstruction caused by the owner".

97. It was not signed by the Owners.

98. Although called a variation, the document is an attempt to unilaterally change the Contract. It is a repudiation of the Contract and Mr Pinzone said: "it was one of the documents that led to ending the contract."

99. The Builders' evidence is accepted that the Owners repeatedly failed to have on site all tiles, although it is accepted that most tiles were available. The Owners' evidence is accepted that not all necessary work preparatory to tiling had been undertaken by the date the "variation" was given.

100. Given that the Builders did not undertake the tiling, the issue is how much should be allowed to the owners for this deduction. The Owners have calculated their tiling allowance on $96m^2$. The Builders said it could be as little as $90m^2$. The Owners' evidence is accepted that tiling they have undertaken is reasonable. The Owners gave evidence that the cost to them of undertaking tiling was $3,379.20 being $\$32.00/m^2$, but they also had a quote at $\$30.00/m^2$ plus GST which would have been $3,168.00.

101. In circumstances where the Builders refused to undertake the work, it is appropriate that the amount allowed to the Owners is the reasonable cost to them of undertaking the work. The Builders must allow the Owners $3,168.00 for this item.

PROVISIONAL SUM ADJUSTMENTS

102. The purpose of provisional sums is to enable an item to be included in the contract which cannot reasonably be costed by the date the Contract is signed. The DBC Act provides in part, regarding provisional sums:

> "20. Warranty concerning provisional sums
>
> (1) This section applies if a builder enters into a domestic building contract.
>
> (2) The builder warrants that any provisional sum included by the builder in the contract has been calculated with reasonable care and skill taking account of

all the information reasonably available at the date the contract is made, including the nature and location of the building site.

21. Requirements concerning prime cost item and provisional sum estimates

(1) A builder must not enter into a domestic building contract that contains an amount, or an estimated amount, for-

(a) a prime cost item that is less than the reasonable cost of supplying the item;

(b) a provisional sum that is less than the reasonable cost of carrying out the work to which the sum relates.

Penalty: 35 penalty units.

…

(3) In determining what is a reasonable cost, regard must be had to-

(a) the information that the builder had, or reasonably should have had, at the date the contract was made; and

(b) the nature and location of the building site"

- **Electrical**

103. There was a provisional sum of $6,000 for this item. The Builders' claim is as follows:

"Total costs incurred for electrical works	$9,806.50
Add extra variations requested by Owner	$1,500.00
	$11,306.50
Less provisional sum allowance	$6,000.00
	$5,306.50
Add Builders' Margin + GST	$992.31
	$6,298.81"

104. The variations appear on the account of Bettalectrix of 10 December 2003 and are:

"Install gpo laundry – washing machine, remove pendant over dining table – to be repaired, remove sensor over front door – wrong colour, s & l Telstra u/g

telephone cable from pit to house. Re-arrange wiring throughout after 3rd amendment plan arrived.

Rewire and replace balance of existing light and power throughout house due to condition of house at rough-in stage.

Replace wiring and lights to front and read bedrooms.

Add GPO for HWS

Add outside lights over back doors

Add gpo's front bedrooms".

105. Variations are marked as $1,500.00 and are not further broken down. The Owners' evidence is accepted that the item "remove pendant over dining table – to be repaired" was a problem caused by the electrician. $100.00 is deducted for this item. The Builders are entitled to GST and margin on $1,400.00 being $196.00, less GST charged by Bettalectrix on $1,500.00 ($136.00) – a nett sum of $60.00. The Builders have not provided a satisfactory explanation for the difference between the provisional sum of $6,000.00 and the amount charged, excepting variations, of $9,806.50.

106. Bettalectrix' invoice also says:

Initial quotation $9,806.50 GST Inc."

107. There is no apparent reason for this 50% increase over the provisional sum, and it is alarming to see builders treat their obligations under the DBC Act in such a cavalier fashion. It is noted in particular that the Contract was signed on 1 June 2003 and the detailed quotation was given by the electrician on 10 June 2003. The additional sum of $3,806.90 is therefore not allowed. It is also found that the provisional sum is inclusive of GST whereas GST is specifically excluded. It is noted that the energy company TXU was paid $803.00 by the Owners for the change from the overhead power supply to underground. This was supported by the invoices from TXU and Bettalectrix of 17 June 2003 and 27 June 2003 respectively,

exhibited by the Builders as A17. The Builders are entitled to a margin of 7% on this item, as GST has already been paid, an amount of $56.80.

108. The Owners' claim for an additional sum of $369.00 to complete the electrical work is dealt with under "Owners Claims" below. They also claimed the Builders' margin of 17% ($62.73), but this is not allowed as the sum they paid will contain a margin, so to allow it would be to deduct the margin twice.

109. The amount payable by the Owners for this provisional item is therefore:

Electrical work covered by the provisional sum	$6,000.00
Plus variations	$1,400.00
Plus nett Builders' margin and GST on variations	$60.00
Plus Builders' margin on TXU charge	$56.00
	$7,516.00

110. The Owners must therefore pay the Builders a further $1,516.00 for electrical work covered by the provisional sum.

- **Plumbing**

111. Again, the provisional sum for "plumbing – water and gas" was $6,000.00. The quoted price was $5,500.00 to Adroit Homes Pty Ltd, and the actual price included "Extra plaster due to grey water hookup" of $949.60, temporary water hookup of $367.43, temporary storm water of $172.14 and "labour to dig trenches for sewer and storm water (impervious soil)" of $940.10. Mrs Kemp said the invoice from Adroit was $6,500.00 and it made an allowance for incomplete work of $940.00.

112. The Owners have a statutory declaration from Mr Michael Batchelor who said that he sub-contracted to the Builders. The link between Mr Batchelor and Adroit Homes Pty Ltd is not clearly shown in the statutory declaration although there is mention of Adroit on the second page and it is accepted

that Adroit is Mr Batchelor's business. Mr Batchelor said he was paid $4,820.00 for "gas and water" and after the contract ended, was paid a further $980.00 by the Owners directly. The Owners also gave evidence that they paid this amount and it is accepted.

113. The claim for extra plaster is fanciful. It is accepted that extra work was done by the Builders for the grey water system, but the Owners' evidence is accepted that the hole cut in the ceiling was very early – before plastering work was undertaken – and related to other plumbing in addition to the grey water. It is work that had to be done regardless of whether the grey water system was installed. No sum is allowed for this item.

114. Temporary water and stormwater - Mr Batchelor said that he did not do any such work and neither has he claimed for it. He said this work was done by the Builders. Regardless of the legality of the Builders doing this work, it is found that it was necessary to enable the Owners to stay in the house. The Owners must allow the Builders a reasonable sum for this item, fixed at $250.00.

115. "Labour to dig trenches" is also a variation and it is noted that in his statutory declaration Mr Batchelor said that all trenches for plumbing were dug by Adroit and that none were dug by the Builders.

116. There is no love lost between the Builders and Mr Batchelor, and in circumstances where he did not attend for cross-examination, his evidence is given less weight than might otherwise have been the case. However it is hard to believe that to dig a trench of eight to ten metres would take sixteen hours, in addition to the time spent by Adroit, and it is unreasonable to charge a labourer out at $45.00 per hour, which is the same rate as is charged for Mr Kemp. The Owners must allow the Builders $100.00 for the trench work.

117. The amount payable by the Owners for this provisional item is thus:

Adroit Homes quoted charge	$5,800.00
Less completion costs	$980.00
	$4,820.00
Plus temporary water and storm water	$250.00
Plus trench digging	$100.00
	$5,170.00
Less provisional allowance	-$6,000.00
	-$830.00

118. The Builder must allow the Owners $430.00 for the plumbing provisional item.

PRIME COST ITEM

119. There was a prime cost sum of $350.00 for a water tank. The Owners supplied the tank and the Builders have deducted a margin, allowing the owners only $290.50. The Builders have no entitlement to the margin and must allow the Owners the full $350.00 credit, in accordance with Clause 12.3 of the Contract.

TERMINATION OF THE CONTRACT

120. On 4 January 2004 the Owners sent the Builders a document which they have numbered 76. Such a document is sometimes called a "show cause" notice, because it requires the other party to show cause, or reasons, why the contract should not be terminated. In accordance with Clause 22 of the Contract, it gave the Builders notice that the Owners intended to terminate the contract and ten days to rectify the alleged breaches.

121. The notice was as follows:

> "As per Clause 22 of the Contract, we hereby serve notice that we intend to terminate the Contract.
>
> The grounds upon which we rely to terminate the Contract are:
>
> (a) Clause 22.1 (a): Kemp Builders has demonstrated it is unavailable or unwilling to complete the work – we refer to your correspondence of December 30 insisting we engage a tiling contractor;
>
> (b) Clause 22. 1 (e): Kemp Builders has failed to proceed diligently with the work – we refer to your failure since November 27 to complete any work, in particular that necessary to be done before tiling can commence (as explained in our letters of December 19 and January 4); to earlier frequent unexplained absences from site since work commenced, in particular the 2-month delay in proceedings from August 7 after the stated reason for the contested suspension of works was resolved; and to failures to respond to repeated queries and requests.
>
> As required by Clause 22.2 (d), you have ten business days i.e. by Friday January 16, to resolve matters by:
>
> (a) completing all necessary work to allow tiling to commence; and
>
> (b) booking a tiler to complete all tiling as soon as possible after and consistent with your indications in December that your preferred tiler would be available some time in January; and
> (c) resuming and continuing work on all other outstanding tasks (as identified in our letter of January 4) to ensure they will be completed as quickly as possible after tiling is finished (one week seems reasonable); and
> (d) properly explaining what caused the variation for concrete and labour which we queried in letters of July 18, 24 and 31;and
> (e) providing figures for credits due to us for not supplying and installing skylights (our requests of August 1 and November 18), and for ordering our own showerbase (same letter of August 1) and bifold doors (your verbal advice in late November).
>
> If you do not attend to all of this within the specified time, we will end the Contract".

122. The document carries the notation "File copy. Original handed over to Steve Kemp 4/1/2003". It is noted that the document was dated 4 January 2004. It is found that the Builders' refusal to complete tiling was both a repudiation of the contract and a demonstration that the Builders were unwilling to complete the Builders' work. It is found that there had been an invalid suspension which would have been sufficient to ground a notice

under 22 (c) or possibly 22 (e), but that the suspension had ceased by the date of the notice.

123. Another ground was "failing to respond to repeated queries and requests". This was not a breach upon which the Owners could rely in the show cause notice, and because items (d) and (e) appear to relate to it, had there been no other basis for issuing the notice ending the contract, this would have amounted to repudiation of the Contract by the Owners.

124. The breach upon which the Owners could rely as both repudiatory and a ground for the show cause notice under clause 22 of the Contract, was the refusal to complete the tiling.

125. The Builders did not remedy the breach and the Owners served the second notice on 17 January 2004. The relevant parts of the notice were almost swamped by extraneous matter in a closely typed page and a half, but were that the Owners served notice that the contract was ended in accordance with clause 22, and that the Owners accepted the Builders' repudiation.

126. It is found that the contract was properly ended by the Owners both under the contract and by effective acceptance of the Builders' repudiation. As provided under clause 22.4 of the Contract, the Owners were entitled to complete the building works and were not obliged to pay anything more to the Builders until the works were completed. Clause 22.5 provides:

> "If the reasonable cost incurred by the Building Owner in completing the Work:
>
> (a) exceeds that which would have otherwise been due under the Contract the difference will be a debt payable by the Builder to the Building Owner; or
> (b) is less than the amount otherwise due under the Contract the difference will be a debt payable by the Building Owner to the Builder."

127. As termination by the Owners was properly done, the Builders have no entitlement to quantum meruit.

OWNERS' OTHER CLAIMS

"Compensation for various failings and actions of Builder"

128. The Owners claim $250.00 for each week of suspension of works and extension of time, a total of $5,500.00.

129. In item 16.4 of the Schedule, "Agreed damages for late completion" there is a dash through the section "$... per week".

130. There are two possible interpretations. One is that the parties agreed the Owners are entitled to zero dollars for liquidated damages, and not entitled to anything for general damages, see *Temloc Ltd v Errill Properties Ltd* [1987] CILL 376 (United Kingdom Court of Appeal) The other is that the parties agreed that liquidated damages do not apply, but the Owners are entitled to general damages (which must be proved in detail) for delay. Mr Pinzone admitted that his understand was that the Owners were not entitled to anything for delay under the contract and added that he might have overlooked this section. Mr and Mrs Kemp said that the agreement was that there would be nothing for liquidated damages. It is found, on balance and consistently with the Owners being permitted to say on site, that the parties' bargain was that there would be nil liquidated damages and that there would not be an entitlement for general damages.

Costs the Owners allege they incurred

1. Plaster Concrete

131. The claim for this item was $14.35. By consent, and to save time, it was agreed that the Builders would pay the Owners $7.00 for this item.

2. Changes to kitchen to compensate for Builders' failure to build to specified dimensions

132. The Owners claimed $202.40 for this item. The Owners alleged, but failed to prove, that a kitchen door was slightly too far north-west. It is noted that the Owners' cabinetmaker did not visit the site to check measure. There is no allowance for this item.

3. Tiling

133. This has been dealt with under variations.

4. Replacement of rusted roof section marked on plans

134. The Owners claim $2,390.30 for this item. They chose to have the whole roof replaced after the contract ended at the cost of $6,600.00 and they estimate this is the proportion referrable to the Builders' obligation to replace a segment of the roof marked as rusted on page four of seven of the plans.

135. That page shows an area on the north-west end of the north-east side of the house adjacent to the shed, approximately 5 metres long and half a metre wide which is marked "replace damaged roof". Another note on the drawing is "Check whole of existing roof and replace rusted/damaged areas of roofing deck and flashings". Mr Kemp and Mr Pinzone agree that if sheets of decking were to be replaced, they would span the roof from north-east to south-west; that is, the damaged area marked on plan 4 of 7 would be at the end of a number of sheets. Mr Kemp gave evidence that it was not necessary to replace 42m^2. Rather, 12.16m^2 would be sufficient, being 4 sheets each 7.6m long by 400mm wide at the north-eastern end of the house. Mr Kemp then changed his evidence to say that the area marked on the plan as damaged could be rectified by flashing. Neither versions of his evidence regarding this item are credible. The Builders must allow the Owners $2,390.30 for this item.

5. Outstanding electrical work

136. The Owners claim $369.00 for this item. It is composed of the following sub-items:

- **Relocate GPO from vanity to inside vanity cupboard**

137. The Owners say they were advised by their architect that the position of the GPO was too close to the basin and they claimed $90.00. Mr Daneluti was the Builders' electrician and attended the Tribunal to give evidence. His evidence is accepted that the GPO was correctly placed. There is no allowance for this item.

- **Install sensor above front entrance and spot light to front left hand corner of house**

138. The Owners had claimed $80.00 for this sub-item but withdrew it on the last day.

- **Failure to centre down lights**

139. Mr Pinzone's evidence is accepted that the Builders failed to position the down-lights properly. The Builders must allow the Owners $80.00 for this sub-item.

- **Supply and install a double GPO above bench in kitchen**.

140. The Owners claim $60.00 for this sub-item. The tax invoice by Online Electrical Solutions of 18 February 2004 further described this sub item as "(in place of 4-gang G.P.O. specified on plan)". There was no 4-v gang G.P.O. on page 6 of 7 of the plans. It is not allowed.

- **Installation of fluro light and clip cable into place under carport**

141. The Owners claim $40.00 for this sub-item. It is not shown on the drawings and is not allowed.

- **Fit light in dining room**

142. The Owners claim $30.00 for this sub-item. Mr Pinzone's evidence is accepted that there was nothing wrong with the dining-room light, which the Builders' electrician had difficulty installing. The Builders must allow the Owners $30.00 for this sub-item.

- **Fit lights above mirrors**

143. The Owners claim $60.00 for this sub-item. The evidence of Mrs Kemp is accepted that the lights could not be installed until the mirrors were installed, and that was the obligation of the owners. The Owners had not installed the mirrors. There is no allowance for this item.

6. Outstanding Plumbing - Gas and Water

144. This item was conceded by the Builders and has been taken into account under the plumbing provisional sum.

7. Outstanding Roof Plumbing

145. The Owners claim $940.00 for this item, which was conceded by the Builders.

8. Outstanding Building Work

146. The Owners claimed $3,600.00 for this item in accordance with the quotation by Your Friendly Handyman (YFH) of 23 September 2004. The

quotation relates to nine items and the price is not broken down between them. The sub-items are:

8.1 Fit bulkheads in kitchen and laundry

147. The Owners withdrew this item

8.2 Fit two bisected doors

148. The Owners gave evidence that YFH spent approximately four hours on this sub-item. Mr Kemp said that such doors can be fitted in approximately one hour. In the absence of better evidence, the average of the two is allowed. The Builders must allow the Owners $100.00 for this item.

8.3 Fill the spaces in above windows

149. Mr Kemp said that there were some gaps between the windows and the beam which ran around the house. He said he didn't fill the gaps because it was not allowed for under the contract. This evidence is emphatically not accepted, and neither is Mr Kemp's evidence that the work could be done in one hour. Eight hours at $45.00 per hour is allowed, with no additional allowance for materials. The Builders must allow the owners $360.00 for this item.

8.4 Cut back shed roof

150. The parties agree that the Builders were obliged to cut back the shed roof and had failed to do so at the date the contract was ended. Mrs Kemp said this sub-item contributed $500.00 to the $940.00 conceded by the Builders for roof plumbing in item 7 above. It is noted that on the second page of document A23 exhibited by the Builders, which was a quotation and invoice

from Adroit Homes, $900.00 was quoted for alterations to the shed, being cutting back the shed roof and fitting the new gutter and $6,800.00 was for the roof plumbing. The quotation for these two items totals $7,700.00 of which $6,360.00 has been invoiced. The sum of $7,700.00 would have been payable by the Builders to Adroit Homes if the work had been completed. The difference is $1,340.00 of which $980.00 has been conceded. The remainder of $360.00 is allowed for this item.

8.5 Plug eave holes in laundry, bathroom, bedroom

151. Mr Pinzone said there were three holes in the eaves where one gas pipe and two old toilet vents were. Mr Kemp estimated these holes could be back-blocked and rectified in ten minutes, which is regarded as hopeful. The Builders must allow the Owners $20.00 for this item, being a little less than half an hour's work.

8.6 Replace multi-part skirting in bedrooms 1, 2 and 3 with 1 piece version

152. Mr Kemp denied he had undertaken the relevant work, which he regarded as unacceptable. While the Tribunal accepts Mr Kemp would not personally do such work, the inference that the Owners might have provided false evidence about such a small, low-value item is equally bizarre.

153. The Builders are found to be responsible for this work and must allow the Owners $25.00 for labour and $15.00 for materials, a total of $40.00.

8.7 Replace two part architrave above the kitchen window/door with one piece

154. The sub-item is found not to have been defective and no allowance is made.

8.8 Fit architrave between kitchen window and door

155. Mr Kemp's evidence is accepted that a D-mould can be installed in this position at a cost of $20.00, which the Builders must allow the Owners.

8.9 Fit a bathroom soap dish

156. This item was withdrawn by the Owners.

9 Book shelves

157. The Owners claimed $348.70 for completion of the bookcase in the hall. The Builders' submission is accepted that they are not responsible for joinery. There is no allowance for this item.

10. Rubbish Removal

158. The Owners' evidence is accepted that the Builders failed to remove all their rubbish and the cost to do so was $300.00. It is noted that the rubbish removed included tiling boxes and tiling was done by others. The Builders must allow the Owners $250.00 for rubbish removal.

Work alleged to be still outstanding

159. The Owners claim $1,056.00 for waterproofing and the security/fly wire doors.

- **Water proofing of shower areas**

160. The contract called for Liquid Flash in the shower areas which was not provided. The Builders must allow the Owners $116.00 for this item.

- **Security/ fly wire door**

161. The drawings call for one security door and two fly-wire doors which the Builders were obliged to provide, but did not. The Builders must allow the Owners $940.00 for this item.

Other Credits Claimed

- **Pergola**

162. Mr Pinzone's evidence is accepted that he asked for a variation not to proceed with the pergola, which appears on the plans. Mrs Kemp said that the pergola omission was discussed prior to contract signing and the failure to mention it in the addendum means that it was not included in the contract price. Her evidence is not accepted. Therefore a reasonable sum for the pergola must be allowed. The Owners' evidence is that the cost of the pergola would have been $954.00. The evidence is pages 13 and 14 of a report from an unidentified quantity surveyor. The absence of the remainder of the report means there is no scale for the project against which to judge this amount. In the context of a contract for $109,084, it certainly seems high. Mr Kemp considered the amount to build the pergola, and concluded it would be $524.00. Given a tendency for the Builders to be over-optimistic in the prices they allow for credits, it is found that a reasonable credit for the pergola is approximately $700.00, which the Builders must allow to the Owners for this item.

- **Shower base**

163. The Owners claim $213.00 for this item, which has been conceded by the Builders.

- **Bi-fold doors**

164. The Owners claim $218.00 for this item which was not supplied by the Builders. The Builders must allow it for the reasons given above regarding doors.

- **Refund of charge to relocate gas meter**

165. Mr Pinzone's evidence is accepted that the Builders told the Owners to arrange and pay for relocation of the gas meter, although it appears on plan 3 of 7. The Builders submitted that this is part of the provisional sum for gas and water. As the nett sum for gas and water plumbing is less than the allowance under the contract, it follows that this is a sum which should have been paid by the Builders. The Builders must refund the Owners $236.50 for this item.

- **Front Door**

166. In accordance with the reasoning regarding doors, the Builders must pay the Owners $99.00 for this item.

Owners claim for repair of raised roof

167. The Owners claimed $2,640.00 for this item. Photographs show that there are some dints in the raised section of the roof, which Mr Pinzone asserts

will corrode more rapidly than the remainder of the roof. Although the roof should not be dinted, Mr Pinzone provided no supporting evidence for his assertion that the dints would result in corrosion.

168. The evidence regarding the roof is quite extraordinary. Ms Van Hulsen said that she gave a stage payment to Mr Kemp and saw the electrician on the roof. She heard a loud noise and Mr Batchelor, the Plumber, went up onto the roof. Mr Batchelor's statutory declaration of 22 April 2005 was that on 25 November 2003 he saw the electricians working on the roof. "I investigated to find roof sheets lifted up and damaged". As mentioned above, there is no love lost between Mr Batchelor and Mr and Mrs Kemp, and his statutory declaration is given little weight in circumstances where he did not attend the Tribunal for cross examination. It is noted that the parties were told about the value of evidence on statutory declaration on the first day of the hearing and that the Tribunal could issue summonses to attend.

169. Mr Daneluti did attend, and his evidence is accepted that he and his workers did not damage the roof, and if they had done so, they would have notified the Builders without delay. Further, it is agreed that neither Mr Batchelor nor the Owners brought the alleged damage to the Builders' attention on 25 November 2003 or shortly after and according to Ms Van Hulsen, Mr Batchelor did not even tell her about roof damage on the day. The Builders were notified of this damage on 4 January 2004.

170. In circumstances where the impact of the damage and the cause of the damage are unproven, there is no allowance for it.

CLAIM FOR EXEMPLARY DAMAGES

171. As an alternative to damages for delay, the Owners sought exemplary damages. These are not allowed in circumstances where there were

significant variations and the extreme misery experienced by the Owners was largely due to their decision to stay at the house during the works.

SUMMARY OF AMOUNTS PAID AND PAYABLE

	To Builder	To Owners
Contract sum	$115,000.00	
Less paid	$109,024.00	
	$5,976.00	

Variations

1.	0	
2.	1,068.00	
3.	0	
4.	0	
5.	470.05	
6.	0	
7.	328.00	
8.	0	
9.	100	
10.	0	
11.	285.70	
12.	142.00	
13.	0	
14.	203.05	

	To Builder	To Owners
15.	176.26	
16.	0	
17.	0	
18.	0	
19.	235.00.	

Bath and toilet		650.00
Sky lights		1,200.00
Window credit		7,156.00
Tiling credit		3,168.00
	3,008.06	12,174.00
Nett variations		9,166.00
	To Builder	To Owners
Provisional sums		
Electrical	1,516.00	
Plumbing		830.00
Prime Cost Item		350.00
Costs Claimed by Owners		
1. Plaster concrete		7.00
2. Change to kitchen		0.00
3. Tiling (under variations)		
4. Replace rusted roof sheets		2,390.30
5. Outstanding electrical		110.00
6. Plumbing – gas and water (see plumbing provisional sum)		
7. Outstanding roof work		940.00
8. Building work		900.00
9. Bookshelves		0.00
10. Rubbish removal		250.00
Work still outstanding		1,056.00
Other credits claimed		
• Pergola		700.00
• Shower base		213.00
• Bi-fold doors		218.00
• Refund charge to relocate gas meter		236.50
• Front door		99.00
Roof damage		0.00

Delay costs or exemplary damages	0.00
Amount due to Owners, excluding interest	$15,049.80

INTEREST

172. Both parties have claimed interest. The Owners are entitled to interest from the date of application of 8 December 2004 to 17 November 2005 at the penalty interest rate.

173. The Builders must therefore pay the Owners interest of $1,649.17 interest, plus the principal sum of $15,049.80, a total of $16,698.97, forthwith.

SENIOR MEMBER, M. LOTHIAN