VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP 705/2018

CATCHWORDS

Domestic building contract between the applicants (owners) and the respondent (builder) to demolish a home and construct two townhouses. Finding that the conduct of the builder, in wrongfully demanding full payment of the fixing stage payment and suspending the works until such payment was made, constituted a repudiation of contract. Owners entitled to accept the repudiation, bring the contract to an end and sue for damages, and a finding that the owners did this by filing Points of Claim wherein they sought relief consistent only with the contract having been terminated. Damages assessed, including the reasonable cost, over and above the contract price, to rectify defective works and complete the contract works. Delay damages assessed. Both contract prescribed liquidated damages for delay and general law damages for foregone rental income allowed, but not for the same period. Claim for damages for loss of amenity, inconvenience, anxiety and distress not allowed.

APPLICANTS	Norma Konsol, Touma Bechara Konsol
RESPONDENT	M.L.E. Homes Pty Ltd (ACN 131 470 801)
WHERE HELD	Melbourne
BEFORE	Senior Member M. Farrelly
HEARING TYPE	Hearing
DATE OF HEARING	April 29 and 30, May 1 and 2, 2019.
DATE OF ORDER	17 July 2019
CITATION	Konsol v M.L.E. Homes Pty Ltd (Building and Property) [2019] VCAT 1065

ORDERS

1. The respondent must pay the applicants $223,355.

2. The question of interest, and costs, reserved with liberty to apply. Any application for interest and/or costs is to be listed before Senior Member Farrelly with a half day allocated.

SENIOR MEMBER M. FARRELLY

APPEARANCES:

For Applicants:	Mr A. Klotz of counsel
For Respondent:	Mr I. Brinfield of counsel

REASONS

1 In 2015 the applicants, Norma Konsol and her Husband Touma ('**the owners**'), decided to progress their plan to retire from their cafe business. The plan included demolishing their existing home in Tullamarine and constructing 2 two-storey townhouses to be constructed on one slab with a common roof and with one common wall. They intended to live in one townhouse and rent the other townhouse to their daughter Mary ('**Mary**').

2 The owners had obtained design and construction drawings from their architect ('**the architectural plans'**) and engineering design drawings and computations ('**the engineering plans'**) from 'Vert Engineering' ('**the engineer'**). They had also obtained the requisite planning permission from the local Council.

3 A friend of the owners recommended the respondent ('**the builder**') as a builder they might consider. After the architectural plans and the engineering plans were provided to the builder, the builder provided a quotation of $670,000. The builder's director, Mr Shaba, subsequently met the owners to discuss the quotation.

4 On 25 January 2016, the owners and the builder signed a contract for the construction of the 2 townhouses ('**the contract'**). The primary contract document is a standard form HIA 'Victorian New Homes Contract', edition March 2014. The contract documents include the architectural plans, the engineering plans and a brief *specifications* list prepared by the builder ('**the specifications**'). The specifications provide brief explanatory information as to the nature and scope of some of the building works.

5 A building permit was issued on 12 May 2016, and demolition of the existing home commenced in June 2016. The slab for the 2 townhouses was completed on around 30 August 2016.

6 The contract provided for a construction period of 230 days after commencement of the works, however there is no dispute that the parties agreed to extend the construction period to 230 days following the completion of the slab. Accordingly, the agreed due completion date for the works became 18 April 2017.

7 The progress of the works was slower than hoped, and from around May 2017 the parties fell into dispute in respect of a number of items of work and payment claims. In June 2017 the owners lodged an application for dispute resolution with Domestic Building Dispute Resolution Victoria ('**DBDRV**'). A conciliation was conducted at DBDRV on 8 November 2017 and agreement on some, but not all, of the matters in dispute was reached. After the conciliation, the builder returned to carry out further works, but on 2 March 2018 the builder suspended works by reason of the owners' refusal to make full payment of the *fixing stage* payment which the builder says was due and owing. The owners say that the builder was not

entitled to full payment of the fixing stage payment. The builder carried out no further works.

8 The owners commenced this proceeding on about 16 May 2018. They alleged numerous breaches of contract on the part of the builder, and sought damages in respect of those alleged breaches.[1] By counterclaim filed on around 5 October 2018, the builder sought unspecified damages.

9 The owners say they subsequently terminated the contract, as they were entitled to do, on 7 November 2018, and continued with their claims for damages in this proceeding.

10 The builder says the owners' purported termination of the contract was not justified and constituted a repudiation of the contract. The builder says it 'accepted' the repudiation, as it was entitled to do, on around 9 November 2018 bringing the contract to an end.

11 Each of the parties pursue their claim for damages in this proceeding.

12 As set out in the reasons that follow, I find that the builder repudiated the contract and that the owners accepted the repudiation and brought the contract to an end as they were entitled to do. However, I find that the owners' acceptance of the builder's repudiation of the contract, and the consequent termination of the contract, occurred by reason of the file and service of the owners' Points of Claim dated 9 August 2018. The owners are entitled to damages as discussed later in these reasons.

THE HEARING

13 The hearing commenced before me on 29 April 2019 and ran for 4 days. The applicants were represented by Mr Klotz of Counsel and the builder was represented by Mr Brinfield of Counsel. Final closing written submissions were received by 26 June 2019.

14 For the applicants, I heard evidence from one of the owners, Mrs Norma Konsol, and from the owners' daughter, Mary Konsol.

15 For the builder, I heard evidence from its director, Mr Jack Shaba.

16 Concurrent expert evidence was given by building consultants Mr Simpson, called by the owners, and Mr Fleming, called by the builder. Each of these experts also produced written reports.

17 A view of the building works with the parties, their legal representatives and Mr Simpson and Mr Fleming was conducted on the first day of the hearing.

[1] the original application, drawn by the owners themselves, alleged numerous wrongdoings on the part of the builder and sought unspecified compensation. Subsequent Points of Claim dated 9 August 2018, drawn by the owner's lawyers, quantified some, but not all, of the damages sought.

THE PARTIES' CLAIMS

18 The nature and quantum of the damages claims of both the owners and the builder were clarified during the hearing and in closing written submissions. I granted leave to the builder to amend its Defence and Counterclaim, and I sought clarification from the owners in respect of some of their claims as set out in their Amended Points of Claim. In the main, the amendments and clarifications provided more details and confirmation in respect of the quantum of each party's claimed damages.

19 On the basis of the parties' latest pleadings[2], and the clarifications provided in both parties' closing written submissions, I set out their respective claims for damages, as I understand them to be, below.

The owners

20 First, the owners claim $139,752.99 as the reasonable cost to rectify defective building works as assessed by Mr Simpson.

21 Next, they claim $211,751.80 as the reasonable cost, over and above the contract price, which they say they will incur to engage another builder to complete the building works. This figure is based upon a quotation dated 10 December 2018 they have obtained from 'Ethos Building'[3]. As I understand it, the sum claimed by the owners, $211,751.80, makes allowance for:

a) the unpaid balance of the contract with the builder, and

b) allowances totalling $8925 in respect of prime cost items- plumbing fittings, range hoods and ovens - as provided for in the contract and in respect of which the owners made some payments direct to the builder's supplier.

22 Next the owners claim delay damages as follows:

a) $12,150 as the contractual allowance for liquidated damages for delay - $150 per week for the period 18 April 2017, the due date for completion of the contract works, to 7 November 2018, the date the owners say they terminated the contract;

b) lost rental income in respect of the townhouse that is, upon completion, to be occupied and rented by the owners' daughter Mary. They claim lost rental at $500 per week from the due date for completion of the works,18 April 2017. In closing written submissions, they say this loss of rental should be calculated up until a date 4 months after the date this decision is handed down, on the basis that that is a reasonable period to allow for the builder to make payment of damages ordered (assuming such order is made), the

[2] the owners' Amended Points of Claim dated 21 December 2018. The builder's Further Amended Points of Defence and Amended Counterclaim, filed and served pursuant to leave granted during the course of the hearing.
[3] Tribunal book page 1335

engagement of a replacement builder and the completion of works by that replacement builder;

c) furniture/appliances storage cost of $400 per month from the date they say they terminated the contract, 7 November 2018. In closing written submissions, owners confirm that they seek this allowance also for the period up to 4 months after the date this decision is handed down.

23 Next, the owners claim $1200 as the cost to remove rubbish left on site by the builder. They say they were required to remove the rubbish in response to a notice received from Hume City Council dated 25 October 2018.

24 Next, as I understand it, they claim $6000 as the cost they paid direct to a supplier of the builder in respect of wardrobe doors.

25 Next, the Owners claim $264 for '*Payment to Council for extension of subdivision permit'*.[4]

26 Next the owners claim general damages for loss of amenity, inconvenience, anxiety and distress. In closing submissions, the arbitrary sum nominated is $20,000.

27 Finally, the owners also claim interest and costs. The basis upon which interest might be awarded, and in respect of which heads of damage, has not (yet) been submitted.

28 I note for completeness that the owners' Amended Points of Claim includes a further head of damage, namely *'interest on loans for payments made prior to being due under the building contract'*, but there is no amount specified. There is no evidence as to the sum claimed and, as this item is not raised in the owners closing submissions, I assume the owners no longer pursue it. If I am wrong and it is pursued, I refuse the claim by reason of the lack of evidence in respect of it.

29 As discussed below, during the course of the building works the owners obtained inspection reports prepared by the building consultant Darbecca Pty Ltd. I note, for completeness, that the cost of the Darbecca reports is not identified, either in the owners' Amended Points of Claim or final written submissions, as claimed damages.

The builder

30 As noted above, the builder's counterclaim was amended during the course of the hearing, primarily in terms of the quantum of various items, pursuant to leave granted by me. As confirmed in its closing written submissions, the builder claims damages in the sum of $17,996.09 calculated as follows:

- original contract price, $670,000;
- *plus* the cost of variation extra works for tiling, alfresco utilities and staircase variation works, $17,887.80;

[4] one of the heads of damage identified under paragraph 15 in the Amended Points of Claim.

- *plus* $3000 as the cost of a site electricity pole ($1500) and a site fence ($1500). Although this expense is specified in the builder's counterclaim, there is no evidence in respect of this item;
- *less* payments made by the owners $518,250;
- *less* the cost to the builder (as assessed by Mr Fleming) to complete the building works (had the builder been given the opportunity to do so) $131,460.91;
- *less* a reasonable allowance (again as assessed by Mr Fleming) to rectify conceded defective works, $16,880.80;
- *less* contract prescribed liquidated damages for delay at $150 per week for the period 18 April 2017 (the due completion date) to 7 February 2018 (as I understand it, the approximate date that the builder says the owners wrongfully refused to pay the balance of the *fixing stage* payment), $6300;
- balance, $17,996.09.

31 The builder also claims interest and costs.

THE DOMESTIC BUILDING CONTRACTS ACT

32 There is no dispute that the contract for the construction of the townhouses is a 'major domestic building contract' under the *Domestic Building Contracts Act* 1995 ('**the Act**').

33 Section 8 of the Act provides that certain warranties as to the building works are implied into domestic building contracts ("the warranties"). Clause 11 in the contract confirms the warranties, including the following:

- the builder warrants that the work will be carried out in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract;
- the builder warrants that all materials to be supplied by the builder for use in the work will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new;
- the builder warrants that the work will be carried out in accordance with, and will comply with, all laws and legal requirements including, without limiting the generality of this warranty, the Building Act 1993 and the regulations made under that Act;
- the builder warrants that the work will be carried out with reasonable care and skill and will be completed by the date (or within the period) specified by the contract.

34 Section 11 of the Act provides that a builder must not demand or receive a deposit under a domestic building contract of more than 5% of the contract price where that contract price is $20,000 or more. Sections 40(1) to (4) of the Act set limitations on further progress payments as follows:

40 Limits on progress payments

(1) In this section—

base stage means—

(a) in the case of a home with a timber floor, the stage when the concrete footings for the floor are poured and the base brickwork is built to floor level;

(b) in the case of a home with a timber floor with no base brickwork, the stage when the stumps, piers or columns are completed;

(c) in the case of a home with a suspended concrete slab floor, the stage when the concrete footings are poured;

(d) in the case of a home with a concrete floor, the stage when the floor is completed;

(e) in the case of a home for which the exterior walls and roof are constructed before the floor is constructed, the stage when the concrete footings are poured;

frame stage means the stage when a home's frame is completed and approved by a building surveyor;

lock-up stage means the stage when a home's external wall cladding and roof covering is fixed, the flooring is laid and external doors and external windows are fixed (even if those doors or windows are only temporary);

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

(2) A builder must not demand or recover or retain under a major domestic building contract of a type listed in column 1 of the Table more than the percentage of the contract price listed in column 2 at the completion of a stage referred to in column 3.

50 penalty units.

TABLE

Column 1	Column 2	Column 3
Type of contract	*Percentage of contract price*	*Stage*
Contract to build to lock-up stage	20%	Base stage
"	25%	Frame stage
Contract to build to fixing stage	12%	Base stage
"	18%	Frame stage
"	40%	Lock-up stage

Contract to build all stages	10%	Base stage
"	15%	Frame stage
"	35%	Lock-up stage
"	25%	Fixing stage

(3) In the case of a major domestic building contract that is not listed in the Table, a builder must not demand or receive any amount or instalment that is not directly related to the progress of the building work being carried out under the contract.

Penalty: 50 penalty units

(4) Subsections (2) and (3) do not apply if the parties to a contract agree that it is not to apply and do so in the manner set out in the regulations.

35 The contract provides a progress payment schedule in accordance with the Act as follows:

-	Deposit: 5% of the contract price	$33,500
-	base stage: 10% of the contract price	$67,000
-	frame stage: 15% of the contract price	$100,500
-	lock-up stage: 35% of the contract price	$234,500
-	fixing stage: 25% of the contract price	$167,500
-	Completion: 10% of the contract price	$67,000
	Total	$670,000

36 In respect of variations to works under a domestic building contract, the Act provides:

37 Variation of plans or specifications - by builder

(1) A builder who wishes to vary the plans or specifications set out in a major domestic building contract must give the building owner a notice that—

(a) describes the variation the builder wishes to make; and

(b) states why the builder wishes to make the variation; and

(c) states what effect the variation will have on the work as a whole being carried out under the contract and whether a variation to any permit will be required; and

(d) if the variation will result in any delays, states the builder's reasonable estimate as to how long those delays will be; and

(e) states the cost of the variation and the effect it will have on the contract price.

(2) A builder must not give effect to any variation unless—

(a) the building owner gives the builder a signed consent to the variation attached to a copy of the notice required by subsection (1); or

(b) the following circumstances apply—

(i) a building surveyor or other authorised person under the **Building Act 1993** requires in a building notice or building order under that Act that the variation be made; and

(ii) the requirement arose as a result of circumstances beyond the builder's control; and

(iii) the builder included a copy of the building notice or building order in the notice required by subsection (1); and

(iv) the building owner does not advise the builder in writing within 5 business days of receiving the notice required by subsection (1) that the building owner wishes to dispute the building notice or building order.

(3) A builder is not entitled to recover any money in respect of a variation unless—

(a) the builder—

(i) has complied with this section; and

(ii) can establish that the variation is made necessary by circumstances that could not have been reasonably foreseen by the builder at the time the contract was entered into; or

(b) the Tribunal is satisfied—

(i) that there are exceptional circumstances or that the builder would suffer a significant or exceptional hardship by the operation of paragraph (a); and

(ii) that it would not be unfair to the building owner for the builder to recover the money.

…

38 Variation of plans or specifications - by building owner

(1) A building owner who wishes to vary the plans or specifications set out in a major domestic building contract must give the builder a notice outlining the variation the building owner wishes to make.

(2) If the builder reasonably believes the variation will not require a variation to any permit and will not cause any delay and will not add more than 2% to the original contract price stated in the contract, the builder may carry out the variation.

(3) In any other case, the builder must give the building owner either—

(a) a notice that—

(i) states what effect the variation will have on the work as a whole being carried out under the contract and whether a variation to any permit will be required; and

(ii) if the variation will result in any delays, states the builder's reasonable estimate as to how long those delays will be; and

(iii) states the cost of the variation and the effect it will have on the contract price; or

(b) a notice that states that the builder refuses, or is unable, to carry out the variation and that states the reason for the refusal or inability.

(4) The builder must comply with subsection (3) within a reasonable time of receiving a notice under subsection (1).

(5) A builder must not give effect to any variation asked for by a building owner unless—

(a) the building owner gives the builder a signed request for the variation attached to a copy of the notice required by subsection (3)(a); or

(b) subsection (2) applies.

(6) A builder is not entitled to recover any money in respect of a variation asked for by a building owner unless—

(a) the builder has complied with this section; or

(b) the Tribunal is satisfied—

(i) that there are exceptional circumstances or that the builder would suffer a significant or exceptional hardship by the operation of paragraph (a); and

(ii) that it would not be unfair to the building owner for the builder to recover the money.

37 The contract makes provision for variation works in terms consistent with the above provisions of the Act.

FURTHER CHRONOLOGY

38 As noted above, the builder commenced the building works (demolition) in June 2016, and the agreed due date for completion of the works was 18 April 2017.

39 During the course of construction, a number of variation works, that is works not expressly included in the original scope of works as set out in the contract documents, were carried out. These works included extra tiling works and the extension of gas and water plumbing to the rear alfresco area in each of the townhouses. There is disagreement as to when the additional works were discussed. The owners say they were discussed at the time the contract was signed, whereas the builder says they were first raised during the course of the building works, after the contract was signed.

40 The progress of the works was slower than hoped. As at May 2017, the works in each townhouse were progressing through the 'fixing' stage, and the owners had some concerns in respect of some of the works, including a concern as to the framing. Although the responsible building surveyor, Mr Phat Lam' ('**the surveyor**'), had approved the frame, and issue a certificate to this effect on 19 April 2017, the owners remained concerned about some works including the builder's use of *I-beams* instead of *posi-struts* to support the first-floor flooring, in the space above the ground floor ceilings in each townhouse. The engineering drawings specified posi-struts.

41 The owners arranged for a building consultant to inspect and report on the works. Inspections were carried out by a building consultant from 'Darbecca Pty Ltd', and inspections were followed by reports dated 22 May 2017, 16 June 2017 and 7 July 2017. The owners presented the first report to the builder with a request that he attend to the various items of work identified in the report as requiring rectification/attention. The follow-up reports identified items which the builder had not attended to.

42 On about 19 June 2017, after they had received the second Darbecca report, the owners lodged an application for dispute resolution with DBDRV.

43 The functions and powers of the DBDRV are set out in Part 4 of the Act.

44 In September 2017, the DBDRV notified the parties that it had accepted the dispute for conciliation. The DBDRV arranged for an inspection assessment of the building works. The appointed assessor, Mr Webb, inspected the building works on 23 October 2017 and produced a report dated 1 November 2017. Mr Webb's report was sent to the parties, and the DBDRV arranged for a conciliation conference at DBDRV's office on 8 November 2017.

45 By the time of the conciliation, the builder had issued an invoice for the fixing stage payment, even though fixing stage had not been reached. The owners had agreed to pay, and had paid, 50% of the invoiced sum.

46 At the conciliation on 8 November 2017, the parties reached agreement on some of the matters in dispute. A '*Record of agreement (partial)'* ('**the conciliation agreement'**) was prepared by the DBDRV and signed by the parties on 8 November 2017. The conciliation agreement sets out, amongst other things, certain works the builder agreed to carry out by 16 March 2018.

47 The builder and the owners both say that they agreed that the owners would pay the remaining 50% of the fixing stage invoice when the builder completed painting and tiling works. This is not reflected in the conciliation agreement, as it states:

> The Owners will pay the Builder for completion of the fixing stage in accordance with the contract.

48 In any event, the builder subsequently carried out further building works, including some, but not all, of the remaining tiling works. The tiling works to the balcony in each of the townhouses was not done, and those tiling works remained not done as at the commencement of the hearing before me.

49 Curiously, on 19 January 2018 the builder, through its accountant, made application to the Australian Securities and Investments Commission (ASIC) for voluntary deregistration. The builder says that the application was a mistake, and what was intended was an application to change the name of the company. In any event, the application did not proceed and the builder was not deregistered. The owners say the application for deregistration itself constitutes repudiatory conduct. I do not agree. The builder was not deregistered. And I accept the builder's evidence that the application was made in error.

50 On 2 February 2018, the builder sent an invoice to the owners for payment of the balance of the fixing stage, $83,750. In the following week, the builder sent a number of emails requesting payment of the invoice.

51 On around 12 February 2018, the owners sent written notice to DBDRV that the builder had not complied with the record of agreement. The notice sets out the owners concerns in relation to tiling works and the builder's request for full payment of the fixing stage.

52 By letter dated 2 March 2018 from the builder's lawyers to the owner's lawyers[5], the builder asserted that the owners had breached the agreement between them *"by failing to make payment for the fixing stage"*. The letter goes on to state:

[5] Tribunal book p1837

> Given the failure to make payment, the building works have stopped and our client reserves his rights in respect of this delay.

53 The builder carried out no further building works, although as noted below, some considerable time later on 5 November 2018 the builder attended the site and removed kitchen cabinetry. Nor have the owners carried out any further building works to the townhouses.

54 The DBDRV, after seeking representations from both parties, provided a '*Notice of decision – Notice of non-compliance with record of agreement'* dated 29 March 2018. This notice confirms the decision of the Chief Dispute Resolution Officer of the DBDRV (pursuant to section 46 of the Act) that there has been non-compliance with the conciliation agreement and that the conciliation agreement *'ceases to have effect'* as at the date of the notice.

55 On 24 April 2018, the DBDRV issued a '*Certificate of Conciliation – Dispute not resolved'*. Under section 56 of the Act, a party cannot make an application to this Tribunal in respect of a *domestic building work dispute* until the DBDRV has issued a *certificate of conciliation.*

56 With the *certificate of conciliation* issued, the owners commenced this proceeding on about 16 May 2018. The builder filed its counterclaim on about 5 October 2018.

57 During the course of the proceeding, the owners obtained expert inspection reports on the existing building works at the townhouses from the building consultant Mr Simpson. On 26 October 2018, the owners' lawyers sent to the builder's then lawyer a '*NOTICE OF INTENTION TO TERMINATE*' the contract, which sets out numerous alleged defective works as referred to in Mr Simpson's reports. The Notice also sets out various alleged breaches of the contract on the part of the builder including the builder's unjustified demand for full payment of the fixing stage payment, and refusing to perform further works until such payment was made, despite the works being well short of having reached fixing stage.

58 On 5 November 2018, the builder's workers attended the site and removed kitchen cabinetry. The builder says the cabinetry had not been 'fixed' into position, although it is apparent from photos produced at the hearing that at least some, if not all, of the kitchen cabinetry had been affixed to walls in the kitchen. As to why the builder returned to site, 8 months after works had been suspended, to remove cabinetry, Mr Shaba says in his witness statement:

> On or about 5 November 2018 I attended the Site and removed the unfixed cabinetry because they needed further work. I did not want to leave half the cabinets behind and risk damage and theft. I took all of them away with the intention to do the further work to them and then bring them all back for fixing into place.6

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6 paragraph 39 of Mr Shaba's witness statement, Tribunal book page 1351

59 When giving evidence at the hearing, Mr Shaba confirmed that the 'further work' to the cabinetry was the cutting in of hinges, and that this was a simple task that could be done on site. He gave evidence also that the cabinetry had been removed because the owners had confirmed their intention to terminate the contract and he was worried that the cabinetmaker had not yet been paid for the cabinetry.

60 Having heard the evidence of Mr Shaba, I am satisfied that when the builder removed the cabinetry on 5 November 2018, the builder was not returning to site after an 8 month suspension to re-commence the contract works. Rather, the builder considered the contract was, or was about to be, terminated, and he was removing cabinetry which had not been paid for.

61 By letter dated 7 November 2018 from the owners' lawyers to the builder's then lawyer, the owners asserted that the builder had not remedied the breaches set out in the above-mentioned notice dated 26 October 2018, that the builder clearly had no intention to complete the contract works, and that the builder's conduct amounted to a repudiation of the contract, and that the owners accepted the repudiation and terminated the contract.

62 By letter dated 9 November 2018 from the builder's lawyers to the owner's lawyers, the builder asserted, amongst other things, that the owners' purported termination of the contract was not justified and constituted a repudiation of the contract on the part of the owners, and that the builder accepted such repudiation. The builder says that it was entitled to, as it did, suspend the building works from 2 March 2018 by reason of the failure of the owners to pay the balance 50% of the fixing stage payment as they had agreed to do.[7]

63 Before turning to discussion as to whether fixing stage was reached and the termination of the contract, I will first deal with variation works and the effect of variations on the contract price.

VARIATION WORKS AND ADJUSTED CONTRACT PRICE

64 The builder says it carried out various variation extra works at the request of the owners, and in respect of which it claims an entitlement to a variation extra charge. The owners claim an entitlement to a credit allowance in their favour in respect of payments they made direct to suppliers. I now discuss these various claims.

Refrigerated air conditioning

65 There is no dispute that the parties agreed that the owners would pay an extra $2000 for the cost of changing the air-conditioning from evaporative to refrigerated. The $2000 payment was made in cash by the owners to the builder on or about 8 May 2017.

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[7] paragraphs 6 and 7 of the respondent's Amended Points of Defence and Counterclaim dated 30 April 2019

Staircases

66 The specifications nominate stairs and steps, other than concrete stairs and steps, to be constructed using MDF. The builder says the specification in this regard applied to the staircase in each townhouse.

67 There is no dispute that, instead of MDF, the stairs were constructed with hardwood timber and that, in lieu of a timber balustrade, a metal, powder coated balustrade was provided. The builder says that the owners selected the stairs and should therefore bear the extra cost of the hardwood timber and powder coated balustrades.

68 Initially the builder claimed extra cost in the sum of $5900, inclusive of GST on the basis that the builder had allowed for a supply cost of $5400, whereas the actual supply cost of the varied staircases and balustrades was $11,300. The contract does not nominate any allowance, either as a prime cost item or provisional sum item, for the staircases. If the builder was allowing $5900, such allowance simply does not appear in the contract documents.

69 The builder produced 2 invoices from the staircase supplier[8], each dated 18 August 2017 and each of which references the supply and installation of Victorian Ash timber staircases with black powder coated balustrades. One of the invoices is for a sum of $7150 (inclusive of GST) and the other invoice is for a sum of $4150 (inclusive of GST).

70 The 2 invoices, added together, total $11,300. However, when giving evidence, Mr Shaba said that one of the invoices was issued by the supplier mistakenly. He says the supplier originally provided the $4150 invoice in error, as that invoice assumed MDF staircases. He says that the replacement invoice, $7150, was the correct charge for the Victorian Ash staircases with the powder coated balustrades.

71 On this evidence, coupled with Mr Shaba's evidence in his witness statement that he had allowed a supply cost for MDF staircases at $5400, it seems to me that the variation extra supply cost for the staircases claimable by the builder would be $1750, that being the difference between the contract allowance of $5400 (as stated by Mr Shaba) and the actual cost of $7150. I asked Mr Shaba if my reckoning in this regard was correct. He accepted that it was correct, and the builder accordingly amended its claim in respect of the variation extra cost in respect of the staircases to $1750. Mr Shaba also confirmed in evidence that the builder did not seek a builder's profit margin on the cost of any of the claimed variation extra works.

72 The owners say that they were not aware that, in selecting the staircases and balustrades, they were selecting materials outside the builder's contractual

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[8] the copy of the invoices produced in the Tribunal book do not identify the supplier, however in his witness statement at page 1350 of the Tribunal book the builder identifies the supplier as 'Staircase Direct Pty Ltd'

allowance and that they might incur additional expense. The first applicant, Norma Konsol, says that the builder sent her a photo of the proposed stairs and she said she liked the stairs. She did not realise at the time that the specifications specified MDF material. The builder also suggested that she go and look at balustrades at the supplier's factory, which she did, and she selected the powder coated balustrade.

73 On all the evidence I am satisfied that a variation extra cost of $1750 should be allowed. I am satisfied, having regard to the specifications, that the hardwood timber stairs and powder coated balustrades constitute variation works. Although the builder has failed to notify the owners of the extra cost of these variation works, the owners have selected the staircases, including the balustrades, and they had received the benefit of them. In such circumstances, I consider it would cause significant hardship to the builder if he were to bear the extra supply cost of the selected stairs, and I consider also that it is not unfair that the owners bear the variation extra cost. Accordingly, I allow a variation extra cost in the sum of $1750.

Extension of gas and water to rear alfresco areas

74 Each of the townhouses has a rear alfresco area. There is no dispute that the contract documents do not provide for the provision of gas and water to the alfresco areas, and that the builder, at the request of the owners, extended piping for gas and water to the alfresco areas.

75 Mr Shaba says the owners requested these variation works during the course of the works, at around electrical rough in stage in around June 2017, and that he told them that the extra works could be done at an extra cost of $1400. He says the owners, through Mary, approved the variation cost.

76 The owners say that these variation works were discussed at the time the contract was signed, and that Mr Shaba agreed to include the extra works at no extra cost. In support of this the owners produced a copy of a ground floor plan of the building which includes a couple of obvious handwritten notes and initials. The handwritten notes state "*extra piping, electrical, sewerage*" and there are hand drawn arrows from the alfresco areas to the notes. The handwritten initials are the initials of the owners, *N.K* and *T.K*. The owners say that the handwritten notes and arrows were penned on the document by Mr Shaba on the day the contract was signed, and the owners penned their initials on the document at the same time.

77 Mr Shaba disputes that the handwritten notes on the produced document are his. He says that, prior to the hearing, he had no knowledge of the document.

78 There is nothing on the document produced by the owners to suggest the date when the handwritten notations were penned. Nor does the document contain any note, one way or the other, as to the cost of the extra works. Nor does the document contain any initials or signature of the builder.

79 In my view it is quite likely that the parties' memories, as to exactly when these extra works were discussed and agreed to, and how the document produced by the owners came about, may have lost clarity with the passage of time. The provenance of the document produced by the owners is unclear, and in my view it provides no support, one way or the other, as to whether the builder agreed to carry out the works at no extra cost.

80 On the evidence before me, I am not satisfied that the extension of the gas and water lines to the alfresco areas became works included within the contract scope of works, at no extra cost, by agreement reached at the time the contract was signed. As such, I find that the works are variation extra works. The question remains whether the builder should be paid for the cost of these extra works, and if so, how much.

81 In the circumstance where the builder has carried out the extra works at the request of the owners, and the owners have obtained the benefit of the extra works, I consider it would cause significant hardship to the builder if he were to bear the extra cost of the works, and I consider it is not unfair that the owners bear the reasonable extra cost of such works.

82 The builder claims $1400. Although the owners contest the entitlement of the builder to charge for the works, they presented no evidence as to the reasonableness or otherwise of the quantum of the charge claimed by the builder. I am satisfied that $1400 for the works is a reasonable charge.

83 Accordingly, I allow a variation extra cost in the sum of $1400.

Extra tiling

84 There is no dispute that the contract documents do not include, within the scope of contract works, floor-to-ceiling wall tiles in the bathrooms, laundries and powder rooms of the townhouses. There is no dispute that the builder carried out such extra tiling works at the request of the owners. There is dispute as to when the builder agreed to carry out these extra works, and whether the builder is entitled to charge for these extra works.

85 The owners say that the extra tiling works were discussed and confirmed at the time the contract was signed, and it was their understanding that there would be no extra charge. They say that during the course of the building works it became apparent that the builder expected to be paid for the extra tiling works. They say that they asked the builder to quote them a price for the extra works so that they could then decide whether to instruct the builder to proceed with the works, or whether they would instead engage a tiler of their own to carry out the extra tiling works. They say that subsequently, as part of the conciliation agreement reached at the DBDRV, the builder agreed to carry out the extra tiling works at no extra cost.

86 Mr Shaba, for the builder, says that the extra tiling works were not raised at the time the contract was signed. He says the owners requested the extra works during the course of the building works and that he was told, by Mary, that the owners would pay the additional cost once the builder

notified them of the additional cost. He agrees that tiling works were discussed at the DBDRV conciliation, but he disputes that he agreed to carry out the works at no extra cost to the owners.

87 The extra tiling works – floor to ceiling wall tiles in the bathrooms, laundries and powder rooms – were carried out by the builder, and the builder claims an entitlement to an extra charge of $14,737.80.

88 The conciliation agreement does not include any provision that the extra tiling works would be carried out by the builder at no extra cost. All that is stated about tiling in the conciliation agreement is:

> The Builder will confirm the Owners' instructions for how tiles are to be laid
>
> The Builder will complete tiling

89 The sum claimed by the builder for the extra tiling works is a little more than 2% of the contract price. The builder has not provided to the owners the requisite written notification pursuant to section 38 of the Act.

90 It is clear from the owners own evidence that, at least at some stage during the course of the building works, the owners accepted that they would pay for the extra tiling works they desired, whether they were carried out by the builder or some other contractor engaged by them.

91 In my view, in circumstances where:

- there is no satisfactory evidence of any agreement between the parties that the builder would carry out extra tiling works at no extra charge; and
- the builder has carried out extra tiling works at the request of the owners,

I consider it would cause significant hardship to the builder if he was not entitled to claim the variation extra charge, and I consider it is not unfair that the owners bear that extra charge.

92 The builder claims $14,737.80. To verify this cost, the builder relies on an invoice from its sub-contractor tiler, Four J Services Pty Ltd.[9] The invoice identifies a total charge to the builder in the sum of $52,668.30 for tiling works carried out to the townhouses. Within the invoice, the charges for "*extra for wall tiling up to cilling* [ceiling]" for laundries, bathrooms and powder room in "*both units*" are noted. The charges for these extra tiling works, including a charge of $1000 for the "*design in bathroom in both units*" total $13,398.28.

93 There are some peculiarities with this invoice of Four J Services Pty Ltd. First, it is dated 1 November 2017, yet it is clear from the evidence of both parties that the extra tiling works were carried out in late 2017 and early 2018. Mr Shaba gave evidence that he only requested the invoice from Four J Services Pty Ltd when his lawyer, during the course of this proceeding, asked if he had any invoices in respect of the tiling works. Mr Shaba says

[9] at Tribunal book page 1751

that the date on the invoice is simply an error on the part of Four J Services Pty Ltd.

94 The invoice is a little confusing. The top portion of the invoice lists the charges for tiling works, including the above discussed extra tiling works. When one adds up all the items in the top portion of the invoice, the total is $52,668.28. The bottom portion of the invoice identifies GST allowance of $5266.80, and then identifies a total sum payable, inclusive of GST, as $52,668.30. From this it is apparent that the charges set out in the top portion of the invoice are charges *inclusive* of GST.

95 How then does the builder, in reliance on this invoice, calculate the sum of $14,738 as the variation extra cost of the extra tiling works? It is not clear from the builder's own evidence how the sum is calculated. As noted above, the top part of the invoice identifies a total of $13,398.28 as the cost of the extra wall tiling works. If one adds 10% to this figure, the total reached is $14,738, which is the sum claimed by the builder. I find that the added 10% is not the application of a builder's profit margin because, as noted above, Mr Shaba confirmed in evidence that the builder did not seek a builder's profit margin on the cost of variation extra works. In any event, the contract does not prescribe a builder's margin percentage rate in respect of variation works. It may be that the builder has added 10% as GST in the mistaken, although understandable, belief that the allowance in the top portion of the invoice for the extra tiling works does not include GST.

96 Having heard evidence from Mr Shaba, I am satisfied that he does not himself know how the sum of $14,738 has been calculated, and I think it likely that somebody else, perhaps the builder's lawyer, has done the calculation for the purpose of this proceeding. I think it likely that whoever did the calculation has erroneously applied GST twice.

97 In any event, that is not to say that the sum claimed for the extra tiling works is unreasonable. Although the owners challenged the entitlement of the builder to charge for the extra works, they did not challenge the quantum claimed as unreasonable.

98 Taking into account Mr Shaba's evidence that the builder simply sought to recover the extra cost of variation works without any additional builder's profit margin, and having regard to the significant amount of extra tiling works carried out, I am satisfied that the sum identified in the top part of the invoice of Four J Services Pty Ltd for the extra tiling works, $13,398.28, is a fair charge.

99 Accordingly, I allow a variation extra cost of $13,398.28.

100 Later in these reasons I discuss defective works and find that some of the extra tiling works will, as part of necessary rectification works to wet areas, will need to be re-done. Such finding does not displace my finding here that, in calculating the adjusted contract price after allowance for variation

charges, an allowance of $13,398.28 for extra tiling works should be allowed.

Wardrobe doors

101 When it came to selecting wardrobe doors, the owners, in the company of the builder's supervisor, 'Amir', visited the builder's usual cabinetry supplier, 'Renma', to inspect the available range of wardrobe doors. The owners selected suitable wardrobe doors and Amir told them that the doors they had selected were more expensive than the builder's range allowance. Amir said that the builder had allowed $6000, whereas the doors the owners selected would cost $9400. At the request of Amir, the owners paid the difference in cost, $3400, direct to Renma as a deposit on the selected wardrobe doors.

102 Amir was not called to give evidence. There is no dispute that the owners paid $3400 direct to Renma when they selected the doors in the company of Amir. The owners produced an invoice from Renma dated 21 November 2017 which confirms a total charge of $9400, in respect of which $3400 had been paid as a deposit.

103 Some considerable time later, when the parties had fallen into dispute, the owners were contacted by Renma and told that unless the balance owing on the doors, $6000, was paid, Renma would no longer be able to retain the doors at their premises, and the doors would be disposed of. The owners were concerned to keep the doors they had chosen, and to not lose the deposit they had paid. They paid Renma the outstanding balance of $6000. They have produced an invoice from Renma dated 21 August 2018 addressed to the owner's daughter Mary, in the sum of $6000. The invoice has a notation that it was paid in full on 7 September 2019. I accept this evidence from the owners. It is not challenged by the builder.

104 Indeed, Mr Shaba confirmed in evidence that Renma was pursuing him for payment of the outstanding $6000, and that he advised Renma that he had not been paid by the owners and that if Renma wanted the invoice paid, Renma should pursue the owners. This is exactly what occurred.

105 What is to be done in respect of the payments made by the owners for these wardrobe doors?

106 As noted earlier, the owners claim for damages includes a claim for $6000 in respect of these doors. As I understand it, they say they are entitled to the original contract allowance of $6000 because they have made that payment direct to the supplier.

107 In my view, rather than an allowance by way of damages, it is appropriate to make an adjustment to the contract price to recognise the fact that the supply of the wardrobe doors, initially falling within the builder's scope of contract works, has been removed from the contract scope of works. As such, there should be a credit variation, that is a reduction, in the contract price to reflect the reduced scope of works.

108 The contract identifies the dollar allowance for a range of prime cost items, however wardrobe doors are not amongst them. The contract does not specify the dollar allowance for the wardrobe doors. On the owners' evidence, that is the evidence as to what they were told by Amir when selecting the wardrobe doors, the allowance should be $6000.

109 Mr Shaba says the contract allowance for standard range wardrobe doors was $3700, and that he had a quote from Renma to support this. The quotation was not produced and no one from Renma gave evidence. The only Renma invoices produced at the hearing are the above-mentioned invoices which confirm the total charge for the wardrobe doors as $9400, of which a deposit of $3400 was paid on 21 November 2017, and the balance of $6000 paid on 7 September 2018.

110 I will allow a credit variation, that is a contract price reduction, of $6000.

111 In my view, there is understandable logic in the owners' unchallenged evidence that they were requested by Amir, the builder's supervisor, to pay, as a deposit for the wardrobe doors, the difference between the contractual allowance for wardrobe doors and the actual cost of the doors they selected. There is no suggestion that the owners were told by anyone, including Mr Shaba, of any other contract allowance for the wardrobe doors.

112 I am satisfied that a credit allowance of $6000 should be allowed in respect of the deletion of the supply of wardrobe doors from the builder's scope of works under the contract.

113 As a result of this finding, I find that the owners have no entitlement to claim damages in the sum of $6000 in respect of the wardrobe doors. However, an allowance of $6000 in their favour has been made in that the contract price, and therefore the unpaid balance of the contract price, is reduced by $6000. As discussed later, the unpaid contract balance forms part of the assessment of the owners' damages.

Plumbing fittings

114 In around May 2017, one of the owners, Norma Konsol, and her daughter Mary attended the builder's plumbing fittings regular supplier, 'Plumbcorp' with the builder's supervisor, Amir, to select plumbing fittings. The cost of the selected fittings totalled $8220. Amir told the owners that this cost was $2220 above the builder's standard range contract allowance. At the suggestion of Amir, the owners paid $2220 direct to Plumbcorp, this being the difference between the contract allowance as advised by Amir, and the actual cost of the selected items.

115 I accept this evidence. It is not challenged by the builder.

116 Like the wardrobe doors discussed above, the contract makes no express provision as to the allowance for the plumbing fittings. They

117 Accepting the evidence of the owners, in my view it is appropriate to account for this item as follows:

- there is an increase in the contract price in the sum of $2220, as the extra cost of a provisional sum item over and above the contract allowance; and
- there has also been a payment by the owners, as part of the contract price, in the sum of $2220.

Door furniture

118 Also in around May 2017, Norma Konsol, with the assistance of her daughter Mary, reached agreement with Amir as to the owners' selection for doors and door handles. Mary says that Amir was paid $1810 in cash, and that he confirmed receipt of this payment in an email dated 6 May 2017[10]. I accept Mary's evidence in this regard. It is unchallenged, and I have viewed the email from Amir dated 6 May 2017.

119 There is no evidence before me to suggest that the payment of $1810 represented the additional cost, over and above the contract standard allowance, for door furniture selected by the owners. On the evidence before me, I consider the payment to have simply been a deposit payment made to the door furniture supplier. Accordingly, there is no contract variation in respect of this item. However, for the purpose of calculating the unpaid contract balance, this payment will be taken into account.

ADJUSTED CONTRACT PRICE AND UNPAID BALANCE

120 In summary, I find for the reasons set out above that the contract price is adjusted to $684,768.28, calculated as follows:

original contract price		$ 670,000
plus additional variation works:		
- refrigerated air conditioning,	$2,000	
- staircases and balustrades	$1,750	
- gas/water to rear alfresco areas	$1,400	
- extra tiling	$13,398.28	
- upgrade of plumbing fittings,	$2,220	$ 20,768.28
balance		$690,768.28
less credit allowance for wardrobe doors		$ 6,000
Adjusted contract price		**$684,768.28**

121 As noted earlier in these reasons, the builder, in calculating its damages claim, allows for contract payments made by the owner in the total sum of $518,250. However, on the evidence of the owners and the builder, there is no dispute that the owners made the following payments totalling $521,250:

[10] Mary witness statement paragraph 25 at Tribunal book page 106

- $100,500 paid on or about 7 September 2016 as payment of the *deposit* and *base* stage;
- $100,500 paid on or about 14 December 2016 in payment of the *frame* stage;
- $60,000 paid on or about 27 April 2017 as part payment of the *lock-up* stage;
- $174,500 paid on or about 4 May 2017 as the balance of the *lock-up* stage;
- $2000 paid on or about 8 May 2017 as the agreed variation extra cost of changing the air-conditioning from evaporative cooling to refrigerated cooling;
- $83,750 paid on or about 19 October 2017 as agreed 50% payment of *fixing* stage

122 Further, as discussed above I find that the owners made additional payments for contract works, namely $2220 for plumbing fittings, and $1810 for door furniture. Adding these payments, I find that the owners have made payments totalling **$525,280** for the contract works. I make no additional allowance for the payment made in respect of the wardrobe doors because, as discussed above, the wardrobe doors have been removed from the contract works and an appropriate credit adjustment has been made to the contract price.

123 Accordingly, with an adjusted contract price of $684,768.28**,** and the owners having made payments totalling $525,280, I find that the unpaid contractual balance is $159,488.28. I round this figure off to **$159,488.**

124 For clarity, I note that no allowance has been made in respect of the $3,000 claimed by the builder as the cost of a site electricity pole and site fence. As noted earlier, this item is identified in the builder's counterclaim, but there is no evidence in respect of this claimed cost. Even if I was to assume that the builder incurred such cost, there is no evidence upon which I might find that it is a variation extra cost to be added to the contract price. To the extent the builder says that the owners are otherwise liable in respect of this cost, the basis of such liability has not been explained and there is no evidence upon which I might make a finding. Accordingly, there is no allowance on any basis in respect of this claimed cost.

WAS FIXING STAGE REACHED?

125 The builder produced in evidence photos taken by Mr Shaba on 5 November 2018 when the builder was removing cabinetry.[11] It is clear from those photos that:

- cabinetry carcasses were on site but not fitted and fixed in position;
- benches and splash backs were yet to be installed;

[11] the photos are at pages 1849 – 1857 in the Tribunal book

- skirtings were yet to be installed;
- basins, troughs, sinks and baths had not been not installed.

126 At the view of the property on the first day of the hearing, I noted also that, in addition to the above matters, some doors and wardrobe doors were yet to be installed. Accepting the uncontested evidence of the owners that, other than a site clean, they have not carried out any further works or otherwise altered the works as the builder left them when he stopped works in March 2018, I am satisfied that the works as viewed by me on the first day of the hearing is the state of the works as the builder left them.

127 It is clear on the evidence that, as at 2 March 2018 when the builder stopped works, the works were considerably short of having reached fixing stage.

TERMINATION

128 In my view, the builder had no entitlement to stop works on 2 March 2018 by reason of the owners' non-payment of the remaining 50% of the fixing stage payment.

129 As set out above, fixing stage was not reached. The contract (compliant with the provisions of section 40 in the Act) is clear in setting out the builder's entitlement to progress payments. Pursuant to clause 29 in the contract, the builder must submit a written claim for a progress stage payment when the stage has been *completed*. Under clause 30, the owners must pay the stage progress payment after the stage has been completed.

130 As noted above, fixing stage had manifestly not been completed. As such, the builder had no entitlement to demand full payment of the fixing stage progress claim, and no entitlement to suspend the works until the payment was made.

131 And it does not assist the builder to assert that the parties agreed to an alternative payment regime.

132 To the extent an alternative payment regime was agreed, the alternate agreement was not set out in the manner prescribed by section 40 (4) of the Act.

133 To the extent it is said that the alternate payment agreement was reached at the conciliation at the DBDRV, the conciliation agreement does not support such finding. As noted earlier, the conciliation agreement provides that the owners will pay for completion of the fixing stage '*in accordance with the contract*'. And in any event, the conciliation agreement *ceased to have effect* by reason of the *Notice of decision – Notice of non-compliance with record of agreement* issued by the DBDRV Chief Dispute Resolution Officer on 29 March 2018.

134 To the extent it might be said that the alternate payment agreement was otherwise reached between the parties, and is enforceable notwithstanding section 40 (4) of the Act, the agreement was that the remaining 50% of the

fixing stage payment would be made upon completion of painting and tiling works. As noted above, the tiling works had not, and still have not, been completed.

135 Accordingly, on any view the builder had no entitlement to demand full payment of the fixing stage payment and to suspend the works until such payment was made. In my view, by taking such action the builder clearly repudiated the contract. That is, the builder evinced the clear intention to no longer be bound by the contract or to propose to fulfil it only in a manner substantially inconsistent with its obligations under the contract.[12]

136 As such, I find that the owners were entitled to accept the builder's repudiation of the contract and bring the contract to an end.

137 The next question is when was the contract was brought to an end?

138 The owners say that the builder's repudiatory conduct occurred over a period of time, with the final act being the removal of the cabinetry on 5 November 2018. They say they unequivocally accepted the repudiation and brought the contract to an end by the letter of their lawyers to the builder's lawyer dated 7 November 2018.

139 In my view, however, the contract was brought to an end by the owners at an earlier date.

140 The owners commenced this proceeding on 16 May 2018. At that time, they were self-represented. Their application includes a 'Summary of Issues' which sets out, amongst other things:

- various items of alleged non-compliant and defective works,
- the conduct of the builder in demanding payment of the fixing stage payment before such payment was due,
- their concern as to the security of the property,
- alleged unreasonable denial of their access to the property, and
- a concluding statement that the owners will require a report to estimate the monetary value of defective and incomplete works.

141 The application sets out a description of the owners' complaints, in their own words, and in my view it cannot be said that the application constitutes an unequivocal acceptance of the builder's repudiation of the contract.

142 At a directions hearing on 28 June 2018, at which the owners were represented by Counsel, order was made, amongst others, requiring the builder to allow the applicants and their experts reasonable access to the property for the purpose of inspection. It is apparent from such order that as at the date of the directions hearing there appeared to have been no unequivocal acceptance of the builder's repudiation of the contract. A

[12] Koompahtoo Council v Sanpine Pty Ltd (2007) 233 CLR

further order made at that directions hearing required the owners to file and serve Points of Claim by 9 August 2018.

143 Points of Claim, drawn by Counsel, dated 9 August 2018 were duly filed and served. Those Points of Claim assert breaches of the contract on the part of the builder in respect of the quality of the building works and the failure of the builder to complete the building works by the due completion date. The Points of Claim references building inspection reports prepared by Mr Simpson, and then sets out the damages claimed by the applicant including:

- the estimated cost, based on Mr Simpson's reports, to rectify defects in the building works and to complete the contract works. The cost estimates are clearly founded on the premise that a new builder will be engaged to rectify and complete the works, as the assessments include allowances for 'preliminaries' and a 40% builder's margin;
- contract prescribed agreed damages for delay at $150 per week commencing from 18 April 2017 (no end date is specified);
- loss of rental at $500 per week commencing from 18 April 2017 (no end date is specified);
- storage costs to be advised; and
- stress inconvenience and loss of amenity damages to be advised

144 The Points of Claim makes no reference to a repudiation of the contract or an acceptance of a repudiation. But neither does the Points of Claim seek an order for specific performance of the contract. On the contrary, damages are sought for, amongst other things, the estimated cost the owners will incur to engage another builder to rectify and complete the contract works. In my view, a claimed entitlement to relief of this nature cannot sit side-by-side with an assertion that the contract remained on foot.

145 In my view, by claiming in their Points of Claim an entitlement to damages for, amongst other things, the estimated cost to engage another builder to rectify and complete the contract works, the owners have, in effect, accepted the builder's repudiation of the contract and brought the contract to an end. And, for the reasons discussed above, I am satisfied that the owners were entitled to take such action.

146 Accordingly, I find that the contract was brought to an end by the owners, as they were entitled to do, on 9 August 2018, and that the owners are entitled to bring a claim for damages.

DAMAGES

147 The general rule with respect to damages for breach of contract is that where a party sustains a loss by reason of the breach, that party is, in so far as money can do it, to be placed in the situation he would have been had the contract been properly performed. The general rule is subject to the

qualification that in some cases circumstances may exist such that it would be unreasonable to rigidly apply it.[13]

148 The primary measure of damages for the owners is the estimated reasonable cost they will incur, over and above the contract price (that is, the adjusted contract price as discussed above) to have the contract works rectified where they are defective and completed where they are incomplete.

RECTIFICATION WORKS

I-beams instead of posi-struts

149 It is not disputed that the engineering plans provide for posi-struts to support the first-floor flooring in each of the townhouses, however the builder used I-beams instead. There is no dispute as to the structural adequacy of the I-beams. The problem with the I-beams, according to the owners, is that they have compromised other building works. The configuration of posi-struts means that things, such as air duct vents, can be passed through them. I-beams, on the other hand, are solid.

150 The owners are not claiming the cost to remove the I-beams and replace them with posi-struts. Such remedial work would involve substantial demolition of works already carried out, and this would be unreasonable having regard to the fact that there is no structural concern with the I-beams.

151 What the owners seek is compensation in respect of other works which have become necessary, or have been compromised, by the use of I beams instead of posi-struts. The affected works include, in each townhouse:

- the construction of laundry bulkheads with a resulting loss of space,
- the need to route air-conditioning ducting along the top of the kitchen cabinetry which creates an obstruction to routing the range hood exhaust to the external of the building, and
- smaller than specified laundry chutes.

152 The compensation sought includes the cost of constructing extra cupboard space to make up for alleged loss of cupboard space. I deal with each of the areas of alleged affected work below.

Laundry bulkheads

153 In each of the townhouses, the builder has constructed a prominent bulkhead which is not noted in the architectural plans. The owners say that the bulkhead was required to house air-conditioning ducting, and that had posi-struts been used the ducting could have been passed through the posi-struts and the bulkhead would have been unnecessary.

[13] Bellgrove v Eldridge (1954) HCA 36; (1954) 90 CLR 613;

154 The builder says that the bulkhead does not house ducting. The builder says the bulkhead houses a sewage pipe from the upper level, and the creation of the bulkhead to conceal the pipe became necessary, not because of the use of I-beams, but rather because of a primary structural beam preventing the passage of the sewer pipe in the space between the ground floor ceiling and the first-floor flooring. Having discussed the matter with Mr Simpson and Mr Fleming, and having viewed photographs taken by the builder during the course of construction which depict the beam and the path of the sewer pipe, I accept what the builder says. The owners' expert, Mr Simpson, also now accepts the builder's explanation.

155 I am satisfied that the structural beam, blocking the path of the sewer pipe, was constructed in accordance with the architectural plans. I find that the bulkhead constructed in the laundry in each townhouse is necessary work carried out by the builder to route the sewer pipe around the structural beam. As such, the owners claim for compensation in respect of this item fails.

Kitchen cupboard space and range hood exhaust

156 At the view, I noticed an air-conditioning duct tightly fitted in to the space between the top of the kitchen cupboards and the kitchen ceiling. The duct has yet to be enclosed within a small bulkhead to be constructed on top of the kitchen cupboards. This situation is the same in each of the townhouses.

157 Again, the owners say that had posi-struts been used, the duct could have passed through the posi-strut and it would not have been necessary to run the ducting along the top of the kitchen cupboards, taking up space.

158 Mr Simpson was also concerned as to whether, having regard to the location of the duct and the use of I-beams, it would still be possible to route the range hood exhaust to the exterior of the townhouse, a necessary item of work which has not yet been carried out.

159 Having viewed the ducting as installed on site, and having viewed the configuration of the roof and the likely route for the range hood exhaust, and having discussed these matters with Mr Simpson and Mr Fleming, I am satisfied that:

- it is acceptable that the duct be installed where it is, on top of the kitchen cupboards; and
- there is no resulting loss of amenity in terms of kitchen cupboard space, and it would have made no difference to the kitchen cupboard space if posi- struts had been used instead of I- beams; and
- when the bulkhead is installed to conceal the duct, there will be no appreciable loss of amenity in terms of the appearance of the kitchen generally; and
- there is sufficient room to satisfactorily route the range hood exhaust to the external of the building.

160 Accordingly, I find there is no loss attracting compensation in respect of this item.

Laundry chutes

161 The builder has installed, in each of the townhouses, a laundry chute which allows for clothes to be dropped from the first floor into the laundry.

162 The architectural plans indicate the dimensions of each chute as 500 mm by 500 mm. The installed chutes are not that large. Although each chute is approximately 500 mm by 500 mm at their opening on the first floor, the chutes narrow to around 500 mm x 250 mm when they pass through the area between the first-floor flooring and the ground floor ceiling.

163 The owners say the compromised size of each chute is the result of the use of I-beam's instead of posi-struts, and they seek compensation for loss of amenity.

164 It is apparent that there is an inconsistency within the architectural drawings in that the drawings identify each chute as 500 mm by 500 mm, yet the drawings also note that the posi-struts are to be placed at 450 mm centres. Obviously, a 500 mm square chute will not fit through an area where posi-struts are 450 mm apart.

165 Further, having heard evidence from Mr Fleming and Mr Simpson, I do not accept that the reduced size of the chutes, where they pass through the area between the first-floor flooring and the ground floor ceiling, is the result of the builder's use of I-beams instead of posi-struts. I am satisfied that it would have made no difference at all to the chute size if posi-struts had been used instead of I-beams.

166 I am satisfied that a chute size of 500 mm^2 was not possible, and that the builder has constructed, in each townhouse, a chute of a size permitted by the surrounding frame construction. Having viewed the chutes, I am also satisfied that they are suitably functional and, to the extent a slightly larger chute might have been possible, there is no appreciable loss of amenity in respect of the chutes constructed.

167 Accordingly, I find there is no loss attracting compensation in respect of the size of the laundry chute in each townhouse.

Conclusion on I-beams instead of posi-struts

168 For the above reasons, I find that the builder's use of I-beams in lieu of posi -struts raises no entitlement to compensation damages for the owners.

Articulation joints

169 Articulation joints have been installed in the brickwork. Where the articulation joints are aligned with the edge of windows and doors, there is no continuation of the articulation adjacent to the edge of the windows/doors. Mr Simpson says the missing articulation is a breach of the

Building Code of Australia (now called the National Construction Code) part 3.3.1.8, which picks up the Australian standard AS3700. Mr Simpson says a 10 mm gap must be allowed between the edge of the doors and windows and the adjacent brickwork.

170 Mr Fleming says that the articulation which has been provided by the builder is common, however he also concedes that Mr Simpson is correct in that the articulation does not meet the regulatory requirement.

171 Having viewed the articulation joints, and having heard evidence from Mr Simpson and Mr Fleming, I find that the lack of articulation identified by Mr Simpson constitutes a breach of the warranties, and I agree with Mr Simpson that the missing articulation should be provided. Without such articulation there is the risk of damage if there is any future movement in the brickwork.

172 Mr Fleming says the missing articulation can be provided by simply cutting the articulation space in the brickwork adjacent to the windows and doors. However, I agree with Mr Simpson that this is not an acceptable means of installing the articulation because it would result in unsightly rough-cut bricks adjacent to the doors and windows.

173 I prefer Mr Simpson's methodology which requires removal of one row of bricks adjacent to the window/door, then cutting in 10 mm articulation, and then replacing the removed bricks. Mr Simpson has provided a detailed costing for these and other works. For these works, he allows $6295.20 (not including preliminaries, builder's margin and GST) for each townhouse. Such costing includes 40 hours labour for a bricklayer at $72.60 per hour, 48 hours for a labourer to remove and replace brickwork including pressure cleaning the brickwork at $60.50 per hour, 4 hours 'supervision' at $96.80 per hour, and one hour for 'miscellaneous' at $100 hour. Mr Fleming considers such costing to be a little high, and he provided, during the course of giving evidence, a ballpark estimate of $2000 for such works.

174 I consider Mr Simpson's costing to be reasonable, save for his allowances for 'supervision' and 'miscellaneous'. No explanation as been provided for the 'miscellaneous' charge and I do not allow it. And I consider that 'supervision' falls within the general charge allowed for builder's margin, and that there should not be an additional extra charge for supervision. Later in these reasons, I shall discuss my allowance for 'preliminaries' and 'builder's margin'.

175 With the deduction of the 'supervision' and 'miscellaneous' allowances, I allow a sum of $5807.80 (not including preliminaries, builder's margin and GST) for this item of required rectification work for each townhouse, a total of **$11,615.60**.

Porch piers

176 Each townhouse has a front portico/porch, and each of the 2 porches has 2 brick piers. The architectural plans show that a roof beam to the porches is

to be supported by a 90 x 90 mm treated pine post housed within each of the brick piers.

177 As constructed, the piers do not house a pine post. The roof beam sits directly on the brick piers. Mr Simpson is concerned that there does not appear to be any tie down between the beam and the piers. For rectification, he allows for demolishing and reconstructing of the brick piers.

178 At the view, I noted that soffit ceilings had not been installed in the porches. The builder says the soffit was not installed because the owners wished to engage their own electrician to install electric lighting to each of the brick piers. The soffit was left off to allow electrical cabling to be installed into the piers via the roof space in the porches.

179 The owners did engage an electrician for this task, however the task could not be completed because in each porch, one of the brick piers has been core filled with concrete. It is not clear why this was done. The builder had no explanation. Perhaps it is connected with supporting the roof beam sitting on the piers. In any event, electrical cabling could not be installed within the one pier in each porch which was filled with concrete.

180 In respect of the tie down of the roof beam, the engineer, Mr Janus of Vert Engineering, had confirmed to the builder in an email dated 11 July 2017 that it was acceptable that the porch roof beam be supported directly onto the brick piers, provided there was a tie-down a minimum of 6 courses into the brickwork. At the view, a tie-down into the one pier (in each porch) that was not concrete filled could be seen, although it could not be determined how deep the tiedown extended into the brick pier. Or

181 Having regard to all the above, I find that the works are not compliant with the architectural plans, and in this regard there is a breach of the warranties. However, I am also satisfied that it will only be necessary to reconstruct the one pier in each porch that is filled with concrete. When that pier is reconstructed, the roof beam can be tied down into it in accordance with the above-mentioned instruction of the engineer. The reconstruction of the pier, without concrete filling, will also allow the owners to install electrical cable for the intended lighting.

182 Mr Simpson provides, for each townhouse, a costing of $7134 (excluding preliminaries, margin and GST) to replace the 2 brick piers. His costing allows 2 hours for supervision and one hour for ‘miscellaneous’. Again, there is no explanation for the ‘miscellaneous’ charge and I do not allow it. And for the reasons discussed above, I also exclude the ‘supervision’ allowance. These deductions bring Mr Simpson’s costing down to $6637.20. As this is the allowance for 2 brick piers, I allow half the sum, $3318.60, as the cost to replace one pier. With one pier replaced in each of the 2 townhouse porches, the total allowance for the 2 townhouses for this item is **$6637.20** (not including preliminaries, builder’s margin and GST).

Ground floor powder room exhaust fan

183 There is no dispute that an exhaust fan required in the ground floor powder room in each townhouse has not been installed. Mr Simpson has provided a costing of $2013 (not including preliminaries, builder's margin and GST) for each townhouse for this work. The builder does not challenge this costing.

184 Accordingly, I will allow a total of **$4026**, not including preliminaries, builder's margin and GST, in total for both townhouses for this item of work.

185 Although this item of work might better be characterised as incomplete works rather than rectification works, I will treat it as the cost of rectification works as that is how Mr Simpson, in his costings, has characterised this item.

Balcony plasterboard

186 The plasterboard lining to the balcony walls in each of the townhouses was not finally sealed/painted by the builder. The plasterboard has deteriorated due to weather damage. Mr Simpson says that some of the plasterboard lining must now be replaced. Having viewed the balconies, I agree. Mr Fleming agrees that the work is required. I accept that rectification is required as suggested by Mr Simpson, and that the builder is responsible for the cost.

187 Mr Simpson allows a costing of $729.20 (not including preliminaries, builder's margin or GST) for each townhouse. This estimate includes $96.80 for 'supervision'. For reasons discussed above, I do not allow a separate costing for 'supervision'. Otherwise I consider Mr Simpson's costing to be reasonable, and I allow $632.40 for each townhouse, a total of **$1264.80** (not including preliminaries, builder's margin and GST) for the 2 townhouses.

Upper story cladding

188 The upper story of each townhouse is lightweight rendered cladding. Mr Simpson says that the underside at the bottom of the cladding has not been sealed in accordance with the manufacturer's instructions. The sealing is necessary to prevent deterioration of the foam substrate. Mr Fleming agrees.

189 Mr Simpson says that, given the very small gap between the underside of the cladding and the roof, it is simply not practicable, if possible, to seal the underside of the cladding in-situ. But rather than removing all the cladding, Mr Simpson says that a more practicable and cost-effective solution is to install flashings at the base of the cladding. Mr Fleming says that it would be possible to seal the cladding in-situ, but he agrees with Mr Simpson that the installation of flashing would be an appropriate alternative solution.

190 Having viewed the roof and the cladding, I agree with Mr Simpson that it would be impracticable, if possible at all, to seal the cladding in-situ. As such, I am satisfied that appropriate rectification is the installation of flashing as suggested by Mr Simpson.

191 Mr Simpson provides a costing of $7895.20 (not including margins and GST) for each townhouse. His costing includes an allowance for 'supervision' which, for the reason discussed above, I do not allow. His costing allows $5808 for labour and $200 for materials. His costing also allows $1500 as the cost of scaffold connected to the roofing.

192 Mr Fleming says that, instead of scaffold, adequate fall protection can be provided by use of a rope anchor system. Under this system, a harness rope fixed to the middle of the common roof is connected to the worker carrying out the work. Mr Fleming says the rope anchor system can be obtained at a cost of $10 per lineal metre. He estimates there is approximately 62 lineal metres of cladding to which flashing needs to be installed, and thus he estimates the cost of the rope anchor system to be approximately $620. As I understand it, this is the estimated cost of the rope anchor system for both townhouses together, as they have one common roof. As to labour and materials, Mr Fleming allows, for each townhouse, a plumber for 2 days at a total cost of $1440 and $200 for materials.

193 Having heard evidence from both Mr Simpson and Mr Fleming, I am satisfied that the more cost-effective rope anchor system is a satisfactory safety measure in lieu of scaffold. Otherwise, I think it fair in respect of this item of rectification work to 'split the difference' between the labour allowances of Mr Simpson and Mr Fleming. On this basis, I allow for each townhouse $3624 for labour, $200 for materials and $310 (50% of the cost of the rope anchor system), a total of $4134.

194 Accordingly, for both townhouses I allow a total of **$8268** (excluding preliminaries, builder's margin and GST) as the cost to rectify this item of defective work.

Balcony Balustrade

195 The balcony in each townhouse is finished with lightweight rendered cladding. In one of the townhouses, a small section of damaged rendered cladding along the top of the balustrade has been repaired, however the repair work clearly stands out. Quite apart from this blemish, Mr Simpson is of the view that the balustrade is likely to deteriorate and allow water entry because the balustrade top does not have a slope to allow the run-off of water. In his view, the simplest way to fix both the unsightly repair work and the lack of fall to the balustrade top is to install a metal capping. Mr Fleming agrees. Having viewed the balustrade, I too agree.

196 Mr Simpson allows a costing of $293 for each townhouse to supply and install the metal balustrade capping. The costing includes a supervision allowance which, for the reason discussed earlier, I do not allow. With the

deduction of the supervision allowance, Mr Simpson's costing for each townhouse is $245. I consider that cost to be reasonable and accordingly I allow **$490** (excluding preliminaries, builder's margin and GST) in total for both townhouses for this item of rectification work.

Upstairs bathroom waterproofing issues

197 The upstairs bathroom in each townhouse will, when works are completed, have a bath fitted against one wall. Mr Simpson is concerned that the plaster wall against which the bath will be fitted may not be water resistant plaster. He says this because photos he has seen of the bathroom during construction do not depict plaster that is blue in colour, the usual indicator of water-resistant plaster.

198 I accept the evidence of Mr Shaba, for the builder, that all plaster installed in wet areas is water resistant plaster.

199 However, the problem with the upstairs bathroom does not end there.

200 No 'water stop' has been installed, embedded in the tiled floor, at the doorway entry to the bathroom. Mr Fleming agrees that a water stop should have been installed but he says that a water stop can be installed at a modest cost by removing the first row of tiles to allow for installation of a water stop when the tiles are relayed. It is very likely that such works will damage the underlying waterproof membrane. Mr Fleming says damage caused to the membrane can be repaired satisfactorily as part of the works. Mr Simpson, however, is concerned that a damaged membrane cannot be adequately repaired, and for this reason it will be necessary to re-tile the whole floor so that an intact membrane, newly installed across the floor, is ensured. Mr Simpson says that a rectifying builder will not warrant the partial scope of works suggested by Mr Fleming. I prefer Mr Simpson's evidence. I do not accept that a compromised waterproof membrane can be satisfactorily repaired as suggested by Mr Fleming.

201 There is a further problem with the shower. At the view, Mr Simpson pointed out that the perimeter edge lip of the shower base is visible. This means, necessarily according to Mr Simpson, that the shower is inadequately waterproofed because there is no water proof membrane installed over the top of the shower base lip. This means there is a point of entry for water behind the shower base at the lip edge. Having viewed the shower on site, I accept Mr Simpson's evidence in this regard.

202 The repair of this item of defective work in the shower will also necessarily mean retailing of the shower walls.

203 I also accept Mr Simpson's evidence that repair of the shower will necessarily, in any event, mean that the entire bathroom floor will need to be stripped and re-tiled. The shower cannot be repaired without some damage to surrounding tiling and consequential damage to the flooring waterproof membrane.

204 Accordingly, I find that rectification of the defective waterproofing works in the upstairs bathroom, in each townhouse, will mean the stripping back and retailing all the tiled areas, ensuring adequate installation of waterproof membrane in the process.

205 The owners had a further concern with the shelf niche installed in the shower wall. The niche is not adequately sloped to ensure run-off of water out of the niche onto the shower wall. As the shower tiling is to be stripped and re-installed, this problem with the niche can be addressed as part of the rectification works.

206 Mr Simpson estimates the cost of the rectification works, for each townhouse, as $9052.20, excluding builder's margin and GST. The estimate includes $580.80 as a 'supervision' allowance. As discussed above, I do not allow a separate charge for 'supervision'.

207 Prior to giving evidence, Mr Fleming had not prepared an alternative cost estimate for this scope of works because he had allowed for only a very minor scope of works to rectify the water stop issue by his methodology as discussed above.

208 I am satisfied that Mr Simpson's allowance is reasonable. Accordingly, with the removal of the 'supervision' component of his cost estimate, I allow $8471 for each townhouse, a total of **$16,942** for the works to both townhouses, excluding preliminaries builders margin and GST.

Ground floor ensuite bathroom

209 In each townhouse, there is no water stop installed in the tiled floor, either at the entrance to the shower or at the doorway entrance to the ground floor ensuite bathroom. Mr Simpson and Mr Fleming both agree that a water stop should be installed, and they agree that the installation of one water stop at the doorway will suffice.

210 However, as discussed above in respect of the upstairs bathroom, Mr Fleming says rectification requires only the removal of one row of tiles at the doorway so that the water stop can be installed when the tiles are re-laid. As discussed above, I prefer Mr Simpson's evidence and find that it will be necessary, to satisfactorily rectify this item of defective work, to re-tile the entire bathroom floor.

211 Again, I am satisfied that Mr Simpson's cost estimate for these works, $9584.60 for each townhouse is reasonable, save that I do not allow the $580.80 inclusion for 'supervision'. With the supervision allowance removed, I allow $8616 for each townhouse, a total of **$17,232** for the two townhouses, excluding preliminaries, builder's margin and GST.

Townhouse 2 boundary fence

212 Prior to the building works commencing, the owners installed a colour bond boundary fence to the title boundary on the north side of townhouse 2.

213 It is apparent that during the course of the building works carried out by the builder, a significant quantity of cement has been splattered onto the fence. There is no argument that the builder bears responsibility.

214 Mr Fleming allows a modest cost to acid clean the fence.

215 Mr Simpson says that it is not a simple cleaning task. He says that removal of the concrete will clearly damage the powder coat of the fence, and as such, appropriate rectification will involve replacement of the affected sections of the fence. Having viewed the cement splattered fence, I agree with Mr Simpson.

216 I allow Mr Simpson's cost estimate (which does not include any 'supervision' allowance) of **$980.80**, excluding preliminaries, builder's margin and GST.

Townhouse 2 sliding glass door

217 The bottom aluminium sill for the sliding glass doors leading to the rear alfresco in townhouse 2 has been slightly damaged. The damage affects the smooth opening and closing of the doors. Mr Fleming and Mr Simpson agree that the sill needs to be rectified.

218 Mr Fleming says the damage could probably be repaired by using a mallet to knock the bent sections of the sill back into place. He allows a labourer/carpenter a half day to carry out the works at a cost estimate of $290.

219 Mr Simpson says a specialist contractor will be required to rectify the problem, and he allows a cost of $500 for the contractor and a supervision allowance of $96.80.

220 Having viewed the sill, and noting the importance of getting the fix right so that the doors function as they should, I accept that a specialist contractor as suggested by Mr Simpson is required.

221 I accept Mr Simpson's cost estimate, save for the 'supervision' component which, for the reason previously discussed, I do not allow. Accordingly, I allow **$500** for this item of rectification work, excluding preliminaries, builder's margin and GST.

Townhouse 2 garage door frame

222 The frame to the pedestrian door at the rear of the garage of townhouse 2 has been installed back to front, with the result that instead of opening against the wall, as intended in the architectural plans, the door opens towards the middle of the garage space. There is no dispute that this is an error requiring rectification.

223 Mr Fleming suggests that the hinges can simply be changed to the other side of the frame. I agree with Mr Simpson that this will leave an unsightly frame where the hinges have been removed. In my view it is reasonable that the frame be removed and installed properly, as intended under the contract.

224 Mr Simpson allows $387.20 for this item of rectification work. His estimate includes $96.80 for 'supervision'. As discussed earlier, I do not allow the supervision component.

225 Accordingly, I allow **$290.40** for this item of rectification work, not including preliminaries builders margin and GST.

Rusted window winder

226 There is no dispute that one window winder, in bedroom one of townhouse 2, is defective in that it has noticeably and considerably rusted. The builder does not dispute liability or Mr Simpson's rectification estimate. Mr Simpson's cost estimate, $166, includes a supervision allowance of $48.40. For reasons discussed earlier, I do not allow the supervision component.

227 Accordingly, I allow **$117.60** for this item, excluding preliminaries, builder's margin and GST.

Townhouse 2 soffit to alfresco area

228 The soffit to the alfresco area in townhouse 2 has notably sagged in the area above the sliding glass door. It is not disputed that rectification is required.

229 Mr Simpson allows $4041.20 for the removal and replacement of the entire soffit in the alfresco area. His costing includes a supervision allowance and an allowance for bin hire.

230 Mr Fleming says it is not necessary to replace the soffit. He says that the soffit, in the area where it has fallen away from the frame, can be re-fixed to the frame using glue and screws.

231 I agree with Mr Fleming. The soffit is not damaged and I do not consider it reasonable to replace it. Having viewed the alfresco area, and being satisfied that interior access to roof space is available if necessary to carry out such works, I accept that Mr Fleming's rectification methodology is practicable and suitable. I asked each of Mr Fleming and Mr Simpson for their cost estimate for the scope of works as suggested by Mr Fleming. Mr Fleming estimated $1000 and Mr Simpson estimated $1200. I think it fair to split the difference and allow a sum of **$1100**, not including preliminaries, builder's margin and GST, to rectify this item of defective work.

TOTAL ALLOWANCE FOR RECTIFICATION WORKS

232 In summary, I make the following allowances for rectification works, not including preliminaries, margin and GST:

- brickwork articulation $11,615.60
- porch piers $6637.20
- balconies plasterboard walls $1264.80
- upper story cladding $8268
- balconies balustrade $490

- upstairs bathroom is $16,942
- ground floor ensuite bathrooms $17,232
- townhouse 2 boundary fence $980.80
- townhouse 2 sliding glass door $500
- townhouse 2 garage door frame $290.40
- townhouse 2 window winder $117.60
- townhouse 2 alfresco soffit $1100

TOTAL **$65,438.40**

Preliminaries, margin and GST

233 The term 'preliminaries' is used to describe preliminary expenses of the building projects such as the cost of permits, site establishment and insurances. The term 'builder's margin' covers a reasonable margin, measured as a percentage of the actual cost of works, for builder's profit. As discussed above, I consider the builder's margin allowance also includes an allowance for the builder's supervision of works.

234 In respect of his estimated rectification works costing, Mr Simpson allows 5% for preliminaries before adding a builder's margin allowance of 40% before finally adding GST. In his cost estimate for completing incomplete works (as opposed to rectification works), discussed below, Mr Simpson allows 5% for preliminaries and a builder's margin of only 30%. The rationale for the larger builder's margin allowance for rectification works is that there is a premium to be paid when a new builder steps in to rectify problems in works carried out by a previous builder. The rationale is sound, although the appropriate extra premium to allow is a matter of opinion.

235 For both rectification works and completion of incomplete works, Mr Fleming allows 5% for preliminaries, before adding 20% for supervision, before adding 15% for builder's margin, before finally adding GST. By this methodology, the 15% builder's margin applies on top of the pre-allowed 20% supervision allowance. The effect is that Mr Fleming's overall allowance for supervision and builder's margin together is somewhere between 35% and 40%.

236 Having regard to the nature of the rectification works in this case, I am satisfied that a builder's margin allowance of 40% (with no prior separate allowance for supervision) is reasonable. As for preliminaries, I allow 5% as suggested by both Mr Fleming and Mr Simpson.

237 Accordingly, I allow $107,431 in total in respect of required rectification works, calculated as follows:

- cost of works $65,438.40
- add 5% for preliminaries $3321.92

subtotal	$68,710.32
- add 40% builder's margin	$27,484.13
subtotal	$96,194.45
- add 10% GST	$9619.44
TOTAL (rounded off to the nearest dollar)	**$105,814**

INCOMPLETE WORKS

238 Mr Simpson has provided a cost estimate to complete the incomplete building works to bring the contract works to completion. For each townhouse he allows, before preliminaries, builder's margin and GST, $105,814.10. This sum includes a supervision allowance of $3872 for each townhouse.

239 As discussed above, I make no separate allowance for supervision as I consider it to be part and parcel of the builder's margin allowance. Removing the supervision allowance, and allowing Mr Simpson's allowance of 5% for preliminaries and 30% for builder's margin, Mr Simpson's cost estimate for completion of the contract works (that is the completion of both townhouses) becomes $306,132, calculated as follows:

- works cost (excluding supervision allowance)	$203,884.20
- add preliminaries 5%	$10,194.21
subtotal	$214,078.41
- add builder's margin 30%	$64,223.52
subtotal	$278,301.93
- at GST 10%	$27,830.19
TOTAL (rounded to the nearest dollar)	$306,132

240 Mr Fleming's cost estimate to engage a new builder to complete the contract works is $201,126.64, inclusive of his allowances as discussed above for preliminaries, supervision and builder's margin, and GST.

241 Generally, across-the-board, Mr Fleming's allowances for items of work are less than Mr Simpson's allowances.

242 One item of note is landscaping. Mr Fleming allows around $20,000 (excluding preliminaries, builder's margin and GST) for driveways, paving and landscaping. Mr Simpson allows $40,000 (excluding preliminaries, builder's margin and GST) for the same works ($20,000 for each townhouse).

243 In respect of landscaping, the contract identifies the following as provisional sum items:

- landscaping front and back
- retaining wall

- fencing
- shed

but no actual provisional *sum* is identified.

244 The owner, Norma Konsol, produced at the hearing a landscape plan. It is apparent from the plan itself that it was created for the purpose of the owners' application for a planning permit. The builder says he had never sighted the plan until it was produced at the hearing by the owners. The plan does not appear to have been included in the contract documents. In any event, the plan is not very useful in terms of prescribing the scope of landscaping works because, although it provides some drawing detail as to plants, garden beds and lawn, it does not show any retaining walls.

245 In respect of the retaining walls, Mrs Konsol says she believed retaining walls would be constructed around the perimeter of the land as part of the contract scope of works.

246 Mr Shaba says the reference to 'retaining wall' as a provisional sum item means that a retaining wall would be constructed *if needed.* As to 'fencing' Mr Shaba says it is a reference to a paling fence between the 2 townhouses yards. As to 'shed', Mr Shaba says the intention was to construct a small shed in the yard. Otherwise, Mr Shaba says he allowed for a standard driveway to the townhouses, the levelling of yards and sprinkling of grass seed.

247 Whatever the parties' particular views are, the fact is that the contract simply does not provide a definitive scope of works for landscaping and driveways.

248 Another item of note is the stone bench tops. Excluding preliminaries, builder's margin and GST, Mr Fleming allows $6000 whereas Mr Simpson allows $24,000 ($12,000 for each townhouse).

249 Again, the evidence as to what was agreed in respect of bench tops is equivocal. The owners say that the builder agreed to provide stone bench tops throughout the townhouses, including the kitchens, bathrooms and laundries. The builder says that stone bench tops were, by agreement, to be provided to the kitchens only. The contract documents are not helpful. The specifications, under the heading 'kitchens and benchtop' state '*stone bench and laminate timber'.*

250 Because of the lack of detail in the contract documents as to the scope of the contract works, and having regard also to the equivocal evidence before me in respect of some items of work, I am unable to find that Mr Fleming's cost estimate to complete the contract works is unreasonably low, or that Mr Simpson's cost estimate is unreasonably excessive. Doing the best I can to be fair, I am satisfied that splitting the difference between Mr Fleming's estimate and Mr Simpson's estimate (and in this regard I mean the estimate of Mr Simpson without the inclusion of a separate 'supervision' allowance as discussed above) produces a reasonable estimate of the cost of engaging

a new builder to complete the incomplete contract works. That middle sum is $253,629, inclusive of preliminaries, margins and GST.

251 The owners seek to rely, not on expert opinion, but rather upon a quotation of a builder, named 'Ethos building', dated 10 December 2018. The quotation is for a total sum of $523,287.34 inclusive of GST. The quotation separates the cost to rectify defective works from the cost to complete incomplete works. The completion works component, inclusive of GST, is $353,576.85, and the owners submit that I should accept this sum as the reasonable cost they will incur to engage a builder to complete the incomplete contract works.

252 The owners also produced a quotation dated 3 February 2019 from another builder, 'Artisan Professional Building Services', in a total sum of $507,545.32, inclusive of GST. This quotation also separates the cost of rectifying defective works from the cost of completing incomplete works. The completion works component, inclusive of GST, is $305,019.70.

253 The owners submit that the two quotations provide the best evidence before me as to the reasonable market rates the owners will incur for the completion of the incomplete works. No explanation is provided as to why the more expensive Ethos Building quotation should be preferred to the Artisan quotation. In any event, I do not accept the submission.

254 No one from Ethos Building or Artisan Professional Building Services was called to give evidence. Without a representative of either quoting builder giving evidence and being available for cross examination, I do not accept that either of the quotations represents reliable evidence as to the fair market price to have the contract works completed. This is particularly so, having regard to my comments above as to the lack of detail in the contract documents, and the equivocal evidence of the owners and the builder, as to the contract scope of works.

255 The cost estimates of Mr Simpson and Mr Fleming provide considerably more detail than the two quotations, and I prefer their expert opinion to the bare, untested evidence of 2 quotations. I think it fair to assess the cost of completing the contract works as the midpoint between the estimates of Mr Simpson and Mr Fleming as discussed above.

256 Accordingly, I will allow **$253,629** as the total cost to complete the contract works.

CONCLUSION – EXTRA COST TO RECTIFY AND COMPLETE THE CONTRACT WORKS

257 For the reasons set out above, I allow $105,814 as the reasonable cost for rectification works and $253,629 as the reasonable cost for the completion of incomplete works. In total, an allowance of $359,443.

258 As set out earlier in these reasons, I find that the adjusted contract price is $684,768.28 and the owners have made payments totalling $525,280,

thereby leaving an unpaid contractual balance of $159,488 (rounded off to the nearest dollar).

259 Accordingly, I set off $159,488 (the unpaid contract balance) against $359,443 (the reasonable cost to rectify and complete the contract works) to reach a sum of **$199,955** as the owners' damages measured as the reasonable extra cost, over and above the contract price, they will incur to engage another builder to rectify and complete the contract works.

OTHER DAMAGES

260 In addition to the general principle as to damages for breach of contract referred to above in these reasons, damages must also meet what is sometimes referred to as the 'test of remoteness'. This test has relevance in respect of other heads of damage claimed by the owners, as discussed below in these reasons. The test is well explained by McLeish JA in the Court of Appeal in *Archibald v Powlett*:[14]

> Damages are awarded for breach of contract in order to put the plaintiff in the position they would have been in if the contract had been performed.[15] The plaintiff must prove that the loss suffered resulted from the breach and that, when the contract was made, such loss was reasonably foreseeable as likely to result from such a breach.[16] That means that the loss must be such as may fairly and reasonably be considered either as arising naturally from such a breach, that is, in the usual course of things, or such as may reasonably be supposed to have been in the contemplation of both parties, when they made the contract, as the probable result of its breach.[17]
>
> This test of remoteness has been expounded as presenting the question whether, on the information available to the defendant when the contract was made, the defendant should, or a reasonable person in the defendant's position would, have realised that such loss was sufficiently likely to result from the breach of the contract to make it proper to hold that the loss flowed naturally from the breach, or that loss of that kind should have been within the defendant's contemplation.[18]

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14 McLeish JA , Archibald v Powlett [2017] VSCA 259, paragraphs 72 and 73

15 *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272, 286 [13]; *Amann Aviation* (1991) 174 CLR 64.

16 *Reg Glass Pty Ltd v Rivers Locking Systems Pty Ltd* (1968) 120 CLR 516, 523 (Barwick CJ, McTiernan and Menzies JJ).

17 *Hadley v Baxendale* (1854) 9 Ex 341, 354; 156 ER 145, 151; *Amann Aviation* (1991) 174 CLR 64, 91–2 (Mason CJ and Deane J), 98–9 (Brennan J); *Baltic Shipping* (1993) 176 CLR 344, 368 (Brennan J).

18 *C Czarnikow* [1969] 1 AC 350, 385 (Lord Reid); *Burns v MAN Automotive (Aust) Pty Ltd* (1986) 161 CLR 653, 667 (Wilson, Deane and Dawson JJ); *Amann Aviation* (1991) 174 CLR 64, 91–2 (Mason CJ and Deane J), 99 (Brennan J); *Baltic Shipping* (1993) 176 CLR 344, 368–9 (Brennan J); *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* (1998) 192 CLR 603, 613 [24] (McHugh J); *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413, 435 [46] (McHugh J).

DELAY DAMAGES

Contract prescribed liquidated damages

261 The owners claim damages arising as a result of the delay in completion of the works.

262 As discussed earlier, the contract provided for the completion of the works within 230 days after commencement of the works, and the parties agreed to extend this date to 230 days following completion of the slab, thus making 18 April 2017 the due completion date under the contract.

263 Clause 40 in the contract makes express provision for liquidated damages for delay, that is, an agreed quantum of damages, $150 per week, for late completion of the building works. The agreed damages apply from the end of the building period (that is, from the due date for completion of the works) until the earlier of:

- the date the building works reach completion;
- the date the contract is ended;
- the date the owner takes possession of the land or any part of the land.

264 The builder concedes that the owners are entitled to the contract prescribed liquidated damages, but it submits that the date the entitlement ceases is 7 February 2018, that being the approximate date when the owners refused to pay the balance of the fixing stage invoice, or alternatively 16 May 2018, the date the owners commenced this proceeding.[19]

265 As discussed above in these reasons, I have found that the owners brought the contract to an end on 9 August 2018. Accordingly, I am satisfied that the owners are entitled to contract prescribed liquidated damages for delay at the rate of $150 per week for the period 19 April 2017 (the day following the due completion date,18 April 2017) to 9 August 2018, a total of 68 weeks (rounded off to whole weeks). I calculate such sum to be **$10,200.**

Lost rental income

266 The owners say that when the building works were completed, they intended to live in one of the townhouses, and they intended to rent the second townhouse to their daughter Mary at a rental of $500 per week. As this evidence is uncontested, and I consider the rental charge to be reasonable, I accept this evidence.

267 The owners claim lost rent for the period commencing from the due date for completion of the works until a date 4 months after I hand down this decision. The owners say that a date 4 months after the date of this decision is a fair period of time to allow for the builder's payment of damages ordered, the engagement of a new builder, and the time it will take the new builder to rectify and complete the works.

[19] builder's closing written submissions paragraph 74a

268 It is important to recognise the difference between *liquidated damages* for delay as prescribed in a contract, and general law damages for delay. Contract prescribed liquidated damages for delay is the agreed assessment of the parties, at the time the contract is entered, of the damages the owners will suffer, and for which the builder will be liable, if the builder does not bring the works to completion by the due date under the contract. Delay damages for breach of contract at general law is the loss actually suffered by the owners as a result of the breach. An owner is not entitled to both contract prescribed liquidated damages for delay, and general law damages for delay, for the same period.

269 And the fact that a contract includes a provision for liquidated damages for delay, that is, the parties have turned their mind to, and reached and recorded their agreement in respect of liquidated damages for delay, does not of itself mean that the parties have also agreed that the liquidated damages clause constitutes the entirety of the owner's rights to delay damages. It is a matter of construction of the contract, and in construing the contract, one starts with the presumption that neither party intends to abandon remedies for its breach arising by operation of law, and clear express words must be used in order to rebut this presumption.[20]

270 The contract prescribes agreed liquidated damages for delay applicable for a defined period of time. It goes no further than that. There is nothing in the contract to suggest that the parties have agreed that any other general law entitlement to delay damages, outside the prescribed period for liquidated damages, is excluded.

271 The owners submit that, as a matter of construction, the contract does not exclude or prohibit general law delay damages such as lost rental income for the same period in which the contract prescribed liquidated damages accrue. In this regard the owners reference the explanatory note in the contract adjacent to clause 40. That explanatory note says, amongst other things:

> The amount used to calculate agreed damages takes into account the expenses that will be incurred by the owner if the building works are not completed on time (for example, rent for alternative housing or interest payments).
>
> The amount to be stated in item 9 of schedule 1 is negotiable and should accurately reflect the owners estimated expenses…

272 The owners submit that the explanatory note enables a construction of clause 40 that, to the extent the clause excludes other general law damages claims, the exclusion is limited to claims for *expenses* as opposed to claims for lost income. I do not accept the owners' submission. In my view, the explanatory note does nothing more than illustrate matters the parties might

[20] Lord Diplock in Gilbert Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd [1974] AC 689 at 717-718

consider when calculating agreed damages for delay in completion of the works. The explanatory note is not an operative clause of the contract.

273 In my view, the parties have agreed to a sum payable as delay damages, and the period in which such damages will accrue, in the event the building works are completed after the agreed due date for completion. Such agreement precludes other claims for delay damages for the same period.

274 Accordingly, I find that, subject to the general principles as to damages as discussed above, the owners may claim general law delay damages, but only in respect of the period after 9 August 2018.

275 The builder submits that the owners' claim as to foregone rental income does not meet the test of remoteness. That is, that it cannot reasonably supposed to have been in the contemplation of both parties when the contract was made.

276 I do not accept the builder's submission. There is no evidence that, at the time the contract was entered, the owners and the builder discussed the owners' intention to rent one of the completed townhouses to their daughter Mary at a rental of $500 per week.

277 However, in my view it is patently foreseeable that the owners might have intended to turn one of the 2 townhouses to a profit, by way of sale or by way of rental income. I am satisfied that lost rental income in respect of one of the townhouses meets the test of remoteness, despite the fact that the builder may not have been aware, at the time the contract was entered, of the owners' actual intention to rent one of the completed townhouses to their daughter Mary.

278 The more difficult question is for what period of time should lost rental income damages be allowed? That is, accepting as I do that one of the townhouses, when completed, is to be rented to the owner's daughter Mary at a rental of $500 per week, for what period of time after 9 August 2018 should such foregone rental income be allowed?

279 As noted above, the owners submit a date of 4 months after the date this decision is handed down. I do not consider that to be a suitable date. It assumes a scenario of future events, which may or may not occur, and it assumes that the owners are entitled to await the future events with no obligation in the meantime to mitigate their loss.

280 There is insufficient evidence to find that the owners are unable to progress the works until such time as they have received damages awarded against the builder. As I have found above, the unpaid contractual balance is $159,489, and it is reasonable to assume that this sum at least could have been put towards progressing the building works as soon as practicable.

281 There is little evidence as to the owners' financial capability to fund the extra cost to engage a new builder to complete the townhouses. The evidence is limited to the statement of the owner Mrs Norma Konsol:

> We are struggling to get another builder to come and finish the properties with the funds we have left.[21]

282 There is no evidence as to the owners' actual available funds or any attempts by the owners to obtain funds or finance to complete the construction of the townhouses.

283 On the evidence before me, I do not accept that it is reasonable for the owners to do nothing to progress the construction of the townhouses until after this decision is handed down, and in the meantime to continue to accrue lost rental income damages.

284 In my view, the owners are entitled to delay damages for the lost rental income for the reasonable period it would take, after the contract was brought to an end, to engage a new builder and for that new builder to complete the construction works. And in this regard, for the reasons set out above I have found that the contract was ended on 9 August 2018.

285 There is little evidence to assist in assessing this period. Although both Mr Simpson and Mr Fleming provide estimated hours for trades to complete various items of defective and incomplete works (and their estimates are different), neither of them provides an estimate as to the overall time period required to complete the construction of the contract works.

286 The quotations obtained by the owners, discussed earlier in these reasons, provide no estimate as to the time that would be required to complete the works.

287 Having regard to the status of the works as I viewed them, the nature and scope of rectification and completion works to be carried out as I have assessed earlier in these reasons, and allowing a reasonable time for the owners to obtain further quotations, select a builder and to make any necessary further finance arrangements, I allow 24 weeks. I reach this figure by allowing 12 weeks for arrangements to secure finance and to select and engage a new builder, and 12 weeks for the building works to be completed by the new builder.

288 Accordingly, I allow lost rental income at $500 per week for 24 weeks, a total of **$12,000.**

Storage of furniture/appliances

289 The owners' apparently claim the cost of storing furniture purchased for both townhouses. I say 'apparently' because this head of damage is not specified in the owners' Amended Points of Claim, but it is raised briefly in the witness statement of Mary Konsol, and also in the owners' closing written submissions.

290 At paragraph 209 in her witness statement,[22] Mary Konsol identifies a number of 'Further damages claimed', including:

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[21] paragraph 53 witness statement of Norma Konsol, Tribunal book page 99.

> National Storage costs – for storage of furniture purchased for both properties from December 2017 to contract end date $3925

291 In the owners closing written submissions, it is submitted that:

> The owners have been paying $400 per month for storage of appliances/furniture purchased for both properties….[23]

292 Other than the brief reference in Mary Konsol's witness statement referred to above, there is no evidence to support this claim. I have been shown no documentation as to the purchase and storage of appliances or furniture. I have no explanation as to the difference between the claim as briefly mentioned in Mary Konsol's witness statement and the claim as referenced in closing written submissions. As to the claim raised in closing written submissions, there is no supporting evidence.

293 On the evidence before me, I am not satisfied that the owners have incurred, and are continuing to incur, the claimed storage cost. I make no allowance for this claimed head of damage.

SITE CLEAN

294 The owners claim $1200 as the cost incurred to remove rubbish left by the builder. They say they were required to clean the site in response to a 'Notice to Comply' issued by Hume City Council dated 25 October 2018. I have viewed the Notice and I accept that the Hume City Council required the owners to remove rubbish and clean the site within 14 days of the notice.

295 I accept the uncontested evidence of Mary Konsol that she and her mother arranged for rubbish removalists to attend the site on 8 and 9 November 2018 to remove rubbish at a cost of $1200.[24]

296 I have viewed the invoice dated 14 November 2018 from the rubbish removalists, 'Leckie Family Trust', addressed to Mary Konsol in the sum of $1200 for the removal of rubbish from the building site.

297 I am satisfied that the cost of the site clean, $1200, has been incurred by the owners as a direct result of the builder's conduct in ceasing works and leaving the site in an unsatisfactory state. The cost arises directly as a result of the builder's breach of contract, and I allow damages in the sum of **$1200** for this item.

LOSS OF AMENITY, INCONVENIENCE, ANXIETY AND DISTRESS

298 The owners seek $20,000 as general damages for the loss of amenity, inconvenience, anxiety and distress. In closing written submissions, the claim is put as follows:

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[22] Tribunal book page 151
[23] paragraph 123 of the owners' closing written submissions
[24] Paragraphs 189 – 195 of Mary Konsol witness statement, Tribunal book pages 147 – 148

> The owners claim damages because of the use of I beams instead of posi-struts, lack of a proper laundry chute, the vertical bulkhead in the laundry and the undue delay that has been the fault of the builder. They seek an award of damages of $20,000 for the loss of amenity inconvenience anxiety and distress occasioned to them by having to live for years in a deficiently constructed house that ought to have been completed by 18 April 2017 and remains incomplete. This is fair and reasonable in all the circumstances.25

299 Again, commentary of McLeish JA in the earlier mentioned case ***Archibald v Powlett*** is instructive[26]:

> The general rule is that damages for anxiety, disappointment and distress are not recoverable in an action for breach of contract.[27] The principal exceptions to that rule are where the contract is one whose object is to provide enjoyment, relaxation or freedom from molestation,[28] and where the damages proceed from physical inconvenience caused by the breach.[29]…
>
> The respondent pointed to several cases in which damages for anxiety, distress and disappointment have been awarded following breach of a building contract giving rise to physical discomfort or inconvenience… However, all these cases involved physical imposition upon the plaintiff, whether by virtue of having to live with offensive odours or a leaking roof, or in unsanitary or dirty conditions, or being obliged to vacate the defective premises… Nothing of this kind was alleged in the present case, where the respondent's premises were intended for the conduct of a business rather than her own occupation.
>
> The respondent also relied on cases in which damages were awarded for inconvenience or discomfort as a distinct head of damage... All of the cases relied upon were claims in tort, rather than contract. However, damages may also be recovered for inconvenience flowing from a breach of contract…
>
> ... the issue arose for consideration by the Court of Appeal in *Boncristiano v Lohmann.*[30] In that case, general damages were awarded for 'inconvenience' occasioned by a builder's breach of contract. The Court took this to include damages for deleterious consequences to health flowing from the physical inconvenience.[31] Winneke P, with whom Charles and Batt JJA agreed, said:
>
> > It now appears to be accepted, both in England and Australia, that awards of general damages of the type to which I have referred can be made to building owners who have suffered

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[25] owners closing submissions paragraph 128
[26] [2017] VSCA 259, paragraphs 62-66
[27] McLeish JA references *Baltic Shipping*, 361-3 and 365 (MasonCJ), 380-1 and 383 (Dean and Dawson JJ), 387 (Gaudron J), 405 (McHugh J)
[28] Ibid
[29] Ibid 365 (Mason CJ), 383 (Dean and Dawson JJ), 387 (Gaudron J), 405 (McHugh J)
[30] [1998] 4 VR 82
[31] Ibid 94

> physical inconvenience, anxiety and distress as a result of the builders' breach of contract, but only for the physical inconveniences and mental distress directly related to those inconveniences which have been caused by the breach of contract.[32]
>
> The case illustrates the difficulty in separating a claim for inconvenience from one for distress and anxiety. But in any event, the respondent's case did not justify the above test. The 'inconveniences which have been caused by the breach of contract' for these purposes are not the time and trouble inevitably spent as a result of dealing with the consequences of any breach of contract… They are the actual disruption and physical imposition resulting from the building and construction works not having been performed as agreed. In the present case, there was no evidence of such inconvenience having been caused by the applicant's breaches of contract…

300 The builder submits that this claim for damages should not be allowed because the contract provides for agreed or liquidated damages for delay, and in any event the owners have provided no particulars as to the alleged loss of amenity, inconvenience, anxiety and distress.

301 I have above, assessed the owners' entitlement to damages arising as a result of the delay in completion of the contract works. I do not accept that they are entitled to further damages for the stress or anxiety accompanying the delay.

302 No evidence, and no explanation, has been put as to why the builder's use of I beams instead of posi-struts raises an entitlement to damages for stress, inconvenience, anxiety or loss of amenity.

303 As discussed earlier in these reasons, I have found that the bulkheads in the laundries do not constitute defective works.

304 While it is true that the laundry chute in each of the townhouses is of slightly smaller dimension than intended in the architectural plans, having viewed the laundry chutes I do not agree that the owners have ended up with 'not proper' laundry chutes. From my observation, the laundry chutes will function satisfactorily.

305 There is otherwise no evidence as to alleged 'inconvenience' that might fall within the compensable range as described by McLeish JA as set out above.

306 For these reasons, I make no allowance for this head of claimed damages.

EXTENSION OF SUBDIVISION PERMIT

307 As noted earlier, the Owners claim $264 for '*Payment to Council for extension of subdivision permit'*. This item is very briefly referenced in the witness statement of the owners' daughter, Mary.[33] There appears to be no

[32] Ibid

[33] paragraph 179 and 209 witness statement of Mary Konsol, Tribunal book page 145 and 157 respectively

documentary evidence produced to verify the permit, the requirement for its extension and the alleged payment of $264. On the evidence before me, I do not know when the permit was granted and when and why an extension of time became necessary.

308 I am not satisfied, on the evidence before me, that the builder is liable for the alleged expense of the extension of the subdivision permit. I disallow this claim.

CONCLUSION

309 For all the reasons set out above, I find that the owners are entitled to an award of damages in the sum of $224,971, made up of the following:

-	extra cost, over and above contract price, to have the contract works satisfactorily completed	$199,955
-	contract prescribed liquidated damages for delay	$10,200
-	lost rental income	$12,000
-	site clean as required by Hume City Council	$1,200
	TOTAL	**$223,355**

310 The assessed damages sum includes no allowance for interest. I will allow the parties to make submissions as to interest.

311 I will order the builder to pay the owners damages in the sum of $223,355. I will reserve the question of interest, and costs, with liberty to apply.

SENIOR MEMBER M. FARRELLY