VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO.BP123/2016

CATCHWORDS

Domestic building; two contracts for different works at the same site, whether same works called for under both contracts; variations, variations signed by owner's solicitor, ability to reconsider signed variations, s38(2) of the *Domestic Building Contracts Act 1995* ("DBC Act") - builder's right to undertake variations of no more than 2% of the contract sum without variation in writing – discretion is the builder's – not obliged to do so; s53(1) of the DBC Act - fair order to resolve a domestic building dispute; time, time extensions for variations, time extension costs, extension of time claims, when an owner is entitled to the dispute them, failure to do so, whether works on the critical path; termination of contracts, contractual two-stage termination, show cause notice and termination notice, termination at common law, rescission for repudiation, risk that purported rescission might itself be repudiatory, affirmation of contract after alleged repudiation; HIA Victorian Small Works Contract of July 2002, clause 8, failure to sign variations as "serious breach of contract", potentially void as an agreement to agree; suspension versus prevention, failure to sign a variation, failure to arrange connection of gas, consequences of repudiation, quantum merit versus contract entitlement, from contract entitlement deduct cost to the builder of completing the works, contractual interest, owner's materials that are lost, bailment.

APPLICANT	Alison Larsson
RESPONDENT	Peter Priftis
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Hearing
DATE OF HEARING	26, 28-30 June and 1, 27 and 28 July 2017, Written submissions received 28 August 2017.
DATE OF ORDER	20 December 2017
CITATION	Larsson v Priftis (Building and Property) [2017] VCAT 2130

ORDER

1 The applicant must pay the respondent $8,997.68 forthwith.

2 Costs and interest are reserved, with liberty to both parties to apply. The attention of both parties is drawn to ss109 and 115B of the *Victorian Civil and Administrative Tribunal Act 1998.*

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicant	Mrs A. Larsson in person and Mr R. Larsson
For Respondent	Mr P. Priftis in person and Mrs S. Priftis and Ms A. Priftis

REASONS

1 Cash flow is the life-blood of building firms. When an owner fails to pay an amount due, the impact on the builder can be devastating. It seems that all builders are aware of owners who fail to pay, and often the last payment is the most difficult to obtain. And the last payment can be the one that renders the job profitable or unprofitable for the builder. On the other hand, many owners are aware of builders who obtain far more than the contract entitles them to. This knowledge tends to make owners and builders wary of each other, often to the detriment of both.

2 The parties entered two contracts (discussed below) for renovation and extension. There is no doubt that these contracts between Mrs Alison Larsson, the applicant-Owner, and Mr Peter Priftis, the respondent-Builder, came to an end. The question is how. Were they repudiated by one of the parties? If so, which?

3 There is no suggestion that the Builder's work was defective. It is not criticised by the Owner. Further, Mr Paul Floreani, builder and engineer who gave evidence for the Owner, complimented the quality of the work, said "It was so close to finished that it wasn't funny" and remarked that he attempted to encourage the parties to bury their differences and finish the contracts. Even Mr Rod Larsson, the Owner's husband, said "there are no complaints about the building quality. The issue is with the contract paperwork."

4 Whether justified or not, the parties appear to have lost trust in one another. These contracts are complicated by at least one other contract between them concerning the home of the Owner and her husband in Erskine Street. The Erskine Street contract is not the subject of this proceeding, but is of some relevance as difficulties concerning that contract impacted on these contracts.

5 The Owner claims a total of $63,049.89 plus interest and costs from the Builder. The Builder claims a total of $30,522.30 plus interest and costs from the Owner.

6 Evidence was given for the Owner by herself, Mr Larsson, Mr Floreani[1], who contracted with the Owner to bring the work to final certificate stage, and Mr Damien Beadle, quantity surveyor.

7 For the Builder, he, his wife Mrs Sandra Priftis, his daughter, Ms Annabel Priftis and Mr Jeff Beck, building consultant, gave evidence.

8 Both parties gave evidence partly orally and partly in writing. They also both provided written submissions by 28 August 2017. In addition, significant written "summaries" were provided by both parties during the

[1] The Builder has suggested that the contract between the Owner and Mr Floreani might have been a sham. In the absence of compelling proof I do not take this suggestion into account.

course of the hearing, many items of which are irrelevant to the eventual outcome, and most contained a mixture of evidence and submissions. There was no order for the summaries and the parties did not seek leave to file them.

9 The evidence in each of these summaries needed to be considered. As I said during the hearing on 27 July 2017, the factual matters in all summaries provided by the parties are in evidence as are the documents that they refer to. I said that I might refer to other documents if there is a secondary reference to them.

10 The summaries handed up are, for the Owner:

- Applicant's Submission of Evidence – 26 June 2017
- Termination of the Building Contracts – 28 June 2017
- Applicant's Responses to Evidence Matters on 29 June 2017 – 30 June 2017
- Applicant's Submission in Response to Respondent's Timeline
- Applicant's Submission of Further Evidence, 20 July 2017 –
- Applicant's Response to Respondent Submission of Evidence dated 20 July 2017 – 27 July 2017

11 The summaries for the Builder are:

- The Respondent's/Applicant's by Counterclaim Position (the Builder's Position) – 26 June 2017
- Chronology – 26 June 2017
- Respondent's Submission of Evidence by Applicant – first handed up 28 June 2017 and replaced on 30 June 2017
- Folder – Respondent's Submission of Evidence – Filed 24 July 2017 but dated 26 June 2017 and containing second copies of some documents
- Folder – Responses to Owner's Loss & Damages and Scott Schedule – 3 July 2017.

BACKGROUND

12 The Owner owns an investment property in Argo Street, South Yarra. The parties entered a building contract dated 2 June 2013 for extension and renovation of the existing dwelling for a price of $343,880.97. It became apparent to the parties that the front of the dwelling required substantial additional work. Rather than merely agreeing to a variation, on the alleged advice of the Builder's professional association, the parties entered another contract dated 17 September 2013. The contract sum for the second contract was $65,663.14 and took the date for completion for both contracts to 31 July 2014.

13 Eleven days after the second contract was signed the parties discovered the existing chimney was unsafe and required works and a planning permit had to be obtained. The Builder claimed an additional 106 days for delay for both the first and second contracts, taking the date for completion of both contracts to 14 November 2014.

14 The contracts were largely administered for the Owner by her husband. He has been referred to by the Builder as her agent, but according to the Owner, his authority was limited. This is discussed further under "Mr Larsson's Role", below.

15 The parties agree that the period for completion of the contracts was extended, but disagree by how much. There is also disagreement about whether the Builder suspended the work once, twice, or not at all and whether any suspension was in accordance with the contracts. The issue of suspension is vital to the question of alleged repudiation by the Builder.

16 The Owner and her family went overseas on 30 August 2014, and according to Mr Larsson, the Builder had known for approximately 4 months that this would occur. Matters came to a head between the parties just before the Owner's departure, when, the Owner alleges, the Builder stopped work.

17 The Owner purported to end the contract by letter from her lawyers dated 9 October 2014. A question is whether she ended the contracts properly. If she did not, her letter repudiated the contracts.

18 The parties agree that a total of $381,179 has been paid to the Builder under the contracts.

19 As ordered on 26 June 2017, the Owner was not given leave to rely on her Amended Points of Claim dated 7 June 2017, which were filed without order of the Tribunal or consent of the Builder.

20 Both the parties filed Tribunal Books. I refer to documents in the Owner's Tribunal Book as "OTB" and the page number, and documents in the Builder's Tribunal Book as "BTB" and the page number.

21 For reasons that are not clear to me the parties have also submitted other documents. The Owner submitted two volumes of discovered documents. When referring to these documents I identify them as "OD" and the page number.

22 The Builder has submitted a book of emails which are referred to as "BE" and the page number. Exhibits submitted subsequent to commencement of the hearing are referred to as "A" and the exhibit number for the Owner, and "R" and the exhibit number for the Builder.

23 I prepared draft headings for this decision and gave copies to the parties on 28 June 2017 as an indication of the matters likely to be considered. I emphasise that the draft headings are not an invitation to the parties to raise matters that were not included in their Points of Claim, Points of Counterclaim or Defences.

24 I also prepared a Scott Schedule which was given to the parties and was used during the evidence given by the experts. Mr Floreani, Mr Beadle and Mr Beck gave evidence concurrently on 29 June 2017.

25 I remark that Mr Beadle's report was limited to 3 items which were the assessment of the reasonable cost of:

- Item 9 – Downpipes removed by Builder;
- Item 27 – Structure for entrance hall cupboards;
- Item 30 – Remove and replace front wall for bins.

Appendix B to the report is a document prepared by the Owner. I accept that its relevance is to list items 9, 27 and 30. Under cross-examination Mr Beadle agreed that he had not been given copies of the building contracts. This was also apparent from his report. I note that he did not visit the site, so his evidence was based entirely on instructions from the Owner and Mr Larsson.

26 On 30 June 2017 I gave the parties copies of the decision in *Shao v A G Advanced Construction Pty Ltd (Building and Property)* [2017] VCAT 1903 as a guide to repudiation.

27 To enable readers to orient themselves regarding some issues, the front door of the house faces north.

THE CLAIMS

The Owner

28 In accordance with paragraphs 25 to 30 of the Points of Claim of 19 July 2016, the alleged losses suffered by the Owner are as follows:

Cost to Complete

Cost to Complete	$26,285.41
Costs not incurred by the Builder but included in the Completion Invoice	$1,346.51
Additional Costs incurred outside the Contract	$3,775.75
Additional Credits to be allowed by the Builder under the Contract	$29,132.02
Less Amount Owing Re completion Invoice	-$12,738.12

Liquidated damages

From the end of the building period as calculated by the Owner being 11 September 2014 to termination of the Building Contract on 9 October 2014, four weeks at $250 a week	$1,000.00

General damages for late completion

Actual loss of rent from 9 October 2014 to completion

being 14[2] weeks at $825 per week	$11,150.00
Total claim	**$63,049.89**

29 The Owner also claims interest and costs.

The Builder

30 In accordance with paragraph 14 of the Points of Counterclaim the Builder has suffered alleged loss and damage as follows:

Unclaimed work	$12,352.08
Other work for the benefit of the Owner:	
Veranda Straightening	$2,000.00
Bulkhead in lounge room	$1,500.00
Safeguarding the chimney while permit sought	$1,500.00
Installing a flashing to the east side of the boundary	$1,000.00
Extension of Time Costs:	
EOT1 – 28 days	$1,000.00
EOT2 – 106 days	$3,785.71
EOT3 – 39 days	$1,392.84
Interest on progress payments under first contract:	
Progress claim dated 13 February 2014 for $51,582.15 - 4 days interest claimed at 20% per annum	$113.06
Progress claim dated 20 March 2014 for $70,915.91 –	
a. $68,776.19 claimed for 5 days	$188.43
b. $2,138.72 claimed 68 days	$79.73
Progress claim dated 20 May 2014 for $83,656.46	
– 7 days claimed	$320.87
Progress claim dated 17 August 2014 for $48,345.01	
– 2 days claimed	$52.98
Interest on progress payments under second contract:	
Progress claim dated 20 March 2014 for $19,698.94 – 5 days claimed	$53.97
Progress claim dated 18 July 29017 for $26,142.07 – 3 days claimed	$42.97
Damage to locks and gates caused by Owner	$300.00

[2] The Points of Claim and Schedule A to the Points of Claim seek 13 weeks. However at OTB545 the Owner calculates her loss as 14 weeks, and 14 x $825 = $11,550

Extra time for second hand front door fitting and installation	\$750.00
Loss of profit on remaining work	\$4,089.66
Total claim	**\$30,522.30**

31 The Builder also claims interest and costs with a specific claim for expert reporting to the date of the counterclaim in December 2016 by JWB & Associates (Mr Beck's company) of \$2,642.

MR LARSSON'S ROLE

32 In the course of the second day of the hearing, on 28 June 2017, Mr Larsson gave evidence that he had authority to act on his wife's behalf "but not to sign on her behalf." The ostensible authority of Mr Larsson was far from clear.

33 On 26 September 2014, in response to the Builder's email of 18 September 2014 which commenced "I have no contractual agreement with Rod Larsson and can no longer correspond with him" the Owner relevantly said:

> I note you have sought to challenge Rod's role in relation to any ongoing communications.
>
> You are no doubt aware that the contract specifies that the owner includes the owner's agent.
>
> Given the extensive level of written and verbal communication between you and Rod in relation to the contract and building works, which in fact preceded the execution of the contract, Rod and I have emphatically demonstrated that he is my agent and you have indeed dealt with him on that basis.
>
> For the avoidance of doubt, I confirm that Rod is, and has been for the duration of the contract, my agent in relation to the management of the contract, which includes all communications with yourself either written or verbal.

34 I also remark on the reliability of Mr Larsson's evidence. On 30 June 2017, the fourth day of the hearing, Mr Larsson said with force and confidence that he had a crystal clear recollection of everything that occurred.

35 A few minutes later Mr Larsson gave evidence that he told the Builder that the gate and house keys should be handed over to Mr and Mrs Larsson's son on 23 September 2014, before the final payment was made but after the work was complete. I asked Mr Larsson how the Builder reacted to that suggestion. When pressed, Mr Larsson agreed that he did not recall what the Builder said. Nevertheless, I do not consider that Mr Larsson was deliberately inaccurate.

CONTRACTS

36 The use of two building contracts has made determination of this dispute significantly more complex than it would have been had there been only

one[3]. Although the contracts were for a single, intertwined project, they impose separate obligations on the parties.

37 The works to be undertaken did not include all the works necessary to make the house habitable. I accept the Builder's evidence that some of the Owner's works were necessary to obtain an occupancy permit.

First Contract

38 The first contract was in the form of the HIA Alterations Additions and Renovations Contract dated 2 June 2013. It allowed for a completion period of 310 days, but this was amended by the second contract. It provided for agreed damages of $250 per week payable to the Owner or the Builder if the other party prolonged the contract in accordance with, respectively, clause 43 or clause 37.3.

Second Contract

39 The second contract was in the form of the HIA Small Works Contract and dated 17 September 2013. It provided that work would commence the next day being 18 September 2013 and that work under this contract and the first contract would be completed by 31 July 2014, subject to clause 5 concerning extensions of time claimed by the Builder. There is no provision for agreed delay damages in this contract.

Whether items in First Contract also in Second Contract

40 The Owner claims that some works to be done under the second contract were already the obligation of the Builder under the first contract.

41 The Owner did not plead that there were items in the first contract that were also in the second contract. However she and Mr Larsson spent substantial time leading evidence on this point, and I mistakenly included it in the decision outline I handed to the parties on the third day of the hearing. The Tribunal is not a court of pleadings. However as Deputy President Macnamara (as he then was) said in *Lloyd L Watkins Pty Ltd v Vondrasek* [2006] VCAT 2479:

> Where pleadings are directed they define the issues. ... It would make nonsense of the process of directing pleadings in the Tribunal if ... I were now to give effect to a cause of action simply because I felt that the facts made it out even although it remained unpleaded ..

42 On the first day of the hearing the Builder marked BTB111, which is a plan of the house, with green highlighter to show that the works under the first contract. These works concerned construction of the new living/meals area, kitchen, pantry, bedroom 1, laundry and bathroom in the back two thirds of the house together with construction of narrow cupboards on the front east side of the house. He then used a yellow marker to show that the second

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[3] If such advice was received by either party, it might have been to overcome the risk that the Owner could end the contract on a "no fault" basis under s41 of the DBC Act.

contract concerned renovation of the entry hallway, bedrooms 2 and 3 and the western side wall towards the front of the house.

Items alleged to be in both contracts

43 During the hearing the three items alleged by the Owner to be in both contracts are stumps, the western wall weather boards and structure for the hallway cupboards. As discussed below I find that none of these items require rectification of the contracts. "Stumps" is considered under "Variations". "Western wall weatherboards" and "Structure for Hallway Cupboards" follow.

Western side weatherboards replace - $3,830

44 Mr Larsson said he believed the first building contract also included the weatherboards along the western wall to the front of the house but otherwise the delineation by the Builder appeared to be correct. The Owner claimed $3,830 as an alleged double charge.

45 The Builder drew my attention to the difference between BTB79 and BTB111. I accept his evidence that the former was a contract drawing for the first contract and the latter a contract drawing for the second contract. I also note his evidence that in BTB79 the western wall is shown as a thick black line which normally indicates that no work is to be done to it.

46 Mr Larsson drew my attention to OTB566 and OTB568 which are respectively an email from the Builder to Mr Larsson of 25 May 2013 and an "Extras Inclusions" of 30 May 2013, both of which mention new weatherboards to the existing west side of the house, included in the first contract. This is consistent with them being included in the first contract and there is a note of their inclusion at OTB92, again, for the first contract.

47 On the first day of the hearing, the Builder appeared to agree that there had been double charging for the weatherboards. He also gave evidence to that effect when he marked up BTB111 in yellow and green highlighter.

48 However, on the second day of the hearing the Builder said that the weatherboards were only charged once, in the first contract. There is no mention of weatherboards in the "Inclusions" to the second contract which appear at OTB93, 94 and 95.

49 I am not satisfied that the western wall weatherboards have been double charged.

50 There is no allowance for this item.

Structure for entrance hall cupboards - $13,200

51 This is the second of the three items concerning which the Owner obtained expert evidence from Mr Beadle.

52 The Owner described this claim in detail at OTB553-4 as follows:

> The First Building Contract has a requirement to build an external structure along the eastern wall of the entrance hall to accommodate a series of storage cupboards.
>
> This structure is clearly identified in the plans. As the Second Building Contract required complete demolition of the front part of the property, the amended plans also required construction of the same structure. The respondent has failed to provide a credit for the duplication of the cost of the structure.

53 Having regard to the "Inclusions" in the second contract, at OTB37 and following, I am not satisfied that the second contract DID call for complete demolition of the front of the house. I therefore treat Mr Beadle's evidence on this point with caution, and do not accept that the structure for the hallway cupboards was in both contracts.

54 It became obvious that the parties were speaking at cross-purposes. The Owner's point was that the Builder appeared to be double charging under both the first and second contract. The Builder's evidence concentrated on how much credit the Owner should be entitled to for work not undertaken by the Builder. The Builder's claim regarding variation V2813020 is considered below under "Variations in dispute".

55 I am not satisfied that this item of work was to be undertaken under both contracts.

Other claims

56 The Owner included other items in her final submissions, at paragraph 7d to 7j of her final submissions. They were neither pleaded nor raised during the hearing and I do not take them into consideration.

Price of second contract

57 The Owner said in her final submission that the Builder is in breach of s31 of the *Domestic Building Contracts Act 1995* (DBC Act) for failing to adequately describe the work under the second contract "so as to exclude items which had been included in the First Building Contract". This is not pleaded in her Points of Claim, and appears to be an attempt to agitate matters that were raised in the Amended Points of Claim which, as I have said, I did not allow the Owner to rely upon.

58 Mr Larsson said that the Builder indicated the price of the second contract would be around $44,000. However the contract price agreed to by both parties was $65,663.14. Ms Priftis said that the Builder was entitled to say that he would not enter the second contract for a price which was unacceptable to him. I accept her submission. The Owner has not included a pleading in her Points of Claim that gives a basis upon which she is entitled to revise the deal she entered with the Builder on 17 September 2013.

VARIATIONS

59 The contract sums (as adjusted) depend in part on variations.

60 The Builder gave evidence that the Owner requested numerous changes to the scope of works. At paragraph 7 of the Points of Counterclaim dated December 2016, the Builder pleaded:

> The Builder attended to 25 variations, that are listed in Schedule A appended to this Counterclaim.

61 Schedule A shows that the variations of addition total $34,720.10 and the variations of deduction total $50,347.30 giving a net deduction from the contract sum for variations of $15,627.20. It also states that all variations were given in writing and signed by the Builder, and that all but four were signed by the Owner, and the remaining four were signed on her behalf by her solicitor, Jan Moffat, while the Owner was overseas.

62 According to Schedule A most of these variations were sought by the Owner, but some (e.g. variation V281301 – "Permit and asbestos removal") were sought by the Builder.

63 At paragraph 7 of the Points of Defence to Counterclaim dated 23 January 2017, the Owner pleads:

> The Applicant/Respondent by Counterclaim admits each and every allegation in Paragraph 7 and particulars contained in Schedule A.

64 On the basis of the pleadings, the variations should not be in contention. Nevertheless, both parties have sought to reopen aspects of the variations. In signing the variations, the parties have agreed to the extra work (or deletion of work) under the contracts. The have also agreed to changes to the contract sum and to the date for completion. Other than in exception circumstances, variations cannot be revisited at law. It matters not that a party may have signed a variation in haste. A clear error in a variation is an exceptional circumstance which, I am satisfied, allows me to revisit the variation.

65 Variations in domestic building contracts are governed by either section 37 or section 38 of the DBC Act. Section 37 provides for variations sought by the builder and section 38 provides for variations sought by the building owner. They were[4] as follows during the contracts between the parties:

> ***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

[4] The only change since the contract dates is to replace references to "the Tribunal" with references to "VCAT".

(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.

(4) If subsection (3) applies, the builder is entitled to recover the cost of carrying out the variation plus a reasonable profit.

(5) This section does not apply to contractual terms dealing with prime cost items or provisional sums.

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.

(7) If subsection (6) applies, the builder is entitled to recover the cost of carrying out the variation plus a reasonable profit.

(8) This section does not apply to contractual terms dealing with prime cost items or provisional sums.

Agreed variations

66 The variations that are not in dispute are as follows:

Number	Item	Addition to Builder	Deduction to Owner
V281301	Asbestos removal and permit	$2,990.84	
V281303	Permit fee – Road closure	$159.72	
V281304	New window Bedroom 3	$863.50	
V281305	Fire Place demolition & bin	$1,980	
V281306	Skylight in hall	$2,242.90	
V281307	Front door jamb and architraves	$1,726.82	
V281309	New downpipe	$438.10	
V2813010	Veranda post repairs	$384.62	
V2813015	Electrical variations	$2,404.51	
V2813017	Footings for pillar	$341.50	
V2813018	Victorian architraves	$633.49	
V2813019	Victorian skirting boards	$1,330.61	
V2813021	Cabinetry stone & heating		$26,503.09
V2813022	Appliances, carpet & gate		$8,500.00
V2813023	Core drill for gas meter	$290.40*	$290.40
V2813024	Rendering to west wall (rear)	$264.00*	$264.00
V2813025	Victorian cornice	$2,949.60	
V281328	Render to brick piers and north wall	$792.00*	$792.00
	Totals	$19,792.61	$36,349.49
	Credit due to Owner		$16,556.88

* These items were noted by the Owner as not completed by the Builder, and are claimed by the Owner as "Costs not incurred by Builder". I include them here as claims and credits.

Variations offered but not undertaken

67 For the sake of completeness I note that the following variations were documented, but not agreed to and not undertaken:

V281307A – Replace veranda

V281308 – Courtyard deck

V2813013 – Additional cabinetry

V2813014 – Cabinetry quote.

Variations in dispute

68 When an owner and builder cannot agree about the cost of a variation, one option open to them is not to undertake the variation but to do the work as originally agreed. It is easy to be wise with the benefit of hindsight. Sometimes a party commits themselves to a variation before it has been reduced to writing.

Stumps variation V281302

69 The credit for stumps was agreed, but the Builder called it into question.

70 Mr Larsson said that the first contract included a Provisional Cost (PC item) of $4,000 for stumps, which was credited by variation V281302/C and the second contract called for complete restumping of the existing house.

71 The Builder claims that the stump variation was given it in error because 48 stumps were installed in total but the second contract only took into account an additional 31 stumps. The Builder and Ms Priftis said that the 17 stumps allowed for under the first contract should not have been deducted.

72 The Builder asked both Mr Beck and Mr Beadle about the cost of 48 stumps. Mr Beck said he thought the average price would be $215 per stump, being $10,320 in total. Mr Beadle said more like $350 per stump being a total of $16,800.

73 As I have said above, parties need to seriously consider any variation they sign. I am not satisfied that there was an error concerning this variation, particularly as the supporting document headed "Extras: Rod Larsson .. Argo Street…" which appears at OTB41, includes 48 stumps at a total price (taking into account five separate items) of $6,946. I accept the Builder's evidence that this document was not a quote, but it is the best evidence available as to what the parties had in mind regarding the stumps. It is for the Builder to prove that he is entitled to the relief he seeks, and he has failed to do so.

74 I do not change the agreed sum concerning the stump credit. The amount to be credited to the Owner for this item is $4,000.

The timber floor variations - V2813011 and V2813012

75 These variations concerning the change of timber floors from Tasmanian Oak to red ironbark, were first sought by the Owner on about 14 May 2014, were then sought in writing by the Builder on 27 May 2014 and were finally signed by the Owner on 17 June 2014. She now claims a further deduction of $5,500. As described at OTB574, the Owner claims $1,200 for

fixing materials that she alleges were double claimed and $4,300 which was the allowance in the second building contract; a total of $5,500[5].

76 V2813011 was the proposed variation to credit the Owner of $6,605.01 for Tasmanian oak and a small tiled area. V2813012 was the proposed variation for the additional cost of and associated with the red ironbark of $13,093.14.

77 The Owner's reason for claiming the additional credit is that the Builder provided detailed costings of the second contract before execution. The document is at OTB576 and 577 headed "Extras: Rod Larsson" and the address. In that document there is an allowance for $4,893.64 for Tasmanian oak plus $1,200 for glue, secret staples, fixing nails and cleaning agents and $4,300 for floorboard labour. If this document could be relied upon (and I accept Mrs Priftis's statement that it is not annexed to either contract) and the whole sum allowed for the Tasmanian oak floor was deducted, it would total $10,393.64.

78 The Owner argued that in V2813012 there is also a claim for fixing materials of $2,555.15 and labour of $4,730. She therefore concluded that the Builder had duplicated the charge for fixing materials and labour in relation to the floorboards.

79 The specification for the second contract at OTB38 provides:

- New 85 x 19 mm standard grade Tassy Oak floorboards to bedrooms 2 & 3, hallway and living/meals area.

Next to this point is handwritten "(allowance $4,900)" and it is initialled by the Owner and the Builder.

- All floorboards will be glued and secret nailed for a better quality finish.

80 The Builder gave the Owner a first variation notice based on sourcing the timber through Bowens, his usual supplier. The Owner found another supplier for a cheaper price. On 27 May 2014 the Builder ordered the timber from the Owner's supplier and sent the two variations to the Owner for signature. There remained a disagreement about the nett change in price. The Builder said red ironbark is more labour-intensive and hence more expensive to lay because it is significantly harder and denser than Tasmanian oak.

81 I accept the Builder's evidence that he had ordered the red ironbark before the variation was signed and was therefore committed to it, even though this was not in his best interests.

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5 In her final submissions at paragraph 72, the Owner mentioned "Section 23(a)(iii) of the Act". It appears the act refer to is the DBC Act. There is no such section however it may be that she sought to refer to s38(3)(a)(iii) which requires a builder to state the cost of the variation. There is no doubt that the Builder complied with this obligation, and the final price was negotiated between the parties. She also referred to section 23 regarding prime cost items. I characterise the change from one type of flooring to another as a variation rather than a prime cost sum adjustment.

82 Although neither party appeared to be particularly happy with the outcome, the variations were finally signed by the Owner when V2813012 was amended to include polishing the floorboards at no extra charge.

Decision

83 Had the negotiation between the parties been less intense and taken less time, I might have been inclined to consider that there had been a mistake between the parties. In circumstances where their negotiations were over a substantial period of time and hard fought, I cannot be satisfied that the variations do not reflect the parties' intentions at the time they were signed. I do not allow the Owner any part of the $5,500 she claims.

If an error, was it significant?

84 Much evidence was given, and many submissions made, about the floor variations. Although I have not allowed the Owner's claim, I consider it appropriate to remark on the nett increase and the evidence of the Builder and the experts about whether it was more expensive to install red ironbark.

* Nett increase

85 $13,093.14 less $6,650.01 is $6,443.13, without taking into account a deduction for the value of polishing the floor. If the Owner's claim[6] for polishing the floor of $2,310 is reasonable, it follows that the net increase was $4,133.13.

86 OD367 is an email from Mr Larsson to the Owner. It is dated 14 May 2014 and recommends the use of red ironbark at an additional cost of $3,672 for changing materials only.

87 In this context, I do not consider a net increase of $4,133.13 unreasonable. If the Owner were successful in having a further $5,500 deducted from the nett sum due for these variations, the Owner would get a floor, agreed by both parties to be more expensive, at less than the cost of the Tasmanian oak floor.

* Alleged increased cost of installation

88 The Builder disagreed that the credit for Tasmanian oak was insufficient. He submitted that Mr Larsson, as an accountant rather than a builder, had no real appreciation of the time necessary to install red ironbark rather than Tasmanian oak. His evidence was that Tasmanian oak can be laid on battens and therefore glued just where the battens are placed. He said that the red ironbark provided by the supplier identified by the Owner was to some extent bowed, and required a much more rigorous method of laying.

89 I ask the Builder why he did not send back any bowed material to the supplier. He responded that he did not have the luxury of time. He believed that his system to overcome the bowing was sufficient, and if he had discovered any badly bowed wood, he would have sent it back. I accept the

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6 As part of the completion costs sought by her.

Builder's evidence that the time necessary to lay red ironbark was approximately double the time that would be necessary to lay Tasmanian oak.

90 I accept the Builder's evidence that red ironbark, in the area in which he installed it, necessitated levelling the underlying concrete floor with "Ardit", applying plastic sheeting to minimise moisture transference, laying ply-wood, with frequent fixings (described by the Builder as "knock ins") through to the concrete floor, then applying a generous layer of glue to the entire plywood floor, to firmly fix every part of the timber to the plywood. I also accept his evidence that a slightly more extensive area of floorboards was laid than originally anticipated when Tasmanian oak was to be installed.

91 I accept the Builder's evidence that the gluing was a two to three person job, whereas gluing Tasmanian oak could be undertaken by a carpenter without assistance.

92 During concurrent evidence the Builder, Mr Floreani, Mr Beadle and Mr Beck discussed the proper cost of laying red ironbark. The Builder said that part of the substrate was on stumps and part was on concrete. The floorboards on stumps were on a substrate of yellow tongue board.

93 Mr Floreani said that there can be difficulties with two different substrates and that if boards are not straight they should be returned to the timber supplier but that he had not turned his mind to the difference in cost between the two types of timber.

94 Mr Beadle said that if boards were laid on yellow tongue, the substrate would be similar to those laid onto concrete. Based on Mr Beadle's comments, Mr Floreani said there was probably no difference in the cost of laying Tasmanian oak and laying red ironbark, but that he had not laid the latter.

95 Mr Beck said there is a significant difference in labour and materials. He pointed out the necessity to trowel on glue to get about a 90 to 95% adhesion and that it is best to lay red ironbark as a two person job whereas Tasmanian oak is easier to manipulate, there is less glue and the materials are less costly.

96 I accept Mr Floreani's evidence that any bowed timber should have been returned to the timber supplier, however I also accept the Builder's evidence that the floor had already caused significant delay and that with extra work an acceptable result could be achieved. I note that there is no suggestion by anyone that the floor is other than acceptable.

Conclusion

97 The variations stand as written, with a nett sum due to the Builder for the change in floorboards of $4,133.13.

Note

98 This variation is also discussed under "Fractious history" below, more specifically under the date, "May-June 2014".

Wardrobe credit – V281320

99 The Builder claims that this credit of $3,153.01 was given in error. It was for an amount to be deducted from the original amount allowed for wardrobes. However, the Builder claims that variation V2813021, which was also a credit allowance and included a deduction of $12,923.64 plus GST for "cabinetmakers allowance to be credited" included the amount that was credited in V281320 for wardrobes. I note that this is the total amount allowed for the cabinetmaker under the first contract inclusions which appear at OTB92. It included "all robes" which I interpret to mean the wardrobes to the new works.

100 The Builder gave evidence that these built-in wardrobes were framed, plastered, had skirting installed, internally painted and were complete except for doors and "internals", which I understand means shelving and rails. I note there is no reference to wardrobes in the inclusions to the second contract or even in the "Extras: Rob Larsson" Document at OTB41. Mr Larsson stated that he did not believe there was an error.

101 At paragraph 14(a) of the Points of Counterclaim there is a reference to Mr Beck's report. On page 5 of that report there is an item:

> Variation No V2813020 was given in error as the total cabinet allowance including robes was credited back on Variation V2813021. – $3,153.01.

102 In her Points of Defence to Counterclaim the Owner stated:

> There is no duplication of credit Variations. Variation V2813021 refers to Cabinet maker allowance for $14,216 including GST (First Building Contract Specifications page 2). Variation V281020 refers to the bedroom robes allowance 2 x $2,000 including GST (First Building Contract Specifications page 4). These allowances were given as the owner supplied all cabinetry work from a third party supplier.

103 The Owner's pleading is correct. Further, both of these variations were issued simultaneously on 30 July 2014. As stated above, parties must not sign variations in haste and seek to undo them at their leisure.

104 As I cannot be satisfied there is an error, the Builder's claim is disallowed and the Owner continues to be entitled to a credit of $3,153.01 for this variation.

Bins – V281326

105 This variation concerns the Builder's practice of making an allowance for bins for rubbish removal in the contract, then charging extra if there are additional bins. As I remarked during the hearing, this practice is likely to

cause a disproportionate number of disputes, particularly when taking into account the difficulty for any owner to check the accuracy of the Builder's claim.

106 In an email to the Builder dated 27 May 2013, Mr Larsson said, among other things, that "all bins are to be included in the contract price with no variation".

107 Nevertheless, it is noted that the bins are included on page 4 of the document headed "Inclusions" which appears at BTB94 and it was within the power of the Owner to refuse to sign the contract unless this item had been deleted. I remark that like other items which appear in this list with prices against them, the Builder should have treated the bins as if they were a prime cost or provisional sum item. To fail to do so potentially breaches s15 of the *Domestic Building Contracts Act* 1995 ("DBC Act") concerning cost escalation.

108 While it is understandable that the Builder might not know how many bins had been used until the last possible moment, the Owner and her husband are less able to check on the number of bins actually used and they have no control over bin use. They also needed time to check this item. As the Owner remarked during the hearing, the last printed entry on the supporting document from Cozee's Bins was for 29 July 2014. If the Builder had promptly charged for this contract sum adjustment, there would have been plenty of time for the Owner to consider it. I note that there is also a handwritten entry for 30 August 2014.

109 I also take into account the Owner's final submissions that although the first contract gives a limited allowance for bins, the second contract does not. At least some of the bins must have been used for the second contract, which involved significant demolition.

110 In accordance with section 53 of the DBC Act, which commences:

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

I consider it fair that the Owner not pay the additional cost of the bins. There is no variation sum adjustment for this item.

Tile credit – V281327

111 V281327 was a tiling credit because the Owner had paid for the tiles and the Builder said the amount of the credit was the exact allowance in the contract. Mr Larsson responded that the issue was not about the variation itself, but the fact that it was presented on the last day before the Owner left Australia for a month, which did not give the Owner the opportunity to reconcile it.

112 However paragraph 14(a) of the Points of Counterclaim referred to Mr Beck's report. On page 5 of that report there is an item:

> Tiled splashbacks: Credit given but works were requested and completed by builder – $236.37.

113 The Owner's response in her Points of Defence to Counterclaim on page 8 is:

> Owner supplied tiles and a $40 per m2 allowance (per First Building Contract Specifications page 3) given on variation V281327 (Note there are 2 Variation forms with the number V281327). Item under Tiler allowance (First Building Contract Specifications page 3) states builder is to undertake all kitchen tiling which includes splashbacks.

114 On 3 July 2017 the Builder said that the credit of $1,541.19 was too great by the amount of $236.37 which should not have been credited because it related to the cost of laying the tiles.

115 The Owner said she understood that the credit deducted the amount for the tiles but not for their laying.

116 The Builder responded that the previous plan was to use a glass splashback and the work of tiling was longer and more expensive.

117 This variation credit was an amount calculated by the Builder and I am not satisfied that he made an error. I do not allow any further adjustment of this variation. The Owner is entitled to the agreed credit of $1,541.19.

Reece extras - V281327A

118 As the Builder remarked, this variation was a contract sum adjustment of $435.10 plus builder's margin giving a total variation of $574.33. The Owner said there was quite a bit to check through on her busy last day at work when she was also unwell. It is noted that the variation is supported by a quotation and a customer order with notes against some of the items showing credits. The last Reece document in the BTB was dated 14 May 2014, however the latest document attached to exhibit R1, was dated 19 August 2014.

119 On 3 July 2017 the Owner gave evidence that she did not have a problem with the sum of $574.33 but it was she, and not the Builder, who paid this additional sum to Reece.

120 The Owner had her solicitor sign this, and three other variations, on 17 September 2014. Further, in her Points of Defence to Counterclaim she admitted this variation. For the reasons given above under Wardrobe variation, the Owner's claim is not allowed and the agreed variation of $574.33 continues to apply.

121 The question of how much it would have cost the Builder to complete the works (including items from Reece) is discussed toward the end of these reasons under "Cost to complete".

Variations in dispute – total

122 The nett adjustment for variations in dispute is:

Number	Item	Addition to Builder	Deduction to Owner
V281320	Stumps		$4,000.00
V28132011 and V28132012	Floorboards	$4, 133.13	
V281320	Wardrobe credit		$3,153.01
V281327	Tile credit		$1,541.19
V281324	Reece extras	$574.33	
	Totals	$4,707.46	$8,694.20
			-$4,707.46
	To Owner		$3,986.74

Nett contract sum adjustment for variations

123 The nett contract sum adjustment for variations is:

Agreed variations	$16,556.88
Variations in dispute	$3,986.74
To Owner	$20,543.62

TIME

124 The issue of when the time for completion was extended to is of vital importance between the parties because it is the only breach of statutory warranty, under s8 of the DBC Act, claimed by the Owner in her Points of Claim.

125 The Builder claims that time was extended in accordance with the provision under the first contract to at least 24 November 2014 or alternatively to 2 January 2015. In her final submissions the Owner claims that work should have been completed by 11 September 2014, although she does not indicate how she has arrived at that date. And paragraph 184 of her final submissions, the Owner states that the "valid completion date should be: "closer to 29 August 2014 than 24 November 2014."

126 The Builder submitted a timeline ("Builder's Timeline") on 26 June 2017. Under the entry for 28 September 2013 the Builder refers to a notification of extension of time concerning the unsafe brick chimney. He said that the planning permit had to be amended and consequently 106 days was added to both contracts which brought the completion date without any further extensions, to 14 November 2014. In her "Response to Respondent's

Timeline[7] submitted 26 June 2017" ("O's RRT 26/6/17") she makes no mention of this date.

Time and money

127 Building contracts distinguish between adjustments to time alone, and adjustments to money as well is time. Where there is a delay that is neither the fault of the owner nor the builder, it is not unusual that the builder will be entitled to a time extension without time extension costs. When the delay is the fault of the owner, or something that the owner could reasonably have prevented, it is common that the builder is entitled to a time extension plus time extension costs.

Agreed time extensions

128 I am satisfied that by virtue of the second contract, as discussed below under "EOT1", the date for completion of both contracts, before any further extensions of time, was 31 July 2014.

129 Having regard to agreed variations entered into after 18 September 2013, time was also extended by agreement as follows:

Date	Variation	Item	Days
20/3/14	V281305	Demolish fire place	1
20/3/14	V281306	Skylight in hall	1
12/5/14	V281307	Front door jamb and architraves	1
12/5/14	V2813010	Verandah post repairs	1
27/5/14	V328012	Floorboards	2[8]
8/7/14	V281315	Electrical changes	1[9]
30/7/14	V2813018	Architraves	1
30/7/14	V2813019	Skirting boards	1
18/7/14	V2813025	Victorian cornice	1
		Total additional days	10

130 I note that "days" is defined in the first contract to mean calendar days. Before any further adjustment, the agreed adjustments by virtue of the variations brought the completion date to 11 August 2014.

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7 The timeline referred to by the Owner was submitted by the Builder on 26 June 2017.

8 The days in the variations concerning time for floorboards and electrical charges was for the additional time to do the work and did not take into account any delay caused by a failure of the parties to agree on the variation.

9 See footnote 7.

Contract provision re time extensions

For contract 1

131 Clause 37 of the contract provides in part:

> 37.0 The date for Commencement is put back or the Building Period is extended if the carrying out of the Building Works is delayed due to:
>
> - a variation or a request for a variation by the Owner in accordance with clauses …
> - a suspension of work in accordance with Clause 38;
> - …
> - anything done or not done by the Owner or by an agent, contractor or employee of the Owner; and
> - any other cause that is beyond the Builder's direct control.
>
> 37.1 The Builder is to give the Owner a written notice informing the Owner of the extension of time. The written notice must state the cause and the extent of the delay.
>
> 37.2 To dispute the extension of time the Owner must give the Builder a written notice, including detailed reasons why the Owner dispute the claim, within 7 Days of receiving the Builder's notice.
>
> 37.3 If there is an extension of time due to anything done or not done by the Owner or by an agent, contractor or employee of the Owner, the Builder is, in addition to any other rights or remedies, entitled to delay damages worked out by reference to the period of time that the Building Period is extended and the greater of $250 per week or that amount set out in Item 12 of Schedule 1. Delay damages will accrue on a daily basis.

For contract 2

132 Clause 5 provides:

> The contractor is not responsible for any delay caused by something beyond the contractor's sole control including any failure by the owner to:
>
> (a) make a selection; or
>
> (b) give the contractor adequate access to carry out the works.
>
> The commencement date will be put back or the building period will be extended by whatever time is reasonable if the contractor claims an extension of time by giving the owner written notice.

133 In the Points of Defence to Counterclaim the Owner raises a number of Builder's alleged overstatements of extensions and over estimations of the time which the Owner believes was necessary to complete the works. Nevertheless, the parties entered into both contracts and the time to

negotiate changes to the period for construction was at the point where the contract was signed or the EOTs were sought. If the Owner disagreed with the times claimed in the EOT's, the time to do so was within seven days of receiving them.

EOTs claimed but not agreed.

134 The Builder gave evidence that:

> The additional [varied] works and the fact that some of the works could not be attended to without a new permit meant extensions of time. Notices of extension of time were submitted to the owner and were not disputed within seven days of the date they were sent. The time therefore was extended in accordance with clause 37 of the first contract to at least 24 November 2014 alternatively, to January 2015.

135 The Builder's claim for extensions of time and extension of time costs are as follows:

EOT1 – 28 days $1,000.00

136 I find that the parties agreed on the extension to the first contract of 28 days, but did not agree that time extension costs should be paid.

137 At paragraph 5(a) of the Points of Counterclaims the Builder pleaded:

> 18/09/2013 – requested by the Owner to renovate the front existing part of the house – 28 days – first contract.

138 The Owner's response in her Points of Defence to Counterclaim is:

> First and Second Building Contracts were terminated – Builder caused unnecessary delays.

139 The claimed EOT relates only to the first contract. This response is irrelevant to a delay that allegedly occurred on 17 September 2013, as the contracts were not terminated until October 2014. Nevertheless, the parties agreed to an extension of time when the second contract was signed and if it had been their intention that the Builder receive an amount for time extension costs, that claim should have been made at the same time.

140 I am satisfied that in accordance with the second building contract and the Notification of Extension of Time, the Builder was entitled to an extension of time of 28 days for the first contract to bring the completion date into line with the second contract, being 31 July 2014. However, the Builder is not entitled to a separate amount for time extension costs.

EOT2 – 106 days $3,785.71

141 At paragraph 5(b) of the Points of Counterclaims the Builder pleaded:

> 28/09/2013 – existing chimney was unsafe and required works. Planning permit had to be applied for – 106 days – first and second contract.

142 BTB108 is a Notification of Extension of Time issued by the Builder on 28 September 2013, claiming an extension of 106 days.

143 At paragraph 5 of her Point of Defence to Counterclaim, the Owner denied the Builder's claim and said in her particulars that the amended planning permit was issued 71 days after signing the second building contract, on 27 November, 2013. She therefore concluded that the EOT was over claimed by at least 31 days and that a credit of 31 days should be granted. Nevertheless, there is no suggestion that she disputed the EOT at the time.

144 Again, the Owner's response is:

> First and Second Building Contracts were terminated – Builder caused unnecessary delays.

145 Again, the Owner's response is irrelevant as the claim for time extension arose out of the need to obtain planning permission for the chimney on 28 September 2013.

146 On the second page of the document "Applicant's Response to Respondent's Submission of Evidence Dated 20 July 2017" at C9(b) the Owner says:

> The owner was again concerned at the elongation of time however was assured again by the respondent that he would complete the building work well within the extended completion date. Based on the respondent's representations and a need to have the building works completed as soon as possible the applicant elected not to delay matters further by disputing the EOT claim.

147 On 28 July 2017 the Builder asked Mr Larsson whether there is any provision in the contracts which requires the Builder to finish the work earlier than the completion date (as extended). Mr Larsson did not mention any contract provision but made reference to various emails. I am satisfied that there was no requirement that the Builder complete the work before the extended date for completion.

148 The parties agree that the time extension claimed by the Builder under paragraph 5(b) concerned the need for a new planning permit to enable the chimney to be demolished. They also agree that the planning permit was issued 71 days after signing the second building contract, noting that there were additional works required that could not be undertaken until after the planning permit was amended.

149 The time for the Owner to make that allegation that time was over-claimed was within seven days of the EOT claim by the Builder. In accordance with contract I find that time was extended by 106 days concerning the chimney works, taking the date for completion to 14 November 2014. As all of the 10 days allowed for in the agreed variations[10] accrued before 14 November 2014, the date for completion, without taking into account EOT3, was 24 November 2014.

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[10] See "Agreed time extensions" above.

150 I am not satisfied that the need for the time extension was because of "anything done or not done by the Owner or by an agent, contractor or employee of the Owner" in accordance with clause 37.3 of the first contract, so there is no allowance for time extension costs.

EOT3 – 39 days $1,392.84

151 At paragraph 5(c) of the Points of Counterclaim the Builder pleaded:

> 29/08/2014 – unable to proceed with works due to the Owner not advising on variation order V281315 that lay on a critical path of construction – 39 days – first and second contracts. This variation was issued on 08/07/2014 and not approved until 17/09/2014 after continued promises by the Owner to return signed copy back to the Builder. Further the Builder was unable to proceed for a period of 71 days.

152 In the particulars to paragraph 5 of her Points of Defence to Counterclaim, the Owner expressed a view that the electrical variation was not on the critical path[11] and therefore did not delay completion of the work.

153 On 29 August 2014 the Builder issued a Notification of Extension of Time to the Owner for both contracts stating that the delay commenced on 29 August 2014 and the reason was:

> Unable to proceed with works due to owner not signing variations.

154 The "Applicant's Submission of Further Evidence – 20 July 2017" at page 4, paragraph 8, submits that this notice is invalid because it is open-ended (without a finish date).

155 As quoted above, clause 37.1 of the first contract provides:

> 37.1 The Builder is to give the Owner a written notice informing the Owner of the extension of time. The written notice must state the cause and the extent of the delay.

156 Although the notice of 29 August 2014 did not indicate the extent of delay, I am satisfied that the Builder could not know the extent until the Owner signed the electrical variation, and her prevention of the Builder's progress came to an end.

157 On 10 October 2014 the Builder issued another Notification of Extension of Time on the same basis claiming 39 days. I find that the two notices constitute one effective notice, which complies with the requirements of clause 37.1.

158 I accept the Builder's evidence that neither Notification was disputed by the Owner, although I note that for the second she appears to have believed, albeit inaccurately, that she had already properly terminated the contract.

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[11] The "critical path" concerns steps which, if delayed, will delay subsequent steps. For example, pouring concrete footings is nearly always on the critical path, whereas choosing paint colours is not on the critical path until work has progressed to a degree where failure to give instructions causes delay in completion of the works.

159 As I have stated above, I am satisfied that until the electrical variation was signed by the Owner's solicitor and returned to the Builder on 17 September 2014, the Builder was entitled to an extension of time and also to extension of time costs.

160 I accept the Builder's evidence that an example of the significant delay caused by the failure to provide the electrical variation was the difficulty in arranging for the attendance of the floor polisher. I accept the Builder's evidence that the floor polisher was booked on three different occasions.

161 I allow an extension of time commencing on 29 August 2014, and ending on 1 October 2014; a period of 33 days. I allow 14 days from the date of receipt by the Builder of the electrical variation, to give him time to re-schedule and re-commence work.

162 I do not allow the entire 39 days sought by the Builder, because I find that the Builder was obliged to recommence work within a reasonable period after the Owner ceased to prevent his progress and that day (except for failure to arrange the gas connection) was 17 September 2014. As demonstrated in correspondence on 18 September 2014 (see under "The Fractious History" for that date) it seems that the Builder was still under the impression that further steps had to be taken by the Owner before he was obliged to take steps to re-commence work. For example, on 18 September 2014 the Builder complained that the Owner had still not given an undertaking to pay on handover and said "and regret that we cannot move forward without it".

163 The date for completion as at 17 September 2014 was therefore 24 December 2014.

164 The Owner must pay the Builder $1,178.43 being the weekly rate of $250, or the daily rate for time extension costs of a little over $35.71 for 33 days.

Owner's pleading and Mr Larsson's submission

165 At paragraph 26 of her Points of Claim the Owner states:

> At the time that the Owner terminated the Building Contract on 9 October 2014, the end of the Building Period was 11 September 2014, and the Building Works had not reached completion.

166 There is no pleading in the Points of Claim which indicates how the Owner came to this conclusion. In particular, there is no reference to extensions of time and no reference to any response that she might have made to the Builder's Notices of Extension of Time.

167 Mr Larsson gave evidence that "my assessments bring the date for completion back to 29 August 2014". I asked him what provisions in the contracts allowed the Owner to make these apparently unilateral adjustments to time. He did not provide any answer that supported his view that such an adjustment could be made.

Overall determination concerning date for completion of each contract

168 The Builder was obliged to complete the works under each contract by 24 December 2014.

CONTRACT TERMINATION

169 Neither party ended either contract in accordance with the provisions in the contracts. It follows in this case that the contracts have been ended under the common law by a party, for the repudiation of the other.

170 Somewhat surprisingly, the Owner suggested, for the first time, in her final submissions that letters from her solicitors of 5 September 2014 and 29 August 2014 demanding that the Builder recommence work amounted to show cause notices. She has not pleaded this and it was not mentioned in the hearing. Having regard to the provisions of clause 46.2 of the first contract, I find that those letters do not fulfil the requirements of show cause notices.

Repudiation

171 A definition[12] of contractual repudiation commences:

> Conduct that evinces an unwillingness or an inability to render substantial performance of a contract. It is conduct that evinces an intention no longer to be bound by the contract or to fulfil it only in a manner substantially inconsistent with one's obligations and in no other way.

172 In *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* [2007] HCA 61, Chief Justice Gleeson, together with Justices Gummow, Heydon and Crennan, described classes of repudiation, the first being "renunciation" of the contract (as described in the above definition), and they said at paragraph 44:

> The test is whether the conduct of one party is such as to convey to a reasonable person, in the situation of the other party, renunciation either of the contract as a whole or of a fundamental obligation under it.

173 The second category, which their Honours described as overlapping renunciation, is failure to perform. They said that it might not even be a breach of an essential term but must manifest:

> …unwillingness or inability to perform in such circumstances that the other party is entitled to conclude that the contract will not be performed substantially according to its requirements.[13]

174 In her final submissions the Owner quoted Brennan J. in *Laurinda Pty Ltd v Capabala Park Shopping Centre* [1958] HCA 23, at paragraph 14 where his Honour said:

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12 Australian Legal Dictionary, Lexis Nexis, 2nd edition

13 Paragraph 44

> Repudiation is not ascertained by an enquiry into the subjective state of mind of the party in default; it is to be found in the conduct, whether verbal or other, of the party in default which conveys to the other party the defaulting party's inability to perform the contract or promise or his intention not to perform it or to fulfil it only in a manner substantially inconsistent with his obligations and not in any other way.

175 The answer to the question "if there was a repudiation, who repudiated?" is found at the end of the fractious history of the parties' dealings with each other. The date of repudiation, and the subsequent date of the end of the contracts, was around 9 October 2014.

176 The most likely characterisation of the Owner's lawyer's letter of 9 October 2014 was either that the Owner was accepting the Builder's repudiation, or the letter was repudiatory as was a further letter of 10 October 2014 and the Owner taking possession on 16 October 2014.

177 The two contracts, like most standard-form building contracts, include a two-stage system to end the contracts. The first is commonly known as a "show cause" notice. That is, a notice is sent by the "innocent" party setting out the other party's alleged breaches. The party who receives the notice must then either act in accordance with the notice or show cause why the contract should not be ended. Stage 2 is termination of the contract by notice given some days later – under the first contract period was 10 days; under the second contract, five days.

178 Such clauses minimise unfairness between parties and force any party inclined to act hastily to stop and think.

Termination provisions in the contracts

First contract

179 Clauses 44 and 46 of the first contract deal with the ability of an owner to end the contract.

180 Clause 44 enables either party to end the contract by notice immediately if the other becomes insolvent.

181 Clause 45 concerns a builder's right to end the contract.

182 Clause 46 is headed "Owner's Right to End This Contract". It relevantly provides:

> 46.0 If the Builder breaches (including repudiates) this Contract nothing in this Clause prejudices the right of the Owner to recover damages or exercise any other right or remedy.
>
> 46.1 The Builder is in substantial breach of this Contract if the Builder:
>
> - suspends the carrying out of the Building Works, otherwise than in accordance with Clause 38;

- …
- is otherwise in substantial breach of this Contract.

46.2 If the Builder is in substantial breach of this Contract the Owner may give the Builder a written notice to remedy the breach;

- specifying the substantial breach;
- requiring the substantial breach to be remedied within 10 Days after the notice is received by the Builder; and
- stating that if the substantial breach is not remedied as required, the Owner intends to end the Contract.

46.3 If the Builder does not remedy the substantial breach stated in the notice to remedy breach within 10 Days of receiving that notice, the Owner may end this Contract by giving a further written notice to that effect.

46.4 The Owner is not entitled to end this Contract under this Clause when the Owner is in substantial breach of this Contract.

183 This clause does not prevent an owner from ending a contract for the builder's repudiation, but puts any owner who ends the contract other than in accordance with clause 44 or 46 at risk of being found to have repudiated the contract.

Second contract

184 Clause 24 of the second contract is headed "Termination" and provides:

> If either party is in serious breach of this contract, the party not in breach may give the other party a written request to remedy that breach. If the breach is not remedied within five days, the party not in breach may end this contract by giving written notice to that effect.

185 Again, the clause does not prevent an innocent party from relying upon the repudiation of the other party to end the contract, but a failure to give notice puts the party ending the contract at risk that it has, itself, repudiated.

Ending the contracts other than in accordance with the termination provisions

186 In the course of the hearing, Mr Larsson suggested that because the word "may" has been used in both contracts with respect to termination, it follows that the contract can be terminated by other means. This was not pleaded in the Owner's Points of Claim, and it was not included in the Owner's Final Submissions.

187 Although Mr Larsson's submission has some attraction, I consider "may" has been used as distinct from "must" when a circumstance arises that would entitle a party to end the contract. The innocent party might decide to continue with the contract regardless of the other party's breach.

Suspension

188 The Builder's Points of Counterclaim plead that the Builder was entitled to suspend the works and did so. At paragraph 9 the Builder pleaded:

> a) The Builder was entitled to suspend the works pursuant to clause 38 of the contract.
>
> b) The Builder was not otherwise in substantial breach of the terms of the contract;
>
> c) The Owner was in substantial breach of the contract and by reason of clause 46.4 of the contract the Owner was not entitled to terminate the contract.
>
> PARTICULARS
>
> i) The Owner had failed to provide to the Builder the information she was obliged to provide with respect to the variation that fell on a critical path, full particulars of which are alleged herein.
>
> ii) The Owner was aware of the suspension notice, and the Builder was not obliged to serve it by registered post. There is no allegation that the notice was not received.
>
> iii) The Builder did not unreasonably suspend the building Works. The owners were [sic] in breach, as particularised in i) hereof.

189 However, in his final submissions the Builder stated that he is not a lawyer, did not understand the difference between suspension and time extension and that there was no suspension. This is discussed in greater detail below.

Contractual suspension provisions

First contract

190 Clause 38 of the first contract provides:

> 38.0 The Builder may suspend the Building Works if the Owner:
>
> - does not make a Progress Payment that is due within 7 Days after it becomes due; or
> - is in breach of this Contract.
>
> 38.1 If the Builder suspends the Building Works, the Builder must immediately give notice in writing by registered post to the Owner. The Owner must remedy the breach within 7 Days after receiving the notice. The Builder must recommence the Building Works within 21 Days after the Owner remedies the breach and gives notice of this to the Builder. [Underlining added]
>
> 38.2 The date on which the Works are to be completed is changed and extended to cover the period of suspension.

191 The parties agree that the Builder did not give the Owner any notice of suspension, as Mr Larsson agreed under cross examination on 28 July 2017.

Second contract

192 Clause 23 of the second contract provides:

> If the owner is in breach of this contract, the contractor may suspend the carrying out of the works.
>
> The contractor must recommence the carrying out of the works within a reasonable time after the owner has given written notice to the contractor that the owner has remedied the breach.

193 Somewhat surprisingly, the clause does not require a builder to give written notice of suspension to an owner.

194 If there was a suspension, I note that at least some of the work suspended was under the first contract, and suspension not in accordance with that contract is one of the breaches that the first contract contemplates will be subject to the two-stage termination process.

The fractious history

195 I record the fractious history in the context of the Builder still having time to complete the works, having regard to the extended dates for completion. As discussed above under "Time", at the time of termination of the contract – late August – if the parties had turned their minds to when the works should have been completed it would have been by 24 November 2014 without any allowance for delay in signing the electrical variation.

May-June 2014 – the timber floor variation

196 Under "The timber floor variations" above I have mentioned the first obvious dispute between the parties, concerning negotiating the price of the change of flooring from Tasmanian oak to red ironbark.

197 With respect to the timber floor variations, the Owner said at the first page of "Applicant's submission of evidence" handed up on 26 June 2017:

> [The Builder's] actions at the time were to leave a lasting negative impression with me for the duration of my dealings with him.

198 The Owner alleges that the Builder suspended work until the floor variations were resolved. In an email from her lawyer dated 29 August 2014, there is the following sentence, which appear self-serving:

> We have been instructed that you previously took all men off the site for two weeks a couple of months ago when you and our client could not agree to a floor variation that you had submitted.

199 The Builder stated that no extra time was claimed for the floor variation, and, with the exception of two extra days to lay the floor, this is accurate. I accept his evidence that although the carpenters were unable to continue, the other trades were working.

200 As I have found above, the negotiations for the timber floor variation took three weeks and the Builder was not in a practical position to refuse to undertake it, because he had ordered the timber before the variations were

signed. It may be that the Owner's claim that she was forced to agree by threat of delay is fair. However I find that the Builder was under at least as much pressure by having committed himself to purchase the red ironbark before the price was agreed and the variations were signed.

201 The Owner's written submission of 26 June 2017, said that the Builder had suspended the work for two weeks in May 2014 "as we did not agree with his variation debit in relation to replacing tiles in kitchen-family room area with timber boards."

202 The Owner continued:

> This was ultimately resolved as I agreed to compromise on sharing the cost differential in dispute in order to have the works recommence.

203 The Owner said that work recommenced after she executed a hand amended variation on 17 June 2014.

204 In reliance on three emails from Mr Larsson to the Builder of 14 May 2014, the Owner asserts that the decision was made on that day. The first email, in OTB367 was from the Builder to the Owner at 10:29 am. It commenced:

> I have spoken with Shannon [at the Builder's supplier] this morning about the timber floors for Argo Street which they need to firm up this week.

205 The email described the difference in price between Tasmanian Oak and red ironbark, giving prices for two different sizes of the latter. The size recommended by the Builder was 85 x 19 mm at a price of $120 per square metre.

206 At 2:10 pm Mr Larsson wrote back to the Builder. The relevant part was:

> 3. We have sourced a supplier of the Red Ironbark (Premium Grade) at $85 per m2. Delivery is $160 to site. The dimensions are 80 mm by 19 mm tongue and groove and end matched. The contract details are Jeff at Watsons Ironbark – Kyabram – [phone number]

207 At 3:31 pm Mr Larsson emailed the Builder again to say:

> Alison has confirmed that the timber floor (Red Ironbark 85 mm x 19 mm) is to be continued through the kitchen and into the small hallway before the bathroom.

208 Although the material might have been agreed, it is disingenuous to suggest that the variation was agreed at this point, because there was no agreement as to price.

209 At paragraph 8 of her Points of Claim the Owner pleaded:

> In or around May 2014 in breach of Clause 46.1 of the First Building Contract, the Builder wrongly suspended the Building Works otherwise in accordance with clause 38.

Particulars

The Builder suspended the Building Works for a period of approximately 2 weeks in May 2014, over a dispute for additional charges for a prime cost charge for supplying and laying timber floorboards.

210 The Builder denies suspending works in May. He gave evidence that although he considered the Owner's attitude unreasonable, he compromised the amount for the timber floor by agreeing to polish it without charge to the Owner. The Owner's evidence is a reflection of the Builder's. She said that she considered the Builder's attitude unreasonable, but agreed to compromise.

211 I am not satisfied that there was a suspension in May.

Variation clause in the second contract

212 In the hearing, the Builder suggested that the Owner was in breach of the second contract because she did not sign the variation within two days. If this was a breach it had been corrected before the contract came to an end, so is not relevant to the question of who repudiated. Nevertheless, there was significant evidence and argument concerning this point, and it is noted that the Owner's solicitor referred to the alleged suspension in May in her first letter to the Builder on 29 August 2014, quoted below under "29 August 2014".

213 I am satisfied that the obligation to install timber floors fell under the second contract, not the first. In another context[14] Mr Larsson has suggested that variations that bear the contract date 2 June 2013 are under the first contract, not the second. Every variation bears that contract date, and given Mr Larsson's attention to detail, it would be expected that a person concerned by such a matter would bring obvious slips or faults to the attention of the other party.

214 In the second contract there is an unusual provision within the variation clause as underlined below.

8. Variations

If the owner wishes a variation, the owner must give the contractor a written request detailing the variation.

If the contractor reasonably believes that the variation requested will not:

(a) require a variation to any permit;

(b) cause any delay; and

(c) add more than 2% to the original contract price,

then the contractor may carry out the variation.

---

[14] In Mr Larsson's written submission "Termination of the Building Contract" of 28 June 2017, ("RL TBC 28/6/17"), he submitted that each of the final four variations related to the first contract, not the second.

In any other case, the contractor must give you a written notice stating either that the contractor:

(a) refuses or is not able to do the variation together with the reasons; or

(b) offers to carry out the variation and:

(i) what effect the variation will have on the works and whether a variation to any permit will be required;

(ii) if the variation will result in delays and the contractor's reasonable estimate of the length of delay; and

(iii) the price of the variation and the effect will have on the contract price.

If the contractor requests a variation the contractor must give the owner a written notice stating the details of the variation why the contractor wishes the variation together with the information stated above.

If the owner wishes the contractor to proceed with a variation the owner must give the contractor the owner's signed agreement to the variation attached to a copy of the contractor's written notice requesting or offering to carry out the variation.

If the owner does not give the contractor such signed agreement or written advice within 2 days of receiving the contractor's written notice requesting or offering to carry out the variation, the owner is in serious breach of this contract.

The contractor can require payment for a variation before the variation work is started.

215 I note that this clause does not give an owner the option of deciding not to proceed (unless that is encompassed within "written advice") with a proposed variation, and therefore the clause has the potential for requiring an owner to sign a contractual obligation about which the owner does not have the details at the date they enter the building contract. The provision seems to me to be an agreement to agree, which is void at law.[15]

216 If I am wrong concerning the validity of this clause, it is likely that at least some of the electrical works related to the second contract and therefore the Owner had been in serious breach of that contract until the variation was signed and delivered to the Builder on 17 September 2014.

3 July 2014

217 The Builder stated that he had provided the plumber's details to Mr Larsson. Document BE201 is the printout of a telephone message from the Builder to Mr Larsson of 3 July 2014, giving the name and registration number of the plumber. Mrs Priftis also remarked that the plumber's name

[15] It has long been the law that agreements to agree are void. See for example *May and Butcher v The King* [1934] 2 KB 17.

and contact details were provided as part of the first contract as is seen at BTB40. The Owner said she was unaware that this was in the contract, however it is noted that she initialled that page.

218 Mr Larsson said that he was unsure whether he passed on the plumber's details to his wife. As I remarked during the hearing, if information was provided to Mr Larsson he had ostensible authority to act on behalf of the Owner and communication by the Builder to Mr Larsson was sufficient for the purpose of communicating with the Owner.

8 July 2014 - Variation V281315 – electrical changes

219 This variation concerned relatively minor electrical changes, but assumed great importance between the parties regarding time for completion. It was sought by the Builder on 8 July 2014, but not signed for the Owner until her solicitor did so, and provided it to the Builder on 17 September 2014. The Owner has given no explanation for this delay.

220 The Owner's failure to sign the electrical variation is one of the grounds upon which the Builder alleges the Owner repudiated the contracts, and is discussed below under "The Builder's allegation that the Owner repudiated – Failure to sign variations on the critical path".

22 July 2014

221 The parties agree that connection of the gas meter was an obligation of the Owner. On 22 July 2014 she sent an email to the Builder advising that Multi-Net was to connect the service. She said they would contact the Builder and she gave the job reference. She said she needed to provide the plumber's name and contact number, the plumbers licence number and the certificate of compliance number. She also made a somewhat light-hearted comment about the difficulties of arranging such things. While it appears that the Builder might have taken offence, I draw no conclusions from this understandable reaction.

222 There is further discussion of the gas meter under "The Builder's allegation that the Owner repudiated – Delaying progress of the works – Gas meter"

31 July 2014

223 On 31 July 2014, the Owner sent the Builder another email which stated in part:

> Have Multi-Net contacted you yet about the new gas line connection?
>
> I rang AGL today and they advised that Multi-Net have accepted the job request for the Gas Line connection – the service order number is …
>
> Once that job is done you can call them to arrange for the new gas meter to be installed. I have advised AGL that I have given you authority, as my builder, to contact them to request the meter installation. …

She then reiterated her request for the plumber's details and concluded:

> The new meter will then be installed within 2 business days. They must have clear access otherwise they will charge me $90 for a failed service call. I have requested that Multi-Net call you in advance of the visit so that you can confirm access for the day they will visit. Can you please reiterate this requirement when you call AGL.

224 The Owner appeared to be telling rather than asking the Builder to do something.

28 August 2014

Variations

225 The Owner complained about four variations that were given to Mr Larsson the night before she was due to go on leave, on 28 August 2014. They were:

- V281327, tile credit of $1,541.19;
- V281326, for extra bins for $1260.02;
- V281324 Reece Extras, for $574.33; and
- V281328 to render brick piers, for $792.00.

226 The Builder agreed that these four variations were provided to Mr Larsson at around 5:45 pm on 28 August 2014. The Builder said that he took Mr Larsson out to dinner and they discussed various matters for two hours but there was no mention of any problem with the variations.

227 The Builder said that, before he and Mr Larsson met, the Owner requested all paperwork. He said that Mr Larsson said it "should all be fine" and the meeting on 28 August 2014 was to supply the final variations and give completion notices. The Builder gave evidence that is something that cannot be done very far in advance.

228 With respect to V281327, the Builder remarked that the decision by the Owner to supply the tiles herself had only been made shortly before the variation was prepared. I accept the Builder's evidence that the Owner paid for the tiles and requested a credit adjustment on 10 August 2014.

229 Variation V281328 was signed and returned to the Builder as the Owner said that it related to future work and the price had been agreed to. She objected to the other variations as "there was insufficient time to reconcile the variations with my records".

230 The remaining three variations, together with the electrical variation, were ultimately signed on behalf of the Owner by her solicitor while the Owner was overseas. The Builder gave evidence that he received them on 17 September 2014, which is supported by the Owner's solicitor's email of that date.

231 I remark that none of these three variations were relevant to the critical path. Other than V281328, each was for a contract sum adjustment for work already undertaken.

Comments about completion

232 Mr Larsson gave evidence that the Builder told him that the work should be finished by 10 September 2014.

An inspector during the Owner's absence, and hand-over

233 It was the Builder's evidence that Mr Larsson said he would appoint someone to do a final handover while he and the Owner were overseas.

234 Mr Larsson said he told the Builder that no-one would be available to inspect the work until his and the Owner's son returned to Australia on 23 September 2014. The Owner and her husband were not to return to Australia until 29 September 2014.

235 The Builder said he had major concerns over who was to do the final inspection. Mr Larsson had project managed the job and he found it surprising that the Owner had to come and look as well. He said he knew approximately eight weeks ahead of time that the Owner and her husband were going overseas on about 30 August 2014.

236 OTB22, 23 and 24 is a three page document which Mr Larsson said he gave the Builder at their meeting. The Builder said he did not recall the document and drew attention to a passage which states:

> The gate and house keys are to be delivered to … [the Owner's and Mr Larsson's home] after 23 September.
>
> Can you contact our son A. on mobile … to arrange a suitable time to deliver to him.
>
> A.. will be showing agents through in that last week.

237 The Builder said he would not deliver the keys until the final payment was made. This is also consistent with clause 41 of the first contract which provides that the Builder must hand over possession of the land and the keys when the Owner pays the final claim. Clause 41.1 goes further and states that if the Owner takes possession of the land before paying the final claim the Builder may treat that action as either repudiation or a substantial breach of the contract which would trigger the first notice in the two-stage system, or allow the Builder to rescind[16] the contract for the Owner's repudiation.

238 I remark that asking for possession of the property before she is entitled to it does not amount to repudiation of the contract. But if the communication is a demand rather than a request, it is inconsistent with the Owner's contractual rights. Further, given Mr Larsson and the Owner's attention to detail concerning the Builder's obligations under the contracts, it is curious

[16] Rescission is bringing the contract to an end by the party who is not in breach.

that Mr Larsson might seek possession without obtaining written confirmation from the Builder.

239 There is no similar provision under the second contract.

240 It would be surprising if OTB22-24 was not genuine, because it contains a few telephone numbers. It also notes that the outstanding matters are painting (external and touch ups), renderer, electrical fit off, tiling, plumbing fit off, final carpentry, floor polishing builders' clean and site clean.

241 Given the difficulties that were already apparent between the parties, it is also surprising that the Owner seemed to be asking, or perhaps demanding, that the Builder assist by providing access for the carpet layer, the gate installer, the landscaper and the curtain subcontractor.

242 However, I am not satisfied on the evidence before me, that the Builder received a copy of this document.

29 August 2014

243 On 29 August 2014 the Builder sent the Owner a "Notification of Extension of Time" which is at OTB159. It gives "Period of time claimed" as "from 29/8/14". Under "reasons" the Builder wrote:

> Unable to proceed with works due to the owner not signing variations.

244 Because the Owner interprets this document as a suspension of the contract, which is one of the grounds upon which the Owner bases her submission that the Builder repudiated, it is discussed below under "The Owner's allegations that the Builder repudiated – Allegation by the Owner that the Builder suspended".

245 In "Applicant's Submission in Response to Respondent's Timeline" handed up on 26 June 2017 the Owner states[17]:

> [Builder's claim that] there was an outstanding amount $1,709.71 due on the Builder's work at … Erskine Street. This was, as I recall, first brought to our attention on the evening of 28 August 2014.
>
> Builder acknowledges in discussion with Rod Larsson that Owner appeared to have incorrectly advised her banker to pay Stage Claim amount rather than the higher Total Claim amount. …this was not deliberate on the part of the Owner.

246 While the non-payment might not have been deliberate, the Erskine Street payment appears to have been used as a bargaining chip by the Owner later. Erskine Street is not the subject of this proceeding, but as stated above, exacerbated the poor relationship between the parties.

247 I accept the Owner's evidence that there was only $1,709.71 due on the Erskine Street contract. I also accept the Builder's evidence that the allegedly "incomplete work" at Erskine Street was a missing power point

[17] Page 4 – 29/8/2014

cover plate, as was confirmed to him in an email from the Owner's solicitor dated 29 August 2014. I also accept the Builder's evidence that this was provided on the same day and yet, as can be seen at paragraph 276 below, the Owner used this as a bargaining chip for the Argo Street contracts. According to the Owner and her husband the outstanding sum for the Erskine Street contract was not finally paid until September.

10:31 am

248 At 10:31 am on 29 August 2014 the Builder wrote to Mr Larsson with a copy to the Owner. He sought a number of things and one was:

> Can you please action/authorise your retailer to install the new gas meter so the plumber can finish the installation of all your appliances by Tuesday/Wednesday.

12:23 pm

249 The Builder sent an email to the Owner and Mr Larsson:

> Hi Alison & Rod,
>
> Can you please give the following your urgent attention.
>
> Please make the final payment for … Erskine Street Armadale bathroom renovation works that is in arrears, prior to leaving for your holiday.
>
> Argo Street Works will require all variations signed for, prior to living for your holiday.
>
> You will need to engage someone to inspect the completion stage of all works while you're away on holidays. Please provide details and phone number of person engaged.
>
> Can you also arrange to have the final payment actioned on completion that will be approximately 10/08/14. This should be a relatively easy task given you work for the same bank.
>
> Please be advised that we cannot fund your work and wait for our final payment while you are on holidays.
>
> If we do not hear from you by the end of business today, we will have no option, other than to stop the building work and apply "Delay Damages" as per contract dated 02/06/13, that will accrue on a daily basis from tomorrow's date being 30/08/14.

I understand this this might be the communication that the Owner characterises as the Builder's unauthorised notice of suspension.

4:04 pm

250 On 29 August 2014 at 4:04 pm the Owner's solicitor wrote to the Builder for the first time. She relevantly said:

> In relation to Argo Street our client has variations of her own and other reconciliations. We understand that you provided Mr Larsson with a list of variations early yesterday evening.

> As you know our client is leaving for overseas tomorrow and there is clearly insufficient time to fully reconcile the multiple variations you have provided together with her variations with the contract. All variations will be comprehensively addressed and resolved as soon as she returns.
>
> Our client requires the building work to continue. We have been instructed that you previously took all men off site for two weeks a couple of months ago when you and our client could not agree to a floor variation that you had submitted. You later admitted that you had made an error in the costs that you put in the contract (where you sought to vary the contract) and in that end our client very generously met you half way. [Underlining added]

251 It is clear that the author of this letter did not appreciate the effect that failing to provide the electrical variation would have on the Builder's ability to complete the work. The passage underlined is inconsistent with the Owner's obligations under the first contract.

252 Having regard to clause 39 of the first contract, the Owner was not entitled to keep the Builder waiting once the Builder issued the notice of completion and final claim. The parties were obliged to meet on site within seven days of receipt by the Owner of those documents, failing which the Owner was obliged to pay within a further seven days. It follows that if the Owner believed there were or might have been further contract sum adjustments, they needed to be provided to the Builder in a timely manner.

253 It is noted that the Owner's solicitor did not characterise the Builder's action as "suspension" at this point, although I rely more on the nature of an action than the way the parties characterise it.

29 August 2014, 4:34 pm

254 The Builder sent an email to the Owner's solicitor:

> Dear Madam,
>
> Please be advised that all works are now on hold until this matter is resolved as accounts are in arrears. I spent a significant time with Rod last night explaining and going through all outstanding matters. He seemed to fully understand.

255 At paragraph 17 of her Points of Claim the Owner pleaded:

> The Builder suspended the Building Works on 29 August 2014, and continue to suspend the Building Works until the Building Contract was terminated by the Owner on 9 October 2014, but failed at any time to give notice of such suspension in writing by registered post to the Owner.

2 September 2014 at 10:41 pm

256 On 2 September 2014 at 10:41 pm the Builder sent an email to the Owner's Solicitor and said:

> Hi Jan,
>
> Thank you for trying to resolve the dispute that has occurred between your client and myself. We hope that arrears are paid and variations are signed quickly or are authorised by you in order to move forward.
>
> Works have been placed on hold until all outstanding matters can be resolved satisfactorily.
>
> Erskine Street bathroom
>
> …
>
> Argo Street
>
> - Variations V281315, V281326, V281327 & V281329 remain unsigned and are holding up works.
>
> - Invoice no. 824269 for completion stage at Argo Street has been provided and is due at handover. Your client needs to accept or dispute the amount owing immediately. We require an undertaking that the Argo Street Invoice will be paid by bank cheque on the day of handover.
>
> The relationship has broken down due to problems associated with late payments, delayed responses and consistent disputes around variations and progress claims. This is been a major inconvenience to us as our trades are being disrupted yet again and will now have to be rescheduled.
>
> We would like all matters resolved quickly so that the job can move forward as soon as possible.
>
> We are unable to connect your client's gas, phone line etc. This is also causing delays and needs urgent attention. [Underlining added]

257 I note that the Builder did not characterise his actions as suspension at this time.

5 September 2014

9:51 am

258 The apparently co-operative relationship between the Builder and the Owner's solicitor did not continue. On 5 September 2014 the Owner's solicitor sent an email to the Builder saying that the final payment had been made on the second contract and concluding:

> The only amount outstanding now relates to the final payment. Pursuant to the Contract "a builder must not demand final payment until the builder has given to the owner … a copy of the Occupancy Permit under the Building Act 1993". Accordingly, the client requires the immediate resumption of work on Argo Street.

259 While what the Owner's solicitors said about contractual obligations is accurate, given that the Builder had said on 2 September 2014 that payment was only due on handover, this comment seems misconceived.

260 I also accept the Builder's evidence, given on 28 July 2017 that before he could obtain an occupancy permit it was necessary for the Owner to complete the gas meter works, cabinets, robes, back step and heating. He was unsure whether it was necessary for carpet to be installed as well.

11:33 am

261 The same day at 11:33 am the Builder wrote to the Owner's solicitor, remarked on an unfortunate telephone call between her and Mrs Priftis, said that a payment had been applied to the unpaid balance on Erskine Street and concluded:

> Please address the outstanding concerns holding up the works at Argo Street. Unfortunately works cannot proceed until the dispute is resolved and hopefully this is done without any more threats.
>
> ..
>
> We are unable to connect your client's gas, phone line etc. This is also causing delays and needs urgent attention.
>
> Please note your client was given her invoice for Argo Street early as she was intending to be away at handover. Our intention was always to finish the works but we are now in doubt about your client's intentions. We believe we are entitled to know if your client disagrees with anything in writing. You also suggested to me that all amounts outstanding would be placed into a trust but I see no mention of this in your response.

8 September 2014 at 4:18 pm

262 The Owner's solicitor sent the Builder an email which stated among other things:

> **Erskine Street**
>
> A separate payment of $1,709.71 will be paid to complete the Erskine Street contract on the basis that this payment represents a progress claim which was due under the contract and appear to have been missed when paying the original progress claim (as was highlighted by yourself.)

She said that the Owner had agreed to sign the four outstanding variations for Argo Street and added:

> As you can appreciate, it is not possible for the signed original variations to be presented to you prior to my client's return from overseas on 29 September however my instructions are that the signed copies will be provided to you by 30 September.

She then said:

> Based on the above confirmations, my client requires the continuation of the building works on Argo Street forthwith including the co-ordination of all third parties. Notwithstanding the unilateral decision you elected to make to delay the building works, my client requires

> the building works to be completed by no later than 23 September, which is well within the timeframe you advised Rod (on 28 August) the works could be completed by.
>
> …
>
> Once your written confirmation is received, then a bank transferred to your account for the $1,709.71 will be made within 3 business days.

263 This email seemed to demand that the Builder complete the works before the date upon which he was obliged to do so, although it does not take the next step of threatening consequences if this did not occur. Had it done so, the email would have been repudiatory.

264 It is also a matter of concern that the Owner's solicitor appeared to admit that there was money due under the Erskine Street contract, but made payment of that amount conditional upon matters under the Argo Street contracts. The unfortunate tone of this email made the Builder's concern about non-payment understandable.

10 September 2014

265 The Builder sent the Owner's solicitor an email:

> I am unable to provide you with a statement following your client's last payment as my bookkeeper is not available however I can determine that the balance left on Argo Street will be $14,447.83. As per your previous offer I will accept the funds being placed into a Trust Account and be paid to me on day of handover.
>
> All outstanding variations need to be signed either by [the Owner] or yourself as her representative before works can continue.
>
> Please clarify what you mean, in relation to third parties. Just to be clear from my perspective. I cannot act as a go-between for your client with respect to her own supplies/neighbours/service providers nor can I offer any form of guarantee for items provided by your client.
>
> It looks as though we are close to recommencing our works at Argo Street and will rebook trades ASAP once you have provided me the variations and the proof of Trust Account details. Your client has had plenty of time to raise any concerns around our accounts however I require you to advise us of any disputes your client may have and we will address them before works commence.
>
> Your client needs to connect her gas meter urgently in order for the plumber to finish.

11 September 2014

3:24 pm

266 The Owner's solicitor sent the Builder a letter by email about a number of matters. Of reconciliation of the final amount payable to the Builder she said:

> Given your inability to provide a reconciliation on the outstanding amounts my client is prepared to leave the issue in abeyance at this stage as it can be readily reconciled at a later date.

Of variations she said:

> Although it is not necessary for someone to sign the variations prior to my client's return given the written assurances I have given you, I have agreed to sign the variations referred to in my previous correspondence for and on behalf of my client. I will therefore require a PDF copy of each of the 4 variations forwarded to me by return email in order for me to sign and return them to you.

Of payment of money into trust, she said:

> The previous offer to pay monies into trust was made as a compromise to the fact that the variations had not been signed. Given that the variations will now be signed, the offer to pay monies into trust is no longer being offered by my client. In any event, there is no contractual obligation for her to do so.

The Owner's solicitor wrote of arrangements for other trades to attend site:

> For clarification purpose, third-party simply means those parties who have been contacted or engaged by my client (as identified on the list supplied to you and which you seem to have readily told that the site has been closed). You have only been asked to advise them when they are able to access the site and to arrange access when required (as you are required to do under the contract and have previously agreed to do). Specifically but not exclusively [there followed a list of six separate contractors]

And to enable AGL to connect the gas – she continued:

> As previously advised to you, AGL will now need access to the site to connect the gas meter and authority has been given by my client to you (as the builder) to provide access and communicate with AGL…. There is nothing more my client can do in relation to the gas connection.
>
> [As] builder, this falls within your obligations.

She concluded as follows:

> Once the variations have been signed you are then legally bound to complete your contractual obligations in accordance with the contract.
>
> I strongly suggest that you use your very best endeavours to complete your remaining contractual obligations.

267 I accept the Builder's evidence that it was not his role to manage separate contractors but he ended up doing that anyway. He gave the example of the heating and cooling subcontractors who sought his advice and asked for extra structures in the ceiling to support their work. I accept his evidence that the amount of outstanding work for the Builder, by the date of termination, was similar to or less than the amount that had to be completed by the Owner's independent trades.

5:20 pm

268 The Builder sent an email to the Owner's solicitor:

> Please provide me with the clause in my contract which states I am obligated to use/manage or be responsible for your client's contractors or service providers.

12 September 2014

269 Somewhat surprisingly, the Owner has included some of the correspondence between herself and her solicitor in her evidence.

270 On 12 September 2014 the solicitor wrote to Mr Larsson and said:

> This is his response. I do not believe there is a clause requiring him to manage independent contractors i.e. trades not engaged by him.

15 September 2014,

12:10 pm

271 On 15 September 2014 the Builder sent an email to the Owner's solicitor in response to her letter of 11 September 2014:

> Please return signed variations. Client is to connect the gas meter as required. The plumbers details are … Please provide proof that you have held the funds on your client's behalf. If this cannot be done soon I cannot promise a timely completion. I have other job scheduled. As you can appreciate builders schedule work months in advance. Your client has gone on holiday with absolutely no regard for my schedule. Planning a holiday and enjoying the holiday is no excuse for causing significant avoidable delays. There is only about 2/3 weeks' worth of work left (weather permitting) (The exterior of the house requires painting). I cannot give completion date but it will be as soon as possible. Your client will have to manage her own contractors after handover. … I cannot understand how your client (a financial expert and a property manager) could not have attended to these items before she left or allowed her husband, an accountant, to sign the Variations on her behalf. I spent several hours with Rod Larsson going through all accounts and the Variations in detail.

272 Having regard to this email, the Builder asked Mr Larsson whether he gave any assurance of speeding up the work. Mr Larsson agreed that no assurance was provided; there were only informal discussions.

6:33 pm

273 Somewhat surprisingly on 15 September 2014 Mr Larsson sent an email to the Builder saying:

> Refer to the attached email address to you dated 22 July 2014, outlining in full detail the requirements in relation [to] the gas meter connection. You have failed to provide the required information on a timely basis which has consequently resulted in an unacceptable delay

in this matter given the difficulties in dealing with this service provider.

Our request of you are quite simple in relation to the gas connection:

1. Provide all the information requested
2. Provide access for them to connect

We have at no stage requested you to "manage" the service provider.

We require the information requested to be provided by 4 pm on 16 September 2014.

9:08 pm

274 The Builder sent an email to the Owner's solicitor, with copies to the Owner and Mr Larsson:

> We have provided the details of the plumbing contract on third of July 2014 by text message as requested by your clients. Are you still acting for [the Owner]?

275 There followed a copy of the text message which was sent on 3 July at 12:35 pm, which provided the plumber's details.

17 September 2014

11:29 am

276 The Owner's solicitor sent an email confirming that she continue to act, attaching the four variations and confirming that she would arrange to have copies of the documents couriered to the Builder.

5:25 pm

277 On 17 September 2014 Mr Larsson emailed the Builder:

> In response to your email response of 15 September, I make the following comments:
>
> 1. You have now received by email and fax the four remaining variations with the pink copies also having been courier to you.
> 2. Alison has no contractual obligation to provide funds in trust pending completion works.
> 3. Your comments in relation to scheduling of other jobs has no impact on your contractual obligations on this job.
> 4. You have known that both Alison and I would be overseas for all of September for at least four months which should have provided you more than sufficient time for you to have made appropriate arrangements.
> 5. You will recall that I mentioned to you on more than one occasion to make sure you provided any final variation several days before Alison left in order for them to be addressed given the time constraints she would be experiencing. You failed to heed my suggestion and left it until late Thursday afternoon (28 August) to

meet with me. Our 4 pm meeting was constantly put off by you and we finally met at almost 7 pm. This then meant Alison had to consider all the information in the variations on her last day, which as previously advised to you, was going to be problematic.

6. You have not been asked to "manage" any of the other contractors simply provide access.
7. Now that you have a signed variations, you have no contractual impediment to opening the site and recommencing the building works.
8. As previously advised, when you confirm in writing that building works have recommenced on Argo Street then the unpaid component of the "completion" progress work on Erskine Street will be paid.

278 Having regard to item 8, it seems that both parties were inclined to use leverage against the other.

18 September 2014

279 The Owner referred, in her written submissions of 26 June 2017, to an email sent by the Builder to her solicitor on 18 September 2014. The Owner interpreted the email as suspension of works until the Builder's requirements were met.

280 The following is the relevant part of the email. The underlined passage is the part quoted by the Owner.

> I have no contractual agreement with Rod Larsson and can no longer correspond with him.
>
> I do not require an apology for the false accusations towards me but from now on would like full and polite co-operation. The weather forecast for Monday is fantastic and would be great to get on with things, so kindly provide me with a signed promise in writing that your client will pay the balance left on Argo Street of $14,447.83 in full on the day of handover (which must be held by you). We have requested this in many separate emails to date, but I have not been assured that your client plans to pay her account. I consider she has had plenty of time to audit our accounts. I am not sure why your client has refused to give me her assurance to date and regret that we cannot move forward without it, we can only assume her intention is to avoid payment. It is … very reasonable [to] expect this given a dispute has occurred.
>
> I have a contractual obligation to renovate your client's investment property at Argo Street which is almost complete! I am not contracted to organise or manage your client's contractors free of charge.
>
> I have always acted honourably but I will not work with anyone who deliberately sets out to avoid payment [for] my services especially given your client is extremely happy with the quality of work provided. I am having a few days off to get well as I have the flu and

> sincerely hope by Monday I have news that the matter is resolved. Please ask your client to request in writing if access is required for the service providers. We need 48 hours' notice and a callout fee [may] be charged if we are required to attend the site when we do not have tradesmen working. We were asked by Multinet to give out our security code today. This is not something we can authorise but we are pleased she has acted on the connection of the gas.
>
> We acknowledge that we are in receipt of the signed variations.
>
> I feel your client needs to take stock and realise that non-payment upsets everyone as does avoidable process delays. …
>
> I hope the matter can be resolved so that I can rebook our trades hopefully by Monday especially given the forecast is good.

7 October 2014

281 Mrs Priftis gave evidence that her mother had been very ill and died during this difficult period for both parties. The funeral was on 7 October 2014.

8 October 2014

282 On 8 October 2014 at 11:41 am the Builder sent the Owner an email. The parts quoted by the Owner are underlined:

> Please be advised that we acknowledge receipt of the now signed variations that have caused the delays on your construction works at [Argo Street]
>
> We have almost completed re-scheduling all of our trades to re-commence work and will be in a position to supply you with a firm date by the end of this week.
>
> Can you please advise us if you have any issues relating to any of the works that would cause concerns for non-payment. Please provide us with an undertaking that full payment will be made on completion of works.

283 In her submission of 26 June 2017, the Owner says she believes this email amounts to coercion on the part of the Builder. A fair reading of this email indicates that the Builder wants to know whether there are any aspects of the work that need to be completed or remedied so that this can be done promptly. Further, a reading of the whole email indicates that the Builder is emphasising that the delay has been due to lack of information about the electrical variation.

Letter of 9 October 2014

284 On 9 October 2014 the Owner's solicitors sent a letter to the Builder apparently by registered post and also by facsimile. The letter purported to terminate both contracts. The letter is not in accordance with the contractual provisions of either contract. Neither does it expressly mention repudiation, although in RL TBC 28/6/17 Mr Larsson describes the letter as acceptance of the Builder's repudiation.

285 It is useful to reproduce the whole letter:

> **Alison Larsson – Building Contract – …Argo Street South Yarra**
>
> We refer to the various communications in relation to the above Contracts and more particularly to your decision to suspend the building works.
>
> We have reviewed the building contracts dated 2 June 2013 ("first contract") and 17 September 2013 ("second contract") and set out our client's position in relation thereto.
>
> 1. You are in breach of the Contract [Sic] in that you have failed to comply with Clause 38.1 in that you have not given notice by registered post as required by the Contract. Your suspension of the building works therefore represents a substantial breach of the first Contract.
> 2. Our client paid the Completion payment of $3,283.16 for the second Contract on 5 September 2014. This payment was made based on your representation on 28 August 2014 that the building works on both the first and second Contract would be completed by 10 – 12 September 2014.
> 3. We note the following extract from your email to this office of 18 September 2014 "provide me with a signed promise in writing that your client will pay the balance left on Argo Street of $14,447.83 in full on the day of handover (which must be held by you). We have requested this in many separate emails to date, but I have not been assured that your client plans to pay her account. I consider she has had plenty of time to audit our accounts. I am not sure why your client has refused to give me her assurance to date and regret that we cannot move forward without it." There is no provision in the contract for you to make such demands nor any obligation for our client to accede to your demands. Your demands and application of consequential financial duress to our client represents a breach of your contractual obligations and provides our client with the right to end the contract and seek unspecified damages as a consequence of your breach.
> 4. Our client is not in breach of the first nor the second Contract, and you had no grounds to suspend the building works.
> 5. Take Notice that our client now ends the first and second Contracts effective immediately.
> 6. You are now not entitled to enter the premises. Any unauthorised entry onto the premises will be treated as a trespass.
> 7. You are required to provide our client with all keys to the property, goods which are in your possession or are the property of our client, residential parking permits and to remove any of your materials or tools from the property. Our client's agent will be available on Monday, 13 October 2014 to meet with you or

> your representative on site to finalise the handover of items referred to above. Please contact Rob Larsson to arrange a suitable time.

286 I note that this letter refers to ending both contracts although the Owner has given evidence that the second contract had been fully paid.

287 In her final submissions the Owner said that although the letter does not mention acceptance of repudiation, it is effective to achieve that end. If the Builder had repudiated the contracts and the repudiation continued on 9 October 2014, I accept the Owner's submission that this letter was an effective acceptance.

288 The Builder gave evidence, which I accept, that he was back at work on 9 October 2014, before receipt of the termination letter of the same date. I accept his evidence that he received the registered letter at 12:30 pm on 10 October 2014. Based on her final submissions, it appears that the Owner also accepts that the Builder first got notice of the termination letter at that time.

289 The Owner's evidence is that before issuing the termination notice, the Builder had not resumed building works[18]. Mr Larsson also gave evidence that he drove past the site between 29 September 2014 and 10 October 2014. He said:

> There didn't appear to be very much or any activity, but there was a high fence.

290 I note that by 9 October 2014 the date for completion by the Builder had been extended to 18 December 2014, so the Owner's attempt to have the Builder finish earlier was potentially repudiatory. I am satisfied that the Builder could have completed the contract within the time available to him, once he had re-commenced, because the work of Emoljac was finished before Christmas. Further, as Mr Floreani of Emoljac had said the work of the Builder "was so close to finished it wasn't funny".

Emails of 10 October

11:14 am

291 On 10 October 2014 at 11:14 a.m. the Builder sent an email to the Owner, with copies to Mr Larsson and the Owner's solicitor. Excluding the formal parts, the email was:

> Please be advised that we have re-commenced works at … Argo Street South Yarra as of 09//10/14.
>
> The unsigned variations have now caused a delay of thirty nine (39) days to the contract, due to the re-scheduling of all trades.

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[18] Paragraph F-10 of Applicants Response to Respondent Submission of Evidence Dated 20 July 2017, handed up 27 July 2017.

> We have now applied an extension of time for an extra 39 days to the contracts dated 17/09/13 and 02/06/13 as advised in our email dated 29/08/14.
>
> Please contact your Gas retailer or Multinet to connect the gas meter as soon as possible.
>
> We have not as yet been contacted by Rod as mentioned in Alison's email dated 26/09/14.
>
> At this stage, we assume that you have no concerns regarding any of the building work at … Argo Street South Yarra, as you have not responded.
>
> Can you therefore, provide us with an undertaking that full payment will be made on completion of works.

292 I note that in accordance with my finding, and the Owner's agreement, that the Builder received the termination letter at 12:30 pm, this email was sent to the recipients before receipt of the termination letters.

4:15 pm

293 At 4:15 pm on the same day, the Owner's solicitor sent an email to the Builder as follows:

> We refer to our discussions this morning and confirm that you have received the registered letter forwarded on 9 October whereby the owner ends the Contract.
>
> In our discussions you indicated that you had in fact returned to site yesterday and that the job can be completely finished by 31 October 2014.
>
> I have discussed this aspect with my client and her instructions are that she will permit Peter Priftis to complete the job at … Argo Street South Yarra on the following basis:
>
> 1. The Contract end date for both Contracts is 31 October 2014.
> 2. That there will be no extensions of time beyond 31 October 2014. Accordingly, Peter Priftis withdraws all notices and entitlement under the first and second Contract advising of extensions of time and forgoes any other entitlements in the first and second Contract as to extensions of time incurred to date (whether by notification or by entitlement).
> 3. That Peter Priftis consents to the owner being entitled to end the first and second Contracts if Peter Priftis has not provided the owner with a copy of the Occupancy Permit on or before 7 November 2014.
> 4. Any extension beyond 31 October 2014 will be subject to original provisions in the Contracts as to agreed damages for late completion of works.
> 5. That sub-contractors which are under the direction of the owner be granted unfettered access to the site from today.

6. That Peter Priftis provide copies of all Permits and Certifications received to date from any Authority to the owner.

7. That Peter Priftis makes no demands or hold up the building work by seeking any undertakings, assurances or obligations of the owner which are outside the terms and conditions of the first and second Contracts.

It is the expectation of the owner that the works will be completed by 31 October 2014 and that any outstanding monies due will then be paid in accordance with the Contract.

Please email your acceptance of the above to Rod Larsson by 10 AM on Monday, 13 October 2014. No trades are to return to site as from Monday, 13 October 2014, until a signed agreement has been exchanged.

Emails of 13 October 2014

3:35 pm

294 Mr Larsson sent an email to the Builder:

Peter

I have not yet received your proposal as yet.

We need to have this resolved today if we are to proceed.

4:43 pm

295 On 13 October 2014 at 4:43 pm the Builder sent an email to the Owner's solicitor with a copy to the Owner as follows:

Please be advised that after discussions with Rod Larsson this morning, the following is proposed.

1. Peter Priftis will agree to complete all works at … Argo Street South Yarra by 15/11/14 if and only when he receives a signed letter from Alison Larsson with an undertaking that full payment will be made on completion of works as per contracts dated 02/06/13 and 17/09/13.

2. Peter Priftis agrees to allow access, (at a time that's suitable to the builder) for Flaming Mo's to complete the air-conditioning and heating units.

3. Peter Priftis agrees to allow access, (at a time that's suitable to the builder) for the appropriate authority to install the gas meter.

As mentioned on a number of occasions, we are at a loss to understand why it has come to this, [however] in the interests of moving forward we are prepared to complete the job once we have received the above mentioned letter from Alison.

296 The Builder gave evidence that the numbered paragraphs were dictated to him by Mr Larsson who had suggested that the Owner would agree if he put it in writing. Mr Larsson agreed that he spoke to the Builder and suggested

a number of points that the Builder could include in an email to the Owner. I accept Mr Larsson's evidence that the first point was not in complete agreement with the matters discussed between him and the Builder.

297 Somewhat surprisingly, the Owner did not accept the terms and did not make any counter-offer. Her response during the hearing on 30 June 2017 was "I couldn't make a commitment to make the whole payment."

298 For the avoidance of doubt, as this letter could be construed as consent to the Owner's course of action on 9 October 2014, because of its provenance I do not take it into account.

6:47 pm

299 At 6:47 pm that evening Mr Larsson replied to the Builder with a copy to the Owner's solicitor:

> Thank you for your proposal in response to our "without prejudice" discussions this morning.
>
> Alison has considered your proposal and has decided to reject it. As we have previously advised, Alison will meet her obligations under the contract. The proposal forwarded to you by [the Owner's solicitor] last Friday stands.
>
> The contracts are at an end as previously advised.
>
> In the absence of your acceptance of the terms and conditions of Alison's proposal, we will continue to completion of the building works from tomorrow morning.
>
> Would you please arrange a time with me for tomorrow, to unlock the site and hand over the keys to the property and deliver any property belonging to Alison (including the parking permit) at the time of unlocking the site.

7:14 pm

300 At 7:14 pm the Builder wrote to Mr Larsson with copies to the Owner and the Owner's solicitor saying that it was disappointing that his offer at been rejected and stating that the site was in his possession. He also said:

> Your claim to end the contract is invalid as a letter to [the Owner's solicitor's] office, as your legal representative, is as legal as a registered letter.

The email does not identify the letter to which the Builder refers.

13 October 2014 - The painter's invoice

301 There is no evidence that the Owner was aware of this in October 2014, but the Builder relies on an invoice from his painter, A Class Painting & Building Pty Ltd, of 13 October 2014 which was sent under cover of an email which said:

> Hi Sandy and Peter,
>
> I finished Argo Street, and I've invoiced only the second time in Carrington
>
> Thanks

302 The Builder's point is that as at 13 October 2014 work was underway and the painting was finished. The parties agree that by the time the Owner took possession on 16 October 2014, the painting was complete, and as mentioned above, on 15 September 2014 the Builder told the Owner's solicitor that the rear exterior of the house still needed to be painted.

303 No evidence was given about when the painter finished the work.

304 I accept Mr Larsson's evidence that he took a photograph over the fence on 12 October 2014 at 7:53 pm (OTB833) and the front door architraves were yet to be painted, and another over the fence on 14 October 2014 at 3:35 pm (OTB836) and the architraves were painted. Unless the Owner's letter of 9 October 2014 effectively rescinded the contracts, based on the Builder's repudiation, the Owner repudiated on 16 October because Mr Larsson, and therefore the Owner, knew work had been undertaken between 12 and 14 October 2014.

16 October 2014

305 The parties agree that on the morning of 16 October 2014 the Owner re-entered the site and excluded the Builder.

306 The Builder gave evidence that on 16 October 2014 he received a telephone call from either his son or one of the tradesmen to say that Mr Larsson was present at the site and they could not gain access. The Builder said he was told that Mr Larsson was removing the Builder's locks on the gates and had instructed those present at site not to enter.

307 The Builder said he went to site and told Mr Larsson that he should not be taking this action. The Builder said he was very upset but he did not think he was at all threatening although he might have raised his voice. The Builder said he did not receive a message that the locks were changed or were going to be changed. He said he told his employees and trades to collect anything that belonged to them.

308 Mrs Priftis gave evidence that when she heard about the lockout she telephoned the Prahran police. They asked whether anyone was one was being threatened and when she said they were not, the police declined to attend.

309 The Builder said he understood that his employees and tradesmen did not take anything until he arrived and then they removed nearly all of their tools and the unfixed materials belonging to them.

310 Mr Larsson gave evidence that on the morning of 16 October 2014 he contacted SY Locksmiths to unlock the site on the Owner's behalf. He said

a man named Archie from SY Locksmiths cut through the reinforcing mesh that the Builder had been using to secure the site. This is confirmed by the photographs that appear at OTB631, 639, 640 and 641.

311 Mr Larsson said that he gained access to the site between 10:30 and 11 am, and that Archie changed the locks then left.

312 Mr Larsson said he relocked and when he came back at about 2 pm the Builder's men were present. He explained to them that the Owner had taken possession and that they were not entitled to work. He understood that the Builder's son, Sean, contacted the Builder. All present waited for the Builder to arrive, no one threatened anyone else but is understandable that there was high emotion. Mr Larsson said he gave the Builder and his people access to remove the goods and tools. He said the only item of size belonging to the Builder which was left on site was some security fencing.

313 Mr Larsson said that the letter from the Owner's solicitor of 9 October 2014 gave notice of the Owner's intention to re-enter the site. He added that the site was not immediately secured after the letter of 9 October 2014, because there were subsequent commercial negotiations between the parties.

314 The Owner added that the "negotiations were totally fresh – the first and second contract had been terminated." I accept that for the Owner they were negotiations for a new deal but for the Builder they were an attempt to affirm the contracts, rendered unsuccessful by the Owner's ongoing acts of repudiation.

315 There was disagreement between the parties about precisely what happened on 16 October. Mr Larsson gave evidence that the Builder and two of his men came into the lounge during a discussion between Mr Larsson and the Builder. The Builder said that did not happen; that he was not in the house with Mr Larsson.

316 Mr Larsson referred to a file note prepared by him which is at OTB20 – 21. The file note is as follows:

> 16 October 2014
>
> Attended premises with Archie from MCS South Yarra Locksmith and Security.
>
> Gate was cut and removed for access.
>
> Lock was changed on front door and was changed on courtyard sliding door. Photos were taken of Archie changing the locks.
>
> Photos were taken of the premises – each room.
>
> No items were removed by me from the premises on 16 October.
>
> Property then locked up (gate required additional chains and locks).
>
> After paying locksmiths at their premises, I purchased additional chains – a lock from Masters. Returned to Site at approx. 2:30 pm and met [the Builder's] employees jumping the fence.

> Advised they were not entitled to enter the site. They called [the Builder]. [The Builder] told them to stay there as he was coming over.
>
> [The Builder] spoke to me and was verbally aggressive (although not threatening) and requested I remain on the premises as he was coming over and would be arriving with the police.
>
> [The Builder] arrived without the police. When asked why they were not with him he advised they were not interested in coming around unless someone was being threatened – which they were certainly not.
>
> [The Builder] was again verbally abusive whilst he instructed his employees to remove certain materials paints, tools, signs, loose building materials.
>
> (He also removed the downpipes (metal pre-painted in Woodland grey) which were part of the roofing contract which had allegedly been paid for).
>
> After all the necessary materials were removed, [the Builder] launched into a verbal tirade against me inside the house. Jack and Craig were asked to stand in as witnesses.
>
> [The Builder] took multiple photos and left at approximately 4 pm.

317 The Builder acknowledged that photographs were taken on that day but said he did not want to reveal them at that point. I gave him the opportunity to do so before the end of the hearing, and reminded him of this before the end of the hearing. He chose not to produce those photographs.

318 I prefer Mr Larsson's evidence of what occurred when the Builder arrived on 16 October 2014. I also note there is no reference to any missing items.

State of the works at 16 October 2014

319 I accept the Builder's evidence that when he was locked off site there was not very much work left for him to do. He gave evidence that the plumbing fit off and the electrical fit off would each take about one day, the floor polishing would take a few days to allow drying, that there was between half a day and one day to rehang doors and finish up any other minor items.

* Various items

320 The Owner's photographs support Mr Larsson's evidence that the appliances had not been installed, kitchen doors had not been hung and in the bathroom the sink had been installed, but the tapware had not. The Builder responded that tiling was incomplete so tapware could not be fitted off.

321 The Builder said of the incomplete works: "it was all to be done in 8 to 10 days".

* Gas

322 Mr Larsson referred me to the photographs appearing at OTB683 and OTB685, which show a capped off gas pipe in one position, being the pipe

on the house side of the gas meter, and the gas meter approximately half a metre away. Mr Larsson asked Mr Floreani whether bringing the house gas pipe to the meter is within the scope of works of the relevant builder and he responded that it is.

323 I accept the Builder's evidence that OTB664 shows the gas pipe in the correct position after the Builder was excluded from site. There is no allowance for this item.

* Allegedly missing items

324 Mr Larsson gave evidence that on 16 October 2014 he said to the Builder that there were a number of items that should have been on-site but were not. He said the Builder responded "ask your solicitor".

325 The Builder gave evidence that the only missing items referred to on 16 October concerned the downpipes. The Builder said Mr Larsson said "those downpipes are mine" when the Builder's men were removing them from site. I accept the Builder's evidence that he responded "No, they are mine – talk to your solicitor" in reference to the downpipes only.

326 Other allegedly missing items are discussed under that heading below.

22 October 2014 at 5:56 – 5:58 pm

327 Mr Larsson sent the Builder four emails, one of which included the claim that there were missing items being:

- NEF Gas cooktop
- Light fitting for bedroom – Boxed up from Custom Lighting
- TV wall mount (Sanus…)
- Wall mounted clothesline
- All door furniture including striker plates, locks handles, kitchen cupboard handles
- Window lock keys

23 October 2014

328 The Builder wrote to his warranty insurer and to the building surveyor to say that the Owner had terminated the contract.

329 At 9:13 pm he wrote to the Owner as follows:

> This letter is in response to your lawyers … letter dated 09/10/14 and received at 11:40[19] am on 10/10/14.
>
> Please be advised that we are not in substantial breach of the contracts signed and dated 02/06/13 and 17/09/13. Your assertions made in your

[19] I note that this is earlier than the evidence that the Builder received the letter at 12:30 pm, but it is still after the Builder's email of 11:14 am on 10 October 2014.

lawyer's letter are incorrect and as a result, you have repudiated the contract. We reserve all rights in respect to your repudiation.

We adopt the numbering made in your lawyer's letter and respond as follows:

1. A notice of suspension was supplied to Alison Larsson, Rod Larsson and Jan Moffat by way of email which was the accepted way of communicating during the conduct of the building works.

The purpose of serving a notice is to bring this document to the other party's attention. This has been achieved and acknowledged by all parties.

The suspension of works notice was issued due to your refusal to sign the variations, thus making us unable to proceed with the remainder of the works.

Clearly if a builder cannot proceed with the works due to something that is down or not done by the owner, then he has the right to suspend the works.

2. We have not at any time requested payment prior to completion of any stage. Please refer to our email to you and dated 29/08/14. The works on both contracts would have been completed by approx. 10/09/14 had the variations been signed prior to you leaving for your holiday.

3. It is not unreasonable for a builder to request some type of undertaking of final payment on completion of works, given your history of late and incorrect payments.

4. You are clearly in breach of the contract dated 02/06/13 and 17/09/13 by not providing essential information to enable the builder to proceed with the works.

5. Your termination of the contract is unlawful. We also note that you have not complied with clause 46 of the contract dated 02/06/13 and have not followed the required steps to properly terminate the contract.

We have not received any Notice/s of Breach. On the contrary, we were led to believe that everything was going well and we were in the process of completing the works when your letter of termination was received.

Even after the termination letter was received, your agent Rod Larsson was communicating with us with a view to completing the works.

The final proposal emailed to all three parties concerned on the 13/10/14 at 4:43 pm was proposed by your agent Rod Larsson.

Please also be advised that we are currently calculating the value of works completed to date together with all variations, loss of profit on the remainder of the contract and delay damages caused by you.

We will be forwarding the invoice to you within the next seven days for your immediate attention.

> As mentioned before, we are perplexed and extremely disappointed in your actions. We were in the process of completing the works and remained committed and able to finalise the project.

The Owner's allegations that the Builder repudiated

330 The Owner's Points of Claim do not use the word "repudiation". However, at paragraph 20 she pleads:

> On 9 October 2014, by letter dated 9 October 2014 from the Owner's lawyers … to the Builder, … the Owner notified the Builder inter alia, that the Building Contract was at an end, on the grounds that the Builder had, in its email dated 18 September 2014, advised that, failing its demands being met by the Owner the Builder would no longer perform the building contract.

While not using the word repudiation, in the letter of 9 October 2014, or in the Points of Claim, I am satisfied that the Point of Claim describe what the Owner claims is repudiation and purports to rescind the contracts for repudiation.

331 The breaches alleged in the Owner's solicitor's letter of 9 October 2014 were:

- suspending the contract without notice by registered post,
- receiving the completion payment for the second contract on a "representation" made on 28 August 2014 that the works would be completed by 10 or 12 September 2014;
- seeking an assurance of payment:
  - of $14,447.83;
  - on handover; and
  - to be "held by you".

Allegation by Owner that the Builder suspended

Alleged May suspension

332 As stated above, I am not satisfied that the Builder suspended the works in May, and the letter of 9 October 2014 does not rely on that alleged suspension as a ground for ending the contracts.

Alleged suspension of 29 August 2014

333 No document of 29 August 2014 was sent to the Owner by the Builder by registered post, and no document of that date mentioned suspension.

334 It is not clear which of the Builder's documents of 29 August 2014 is interpreted by the Owner as a suspension of the contract. One is the email of that date, of 12:23 pm where the last paragraph is:

> If we do not hear from you by the end of business today, we will have no option, other than to stop the building work and apply "Delay

> Damages" as per contract dated 02/06/13, that will accrue on a daily basis from tomorrow's date being 30/08/14.

335 Another is the Builder's "Notification of Extension of Time" of 29 August 2014, for which the reason given by the Builder is "unable to proceed with Works due to owner not signing variations". (OTB159.)

336 A third is the Builder's email to the Owner's solicitor of 29 August 2014 at 4:43 pm which commenced:

> Please be advised that all works are now on hold until this matter is resolved as accounts are in arrears.

337 On 2 September 2014 at 10:41 am the Builder emailed the Owner's solicitor and confirmed that the:

> …works have been placed on hold until all outstanding matters can be resolved satisfactorily.

338 In his opening statement at the hearing the Builder said:

> The Builder could not carry out the [electrical] variation that fell on the critical path of the works and the Builder requested that the owner execute a variation or advise that she wanted to proceed with the original works. The owner did not do either of the requested tasks for at least 70 days. Further, she did not provide vital information and the works were suspended by way of a Notice. The builder was entitled to suspend the works as he could not progress them without the owner's indication as to which way to proceed. The builder had 21 days to recommence the works after the information was provided.

339 The Builder continued:

> The builder attempted to overcome the impasse and in September 2014 the works resumed. In fact, despite the service of the notice some of the works were still taking place (the project however, could not be completed without the written [electrical] variation or the indication not to proceed with it).

340 I note that by the date of commencement of the hearing, the Builder appeared to characterise what he had done as suspension. By the time the final submissions were filed, his view seems to have changed.

341 At paragraph E of his final submissions, the Builder states:

> The builder (not being legally trained) confused himself and referred to his actions as suspending the works. The works were never suspended. The builder has issued EOTs and thought that they are the same as notices of suspension. The works were carried out throughout the whole period of time, even on the day of termination.

342 Given the Builder's emails to the Owner, her solicitor and Mr Larsson, it seems unlikely that works were being carried out.

343 The Owner referred to the email of 12:23pm and stated in her "Applicant's Submission of Evidence" handed up on 26 June 2017:

> As I was not in breach, the Builder had no right to suspend the Building Works as you did on 29 August 2014.
>
> The Builder applied coercion to have me sign the variations. I had insufficient time to reconcile all variations with my records together with any variations I have identified. Furthermore he had alternative remedies under the contract for unsigned variations.
>
> His demands were unwarranted and his undertaking to "stop the building work and apply "Delay Damages" as per contract dated 2/06/13, that will accrue on a daily basis from tomorrow's date being 30/08/14 failing all variations being returned and signed" was a breach of the contract by the Respondent.

Suspension or prevention?

344 The Builder's characterisation of his actions have been contradictory, but by 9 October 2014 when the Owner purported to end the contract, he had never described what happened as suspension. Neither had he by 16 October 2014 when she re-took possession of the site.

345 Nevertheless, I will consider what actually happened, rather than how the parties described it.

346 "Prevention" is also known as the "Peak" principle, described in *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1970) 1 BLR 111 and applied by the Supreme Court in *SMK Cabinets v Hili Modern Electrics Pty Ltd* (1984) VR 191. Briefly, the principle is that an owner who causes a delay cannot take advantage of such delay by charging the builder liquidated damages over the period of the delay.

347 Consistently with the Peak principle, and having regard to *Hera Project Pty Ltd v Bisognin (No 3)* [2017] VSC 268 at paragraph 106 and following, this Owner should not be able to end a contract for a failure to complete the contract which has been caused by her or her agent.

348 There are two acts of prevention by the Owner that potentially remained relevant by 9 October 2014. The first concerned the Owner's failure to sign the electrical variation in a timely manner. The second concerned failure to arrange for installation of the gas meter.

349 If I am wrong and the Builder's action should properly be described as suspension, I note that concurrently with the Builder's alleged suspension, the Owner took a number of steps that were inconsistent with the contracts, and the Builder was still within time to finish the works. It was therefore unreasonable for the Owner to purport to terminate the contracts other than in accordance with the contract provisions.

* Electrical variation

350 As described above, the electrical variation was signed and delivered to the Builder on 17 September 2014. As found above under "EOTs claimed but not agreed – EOT3", the time allowed for this event (without taking into

account time extensions to which the Builder was already entitled) was 33 days, ending on 1 October 2014. I find that the Owner had prevented the Builder from completing the contracts by failing to sign the electrical variation, and the prevention extended until 1 October 2014 – eight days before her lawyer purported to terminate the contract.

351 If the Builder was refusing to work on 9 October 2014, it cannot be attributed to the Owner's failure to sign the electrical variation. However I am not satisfied that the Builder suspended the works on 29 August 2014; rather, I find that his various notices drew to the Owner's attention that she was preventing him from finishing.

* Gas meter

352 I accept the Builder's evidence that AGL had still not connected the gas meter by the date the contracts were ended.

353 I accept the Builder's evidence that until the gas meter was installed the plumber was unwilling to return to finish his work, which held up both the tiler and the carpenter.

354 The importance of installation of the gas meter was that the work under the first contract could not be finished without it, and it was the Owner's obligation to have it installed.

355 On 22 July 2014 the Owner sought information concerning the plumber's identity for gas meter installation that I have found was already in her possession (OTB97). She also sought the "certificate of compliance number", but I accept the Builder's evidence that the certificate of compliance could not be issued until the gas work was completed, which included connection and commissioning the whole system including appliances.

356 On 31 July 2014 the Owner wrote to the Builder in a way that can best be interpreted as a requirement that he undertake part of the work necessary to have the gas connected. Dealing with the gas supplier was not within the Builder's obligations. I accept the Builder's evidence that dealing with service providers is time-consuming and difficult. Had the Owner sought, or the Builder offered, a variation, this role might have fallen within the Builder's obligations. Neither party did, and the Owner's insistence that the Builder be involved with the gas supplier was inconsistent with the contracts.

357 On Friday 29 August 2014 the Builder wrote to Mr Larsson seeking installation of the gas meter to enable the Builder to complete installation of appliances the following Tuesday or Wednesday. I accept the Builder's evidence that he needed the gas and various other connections to keep the work going.

358 In an email to the Owner's solicitor of 2 September 2014, the Builder said:

> We are unable to connect your client's gas, phone line etc. This is also causing delays and needs urgent attention.

This was repeated in an email to the Owner's solicitor at 11:33 am on 5 September 2014.

359 In her email of 8 September 2014, the Owner's solicitor said:

> … my client requires the continuation of the building works on Argo Street forthwith including the coordination of all third parties. [Underlining added]

360 As mentioned above, the underlined demand was not in accordance with the Builder's obligations under either contract.

361 In an email to the Owner's solicitor of 10 September 2014 the Builder said:

> Please clarify what you mean, in relation to third parties. Just to be clear from my perspective. I cannot act as a go-between for your client with respect to her own supplies/neighbours/service providers …
>
> …
>
> Your client needs to connect her gas meter urgently in order for the plumber to finish.

362 At 3:24 pm on 11 September 2014 the Owner's solicitor's letter by email to the Builder relevantly included:

> For clarification purpose, third-party simply means those parties who have been contacted or engaged by my client … You have only been asked to advise them when they are able to access the site and to arrange access when required (as you are required to do under the contract and have previously agreed to do). … [Underlining added]
>
> …
>
> As previously advised to you, AGL will now need access to the site to connect the gas meter and authority has been given by my client to you (as the builder) to provide access and communicate with AGL…. There is nothing more my client can do in relation to the gas connection.
>
> [As] builder, this falls within your obligations.

363 I accept the Builder's evidence that it was not his role to manage separate contractors but he ended up doing some of that anyway. He gave the example of the heating and cooling subcontractors who sought his advice and asked for extra structures in the ceiling to support their work. I accept his evidence that the amount of outstanding work for the Builder, by the date of termination, was similar to or less than the amount that had to be completed by the Owner's independent trades.

364 The Builder's response, at 5:20 pm on the same day was:

> Please provide me with the clause in my contract which states I am obligated to use/manage or be responsible for your client's contractors or service providers.

365 As mentioned above, for reasons that are not clear, the Owner has included in her evidence correspondence between her solicitor and herself or Mr Larsson. On 12 September 2014 the solicitor wrote to Mr Larsson and said:

> This is his response. I do not believe there is a clause requiring him to manage independent contractors i.e. trades not engaged by him.

366 It is surprising that the Owner's solicitor would include the words underlined above at paragraph 362 if she knew they were inaccurate or had no reason to consider them accurate. However, I have no reason to believe that the Builder was aware of those words at the time.

367 On 15 September 2014 the Builder emailed the Owner's solicitor again requesting that the gas meter be connected and again providing the plumber's details. As mentioned above, somewhat surprisingly, at 6:33 pm Mr Larsson sent an email to the Builder again asserting that the Owner had not received details regarding connection of the gas meter and requiring the Builder to provide those details and give access to enable the gas supplier to connect.

368 In light of the advice received from the Owner's solicitor on 12 September 2014, this response by Mr Larsson seems unfair. It is hard to imagine what Mr Larsson considered the Builder would have to do in addition to the work demanded to "manage" a service provider for whom he is not responsible.

369 The Builder responded at 9:08 pm:

> We have provided the details of the plumbing contract on third of July 2014 by text message as requested by your clients. Are you still acting for [the Owner]?

There followed a copy of the text.

370 At 5:25 PM on 17 September 2014, in his email to the Builder, Mr Larsson again repeated that:

> You have not been asked to "manage" any of the contractors simply provide access.

371 The Builder again asked the Owner to arrange connection of gas on 10 October 2014 at 11 am.

372 I am satisfied that, for this proceeding, the Owner's failure to connect the gas amounted to prevention. I find that the Builder's various communications to the Owner on 29 August 2014 gave notice of prevention, rather than suspension, based on the failure to have the gas connected. The Owner's act of prevention was still current when she purported to end the contracts by the letter of 9 October 2014.

373 As recorded under the relevant date above, on 23 October 2014 the Builder sent a self-serving, or perhaps self-sacrificing, letter to the Owner which discussed a number of matters and agreed that the Builder had suspended the works. The letter was written after the contracts had ended and is not

relevant to the reality of whether the Builder suspended the works or whether the Owner prevented completion.

Representation of completion by 10-12 September 2014

374 Part of the email sent to the Owner and Mr Larsson at 12:23 pm on 29 August 2014 was:

> Can you also arrange to have the final payment actioned on completion that will be approximately 10/08/14.

375 This is not an undertaking, agreement or representation about completion, but an indication of when it would be possible if the Builder's conditions were met.

Alleged repudiation of 18 September 2014

376 By this date the Builder had received the signed variations. He wrote to the Owner's solicitor requiring a signed promise in writing to pay the balance of $14,447.83 in full on the day of handover. The question is whether any of these demands amounted to "unwillingness … to perform the contract[s] … substantially according to [their] requirements"[20] and if any of these demands were repudiatory.

377 The Builder also said:

> I am having a few days off to get well as I have the flu and sincerely hope by Monday I have news that the matter is resolved. …
>
> I hope the matter can be resolved so that I can rebook our trades hopefully on Monday especially given the forecast is good.

378 In her final submissions, the Owner said at paragraph 118:

> Whilst the Builder expressed a desire to complete the works, his conduct was contrary to this stated desire. In *Sargent v ASL Developments Ltd* [1974] HCA 40, Mason J said (at para 159):
>
> > The correspondence suggest a willingness on the part of Mr Gurleyen to finish the job and the Owner appears to have adopted a very casual attitude in terms of making decisions about what she wanted and how long the work was going to take. Nevertheless, if, viewed objectively, the conduct of the Builder demonstrates an intention on its part to perform the Contract in a manner substantially different from its contractual obligations that will amount to an act of repudiation even though subjectively, Mr Gurleyen might have been anxious to complete the Contract.

Affirmation by the Owner?

379 In her final submissions the Owner states that other than her email to the Builder of 26 September 2014 confirming that any further communication should be with her husband there was no communication from the Owner to

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[20] See "Contract termination - repudiation" above.

the Builder from 17 September 2014 to 10 October 2014 which affirmed the contracts.

380 As quoted above, on 26 September 2014 the Owner sent an email to the Builder which included:

> For the avoidance of doubt, I confirm that Rod is, and has been for the duration of the contract, my agent in relation to the management of the contract, which includes all communications with yourself with a written or verbal. [Underlining added]

381 This is a clear affirmation of the contracts by the Owner after the Builder's alleged repudiation on 18 September 2014, so the issue is not just whether the Builder repudiated the contracts on 18 September 2014, but whether any acts of repudiation were still current on 9 October 2014.

382 I am satisfied that the Builder's email of 11:14 am on 10 October 2014 crossed in the mail with the Owner's letter of 9 October 2014. The Builder's email notified the Owner that work had recommenced but still sought an undertaking that full payment would be made on completion of the works.

383 The Owner's solicitor's email at 4:15 pm is equivocal, because condition 3 refers to the Builder consenting "to the Owner being entitled to end the first and second contract". However, on balance I find it is not affirmation as the arrangement it proposes is very different to the original contracts.

"Signed promise in writing"

384 Parties are not entitled to an assurance that the other party will comply with the contract, but neither is seeking it repudiation of the contracts. It would only become repudiatory if the Builder refused to continue to perform the work without the assurance.

385 I am satisfied that until 17 September 2014 the Builder's failure to continue with the work was because of the Owner's failure to provide the electrical variation, and after that he was preventing from completing because of the Owner's failure to arrange for connection of the gas.

386 The Builder's email to the Owner of 8 October 2014 said that the Builder was rescheduling trades to recommence work and that the Builder would be in a position to supply the Owner with a firm date by the end of the week. He went on to reiterate his request that if there were any issues relating to the works that might cause non-payment the Owner should notify him. He also asked for an undertaking that full payment would be made on completion, but did not express in that email that the undertaking was a condition of recommencing work.

387 I find that by 8 October 2014 the Builder was not insisting on a signed promise in writing.

Of $14,447.83

388 On 29 August 2014 the Builder sent an email to the Owner and Mr Larsson which included:

> Can you also arrange to have the final payment actioned on completion that will be approximately 10/08/14.

And on 2 September 2014 he sent an email to the Owner's solicitor which included:

> Invoice no. 824269 for completion stage at Argo Street has been provided and is due at handover. Your client needs to accept or dispute the amount owing immediately. [Underlining added]

389 The Builder was not seeking money before he was entitled to it. However, he was not entitled to acceptance or disputation of the amount owing "immediately", although it would not be repudiatory unless it was a condition of performance in accordance with the contracts.

390 Then on 5 September 2014 he wrote to the Owner's solicitor again, saying:

> Our intention was always to finish the works but we are now in doubt about your client's intentions. We believe we are entitled to know if your client disagrees with anything in writing.

391 At this time the Builder was not insisting on a fixed sum; he was asking the Owner to either confirm or dispute the amount claimed. In particular he was asking whether there was any reason why the full amount claimed might not be paid.

392 The first mention of $14,447.83 of which I am aware was in the Builder's email to the Owner's solicitor of 10 September 2014, and appears to have been given in response to a question from her. He also said:

> Your client has had plenty of time to raise any concerns around our accounts however I require you to advise us of any disputes your client may have and we will address them before works commence.

393 As stated above, on 18 September 2014 the Builder emailed the Owner's solicitor seeking a written promise that the Owner would pay $14,447.83 in full on the day of handover. This was potentially repudiatory, because the Owner had the right, under clause 39 of the first contract, to inspect the works when completed but before payment. Further, on the evidence of both parties, without taking into account interest or time extension costs, $14,447.83 was a little more than the Owner would have been obliged to pay under the first contract, but probably a little less if there was no prevention by the Owner and interest and time extension costs were taken into account.

394 By his email of 11:41 am on 8 October 2014, the Builder was seeking an "undertaking that full payment will be made on completion of the works". There is no mention of the amount, nor that re-commencement of work was conditional upon that undertaking.

395 Confirmation that the email of 8 October 2014 was a request rather than a demand lies in the email in almost identical terms, of 11:14 am on 10 October 2014 which notified the Owner that he had resumed works. As I commented above, the unfortunate fact for both parties is that this email, and the letter of 9 October 2014, crossed in the mail.

396 I am not satisfied that by 9 October 2014 when the Owner's solicitor sent the letter, the Builder was still insisting that the Owner pay $14,447.83, and I find that the Owner cannot rely on this matter to demonstrate repudiation by the Builder.

On handover

397 As can be seen from the emails of 2 and 18 September 2014 the Builder was not seeking payment until handover – the point at which the Builder would be entitled to payment under clause 41 of the first contract.

To be "held by you" (on trust)

398 The Owner's final submissions refer to OTB858 which was not referred to during the hearing. It surprisingly mentions a 'without prejudice' conversation between the Owner's solicitor and Builder of 1 September 2014 where the Owner's solicitor reported to the Owner that she had made an offer to the Builder that the Owner should pay an amount into trust. In the course of the conversation the Builder was reported to have said that they still had 100 days to complete, by which I understand he was saying "in which to complete".

399 On 5 September 2014 at 11:33 am, an email by the Builder to the Owner's solicitor contained the first mention of payment of money into trust:

> You also suggested to me that all amounts outstanding would be placed into a trust but I see no mention of this in your response.

400 Then on 10 September 2014 at 1:47 pm the Builder sent the Owner's solicitor an email which included:

> As per your previous offer I will accept the funds being placed into a Trust Account and be paid to me on day of handover.

401 On 11 September 2014 at 3:24 pm the Owner's solicitor's email letter to the Builder included the following:

> The previous offer to pay monies into trust was made as a compromise to the fact that the variations had not been signed. Given that the variations will now be signed, the offer to pay monies into trust is no longer being offered by my client. In any event, there is no contractual obligation for her to do so.

402 On 15 September 2014 at 12:10 pm, the Builder again sought proof from the Owner's solicitor that she held the funds on her client's behalf.

403 On 17 September 2014 at 5:25 pm, Mr Larsson emailed the Builder and it included the following:

> Alison has no contractual obligation to provide funds in trust pending completion works.

404 By 18 September 2014 the Builder was not asking that money be paid into trust, and he made no such request or demand after that date. As I have found that the Owner affirmed the contract on 26 September 2014, this potentially repudiatory demand was not one upon which she could rely on 9 October 2014.

405 Nevertheless, I recount the history of the request or demand that money be paid into trust.

406 At some time after the Owner went on leave, and before the four outstanding variations were signed by her solicitor on 17 September 2014, her solicitor was the first person to suggest that money in dispute could be placed into a trust account. I accept Mrs Priftis's evidence, given on 28 July 2017, that in her first or second conversation with the Owner's solicitor[21], the latter suggested payment of money into her trust account and Mrs Priftis responded "great idea". I also accept Mrs Priftis's evidence that she said that the Builder was willing to have someone from the HIA or VBA check the work before payment.

407 At paragraph J of his final submissions the Builder said:

> The issue of the allegation by the owner that the offer, once accepted, cannot be disclosed, is not plausible. Once an agreement is made, the parties cannot hide upon the without prejudice veil, especially since the builder relied upon the offer to conduct open communication. [Sic]

408 The obligation to pay money into trust could only become binding if it was supported by fresh consideration – something of value given by the Builder in exchange for the Owner's new obligation. The consideration proposed by the Owner's solicitor was that it was in place of the Owner promptly considering and signing or rejecting the outstanding variations. I accept the suggestion of placing the money into trust was a step in the negotiations rather than a term of a completed agreement.

409 I accept the Owner's evidence that this offer was made without her authority and as between her and her solicitor, was subject to her agreement. I also note that this fairly fine point can be lost on a person who is neither a lawyer nor dealing with legal matters on a daily basis. I accept Mrs Priftis's evidence that the Owner's solicitor said nothing about having to check this with her client.

410 Even if the Builder had still been insisting on the payment of money into trust, in this dispute I am not satisfied that the demand for payment of money into trust was repudiatory. It was suggested by the Owner's solicitor, apparently on her behalf, and I am also satisfied that the Builder believed that there was a concluded agreement.

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[21] Other evidence was given about alleged threats by the Owner's solicitor. They are not relevant to the outcome and I do not take them into account.

Alleged early claims for payment

411 In her final submissions, the Owner appears to characterise payment of money into trust as a demand for early payment to the Builder. I characterise it as a demand for early payment by the Owner, but not to the Builder. I find that it was to be paid into trust for the Owner and on successful completion of the contracts, then be paid to the Builder.

412 The Owner referred to completion invoices for the first and second building contracts, both issued shortly before her departure. Her evidence is that the invoice for the first building contract for the sum of $12,738.12 was not expected by her as the work had not yet been completed. She added that she did not have the opportunity to reconcile the invoice with her records.

413 The invoice for the second building contract was for $3,283.16. She said in her Submission of Evidence of 26 June 2017:

> Notwithstanding that the building works had not yet been completed for the Second Building Contract, there were no variations submitted in relation to that contract, I elected to pay the completion invoice and instructed my bank on 29 August 2014 at 8:55 am by email to "pay Peter Priftis my builder the amount of $3,283.16 on 5 September 2014". I subsequently amended to 4th September.

414 I am not satisfied that the Builder was seeking payment before it was due.

415 I interpret the Builder's request that the Owner give details of any defects or incomplete work as consistent rather than inconsistent with the contracts.

Negotiations immediately before 16 October 2014

416 The Builder said of the negotiations immediately before the Owner retook possession of the site:

> We were in negotiation before and after receipt of the letter of termination. We were willing to go back to work. I had plenty of time to finish before 14 November 2014.

417 I accept the Builder's view of these negotiations.

"Remedial period"

418 In her final submissions, the Owner introduced the concept of a "remedial period" before the end of which the Builder was obliged to resume the building works. This was not pleaded and not the subject of any evidence given during the hearing. She said the remedial period commenced on 1 September 2014 and ended 21 days later. This is surprising because during the hearing nothing of consequence has been brought to my attention that occurred on 1 September 2014, or even on 31 August 2014.

Conclusion concerning the Builder's alleged repudiation

419 I am satisfied that any repudiation by the Builder was no longer in effect by 9 October 2014, as the Owner had affirmed the contract on 26 September

2014. I am satisfied that the Owner was not entitled to end the contract on 9 October 2014 based on the Builder's repudiation.

The Builder's allegations that the Owner repudiated

420 The Builder alleges at paragraph 8 of his Points of Counterclaim that the Owner repudiated the contract. The relevant parts of paragraph 8 are:

> The Owner terminated the contract unlawfully, in that she:
>
> i) Was in breach of the contract by virtue of not providing the Builder with the signed variation that fell on the critical path of works;
>
> ii) Continuously delayed progress of the works by failing to provide information in respect to goods and selections as shown in the correspondence between the Builder and the Owner.
>
> iii) Repudiated the contract by immediate termination of the contract on 10 October 2014[22] by way of a letter from her then legal representative …

At paragraph 12 the Builder repeated his allegation of repudiation by the Owner, and at paragraph 13 he pleaded that he had already accepted the repudiation or did so by virtue of that pleading.

"Immediate termination"

421 I discuss this aspect first, because my finding that the Builder did not repudiate the contracts means that the Owner's solicitor's letter of 9 October 2014 did not constitute rescission on the basis of the other party's repudiation.

422 As mentioned above, the Owner did not terminate either contract as contemplated in the contracts. The termination mentioned in the letter of 9 October 2014 was immediate. I find that the letter itself was repudiatory and that the Builder was entitled to accept her repudiation any time after receipt of the letter.

Failure to sign variation on the critical path

423 This allegation concerns the electrical variation.

424 At paragraph 76 of her final submissions, the Owner says:

> At no stage up until 29 August 2014 did the Owner indicate that the variation was in dispute or the works were not in accordance with the variation. The Builder has provided no evidence that those issues were in dispute.

425 The issue that beggars understanding, is why the Owner did not simply sign this variation, which by 28 August 2014 had been with her for over seven weeks. It is clear that by 29 August 2014 neither party trusted the other, and neither party was entitled to assume that the other party trusted them.

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[22] Date the letter was received rather than the date of the letter.

426 The Owner submitted in her O's RRT 26/6/17 that the Builder had undertaken 80% of the work required under the electrical variation on the outstanding value was $485.76. She described it as "a total overplay and self-serving justification on the part of the Builder".

427 The Builder claims that the Owner's failure to provide a written variation caused a delay in work on the critical path. The Owner claims it was not on the critical path.

428 Because of its importance, I reproduce the details of the work to be undertaken:

> ELECTRICAL EXTRAS
>
> 1 x Additional LED to entry feature wall
>
> 1 x Extra exterior wall light to deck
>
> 3 x Garden light switches
>
> 6 x Extra power points
>
> 4 x lights under overhead cupboards in kitchen
>
> 3 x extra T. V. points
>
> 4 x Foxtel points
>
> 2 x Dimmers

429 The delay in signing this variation was in the context of the breakdown of trust between the parties, and whether justified or not, I accept the Builder's evidence that he was very concerned that the Owner might change her mind and require him to install the electrical items as originally contracted. Given the history between the parties, I do not consider his concern unreasonable.

430 I also accept the Builder's evidence that reversal back to the original electrical design would have led to changes to plastering and therefore it stood in the way of certain finishing trades, such as painting and floor polishing.

431 In the Owner's written submission of 26 June 2017 she said at point 4:

> The Builder had already carried out most of the work in respect of the electrical variation for which part payment had already been made (only further requirement was fit off) so it is inconsistent to subsequently look to invoke sanctions against me given the variation had not yet been signed. I had sought to visit the property to confirm the work undertaken was in accordance with my request. Due to a heavy work commitment I had not done so by 29 August 2014. I contend that he always had the option to cap off the wiring rather than fit them off.

432 I remark that if the Builder was correct in his assessment that returning to the original electrical requirements under the contracts would involve undoing and redoing work, simply capping off the wiring was an insufficient measure.

433 The Owner also remarked that the Builder's expert report by Mr Beck states on page 7:

> … some electrical works in relation to this variation have been completed and the total amount left to complete this variation was $480.90 being 80% of the works were complete.

She concluded:

> In essence the Respondent created this confrontation in dispute over a matter of $480 outstanding under an unsigned Electrical Variation, in a total contract value of over $400,000.

434 During the hearing Mr Larsson for the Owner submitted that s38(2) of the DBC Act permits the Builder to carry out a variation ordered by the Owner which does not require a permit change, will not cause a delay and will not add more than 2% to the contract sum. He submitted that the Builder should have gone ahead, to avoid any further delay.

435 As I said during the hearing, I consider this provision is mainly for protection of builders rather than owners. A builder "may" act in this manner, but is not obliged to do so. Further, given the mistrust between the parties over the timber floor variation, the Owner's refusal or failure to provide this variation in writing would lead a prudent builder to conclude that the nature and extent of the variation, or even whether there was a variation, had not been concluded. Again, regardless of the thoughts and motivations of the parties, in the context of the relationship between the parties, it was reasonable for the Builder not to continue the work. The risk that work might have to be re-done to strictly accord with the contract, placed this work on the critical path.

436 During the hearing Mr Larsson asked Mr Beadle whether the electrical fit off would be on the critical path. Mr Beadle said it was hard to imagine. However I note Mr Beadle was not in possession of all the relevant facts and because of that his evidence about the critical path does not assist. This is no criticism of Mr Beadle.

437 I find that the Owner's failure to sign the variation could have amounted to repudiation of the contracts if she had not remedied her failure before the contracts were ended. I am not satisfied that this was a failure upon which the Builder was entitled to rely, in order to accept repudiation, on 16 October 2014 when the Owner re-took possession of the site and the contracts ended.

Delaying progress of the works

438 Evidence has not been given for the Builder that proves the Owner was in breach of her obligation to provide "information in respect of goods and selections". However, as discussed above, the Owner was obliged to arrange for installation of various services including the gas meter, she still had not done so by the time she re-took possession of the site and I have

found that it prevented the Builder from completing his obligations under the contracts.

Who repudiated?

439 For the reasons given above, I find the Owner repudiated the first contract, and the second contract to the extent that it was still executory. I find that the Builder accepted the Owner's repudiation.

The consequence of who repudiated

440 The result of repudiation by an owner is to render the contract void from the beginning. In such circumstances the builder is entitled to claim quantum meruit – the value to the owner of the work undertaken including the goods and materials supplied by the builder. As discussed by Senior Member Walker in *Paterson Constructions Pty Ltd v Mann*[23] the amount that a builder can recover is not limited by the amount to which the builder would be entitled under the contract, if not repudiated by the owner. For example, at paragraph 533 of *Paterson*, Senior Member Walker said:

> I might add that, by succeeding in a claim for a quantum meruit, the Builder has recovered considerably more than it might have recovered had the claim been confined to the Contract.

441 In such circumstances, builders usually provide the evidence of a quantity surveyor as to the value to the owner of all of the works. At paragraphs 524 and 525 of *Paterson*, SM Walker said:

> Generally at common law, termination of a contract will not affect rights that have accrued under it before termination …
>
> However, as was pointed out in *Sopov v Kane*[24], it is now well established that, in the case of a building contract, when one party repudiates the contract and the other party brings it to an end by accepting the repudiation, the contract is avoided ab initio. The situation might be thought illogical but, as the Court of Appeal said, this apparently anomalous situation can only be remedied now by the High Court. A claim under the Contract for delay costs cannot be maintained for the same reason that the Builder is now entitled to claim a quantum meruit for the work that it has done.

442 Neither party provided evidence regarding the value to the Owner of all work undertaken by the Builder, from the beginning of the contracts. The Builder seems to have used a mixture of the entitlements already accrued under the contract and "value of work" and "profit" after termination, together with claims for other items.

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23 [2016] VCAT 2100, paragraphs 512 to 525

24 *Sopov v Kane Constructions Pty Ltd (No 2)* [2009] VSCA 141

443 Clause 45 of the first contract provides:

> If the Owner breaches (including repudiates) this Contract, nothing in this Clause prejudices the right of the Builder to recover damages or exercise any other right or remedy. [Underlining added]

444 I find on balance that in this proceeding the Builder is seeking the amount that he would be entitled to under the contract. I assess the parties' entitlements in this manner, taking into account that the incomplete work must be assessed on the basis of the cost to the Builder of completing it, not the cost to the Owner of having the work undertaken by a third party.

445 As I have found that the Owner repudiated, I consider the Builder's rights first, and then consider the amounts to be deducted as the work under at least the first contract was incomplete.

CLAIMS BY BUILDER

"Unclaimed work" - $12,352.08

446 The Builder claims this sum in accordance with a list on page 5 of Mr Beck's report. Mr Beck's description was "I have been advised by the builder the following works were completed", but reaches a total of $13,197.08. I have regard to the contract entitlements of the parties rather than this sum, and to that end, in "Reconciliation of Contracts" below, I take the contract sums as adjusted by items such as variations and time extension costs. I consider the following items to the extent that they change the contract entitlements.

Toilet hire - $1,146.70

447 The Builder said that toilet facilities were to be provided by the Owner which is correct in accordance with clause 3 of the second contract. The Owner's response in her Points of Defence to Counterclaim is:

> The first building contract is silent on recovery of costs from the owner of toilet hire. As the First Building Contract was ongoing, item is not recoverable from owner.

448 The fact that the Owner was not obliged provide a toilet under the first building contract did not impinge on her obligation to do so under the second building contract. I am satisfied that the Builder is entitled to the amount he claims.

449 The Owner must pay the Builder $1,146.70 for this item.

Installation of the front door exceeded $750. Extra labour (two men for one day $880) and $25 material – $905

450 The question of how much is reasonable with respect to the front door is discussed below under "Front Door" as part of the credit sought by the Owner.

451 The Builder claims that he is entitled to $905. It is not clear whether the $905 is in addition to the $750 he seeks to retain for supply of the front door or whether it is instead. As the Builder has adopted a semi quantum meruit method of charging, I conclude that it is instead.

452 On page 11 of the Points of Defence to Counterclaim, the Owner pleads at paragraph 6 that 7 ½ hours should be allowed for extra time for fitting the front door including GST and builder's margin being a total of $495. It is not clear how the Owner came to that conclusion.

453 I am not satisfied that the Builder is entitled to any further sum. My determination below under "Front Door" stands.

Completion of Painting at the property (includes the front door) – $4,355

454 Confusion has been caused by some degree of conflict between the first and second contracts. The first contract required the Builder to undertake painting "to all internal and external new works areas". The second contract includes the provision "Painting to all of existing house has an allowance of $3,895 inc GST."

455 Again, it appears that this is the Builder's whole claim for painting, in substitution for his contractual entitlements.

456 The Builder seems to have interpreted the second contract as governing the painting for the whole house. I do not interpret the contracts in this way. I find that a reasonable interpretation is that the reference to "existing house" was as distinct from "new work areas" and meant the areas that were subject to the second contract.

457 Mr Larsson submitted that "all of existing house" in the second contract meant that a credit of $3,895 should be given to the Owner. I do not find the submissions of the Builder or for the Owner particularly helpful.

458 Both Mr Beck and Mr Beadle agreed that the approximate value of painting the whole house, inside and out, was in the region of $8,000. Without more information I am unable to say precisely how the area and complexity of painting for the first contract compares with the second contract. Having regard to the Builder's evidence on the first day and with respect to OTB111, I conclude that the area to be painted was slightly more in the first contract than in the second contract. I cannot be satisfied that painting for the second contract has exceeded $3,895 and I make no allowance for it, other than the Builder's entitlements under the contracts.

Builders margin of 20% for painting completion – $871

459 Because there is no additional allowance for painting, there is no additional builder's margin.

3 hinges @ $10 each for the front door – $30

460 I am not satisfied that the Builder is entitled to $30 in addition to his contractual entitlements.

Office administration and collection of goods – $2,500

461 Parties to contracts are usually only entitled to recover amounts and items allowed to them under the contract. Where extra time and expense has been caused to a party by another, the usual source of recovery is for time related damages such as liquidated or agreed damages, or general damages.

462 However in this proceeding I am satisfied that the Builder has been put to significant trouble and expense by the Owner's inaccurate view of her entitlements under the contracts which has led to administrative expenses beyond those normally covered by time extension costs. The Owner must pay the Builder the amount sought of $2,500.

Tiled splash backs: Credit given but works were requested and completed by builder – $236.37

463 For the reasons given above under "Variations in dispute", there is no further allowance for this item.

Variation No V2813020 - given in error as total cabinet allowance credited in Variation No V2813021

464 For the reasons given above under "Variations in dispute", there is no further allowance for this item.

Conclusion regarding "Unclaimed work"

465 The Owner must pay the Builder:

For toilet hire	$1,146.70
For office administration	$2,500.00
	$3,646.70

Other works for the benefit of the Owner

466 The Builder confirmed during the hearing that these items form part of the total sum of $30,522 claimed by him.

467 Mr Larsson submitted that each of the following items should have been part of the second contract and should not be allowed. Mr Larsson also said that the Builder did not seek a variation for any of these items and that the first time Mr Larsson was aware of them was when they appeared in Mr Beck's report, which in turn is referred to at paragraph 14(a) of the Points of Counterclaim.

468 Each of the following is described on page 6 of Mr Beck's report. Before dealing with the specific items he said:

> I have been advised by the builder of the following works that were completed at the property by the builder which were not part of the contract works and have not been invoiced for. Whilst I did not observe these items at the time of construction, I can state that I inspected them during the course of my attendance at the building on 14 October 2016.
>
> Please note: I have also provided my opinion on the cost of the works as provided to me by the builder.

At the end of these items Mr Beck added:

> All of these items should attract the builder's margin stated in the contract.

Veranda Straightening - $2,000.00

469 Mr Beck said:

> Veranda variation: Footing for post, timber post and fixings and labour of 2 men for 2 days to excavate footing, remove soil, prepare and install post, pour concrete footing.
>
> Total cost $2,000 plus GST

470 It is noted that the Builder sought a variation to replace the veranda on 5 May 2014 and it was not agreed. A variation for veranda post repairs, being V2813010, was agreed on or about 12 May 2014. I note the Builder's written statement in the book handed up on 3 July 2017 by the Builder: "Responses to Owners Loss & Damages and Scott Schedule Claims" where he discussed variation V328107, which was rejected by the Owner and variation V2813010, which was approved, and continued:

> It soon became apparent that everything we attempted to repair would create more work in order to make it safe and last a lot longer.

471 I am not satisfied that there is a contractual basis upon which the Builder is entitled to this additional sum, particularly when he did not seek a further variation at a time when it could have been negotiated between the parties. I make no allowance for this item.

Bulkhead in lounge room - $1,500.00

472 Mr Beck said:

> Feature wall: Constructed on each side a family room. Includes bulkheads to both sides of the ceiling. Structural timber MGP10 framing pine, plaster and labour. Total cost $1,500 plus GST.

473 I am satisfied that the design provided by the Owner did not allow for a bulkhead, but allowed for the east wall in the living/dining area to be placed in a manner that would cause some loss of space. I am satisfied that Mr Larsson and the Builder discussed this on 19 June 2014 as evidenced by an email from Mr Larsson to the Builder of that date where he said in part:

> Responses to some of the questions this morning.
>
> Alison has confirmed with Chris the following
>
> …
>
> 1. Bulk head between lounge and kitchen has been advised and noted.

474 The Builder did not seek a variation and on behalf of the Owner, neither she nor Mr Larsson enquired whether there would be any additional charge. I accept the evidence of Mrs Priftis that this slipped the mind of the Builder and herself.

475 Nevertheless, I am satisfied that building a bulkhead in this position was of value to the Owner and caused the Builder to incur extra expense. It is an item for which the Builder would have received an allowance under a pure quantum meruit claim.

476 I am satisfied that $1,500 is a reasonable additional charge for this item. The Owner must allow the Builder $1,500 for this item.

Safeguarding the chimney while permit sought - $1,500.00

477 Mr Beck said:

> Propping unsafe chimney. 3 trades over the course of one day plus scaffold and support timbers. Total cost $1,500 plus GST.

478 I note that the Builder states this work would have been done around 20 September 2013. The Builder had given a restumping credit just two days earlier and was clearly aware of the contractual obligations concerning variations. I am not satisfied that there is a contractual basis upon which the Builder is entitled to this additional sum and I make no allowance for it.

Installing a flashing to the east side of the boundary - $1,000.00

479 Mr Beck said:

> Flashings: Install flashing to ensure stormwater does not enter between adjacent dwellings total cost for material and labour $600 plus GST.

480 The Builder said that a variation was necessary for flashing between the house and the adjacent building on the eastern boundary. I accept Mr Larsson's submission that this was part of the first building contract. In particular, sheet A 03 of the construction drawings which appears at OTB4 shows "Colorbond parapet flashing" to three of the four sections drawn there.

481 I am not satisfied that the Builder is entitled to an extra sum for this item.

Conclusion regarding other items

482 For the reasons given above the Owner must allow the Builder a total of $1,500 for these items.

Delay costs

483 As determined above under "EOT3", the Owner must pay the Builder $1,178.43.

Interest on late payments

484 These claims are for allegedly late payment of progress claims. On 28 July 2017 the Builder asked Mr Larsson in cross-examination whether all the accounts were paid on time. Mr Larsson responded that some were a couple of days late or some items were missed.

First contract

Progress claim dated 13 February 2014 for $51,582.15 - 4 days claimed @20% $113.06

485 In her Points of Defence to Counterclaim the Owner alleged that the Builder was in the practice of delivering pre-dated claims to her home. She said that payment was not late for this claim and pleads that there is no interest payable.

486 I prefer the Builder's evidence and allow $113.06.

Progress claim dated 20 March 2014 for $70,915.91 –

a. $68,776.19 claimed for 5 days $188.43

487 Again, the Owner alleged the payment was not late and no amount was payable for interest.

488 I prefer the Builder's evidence and allow $188.43.

b. $2,138.72 claimed 68 days $79.73

489 The Owner admits this claim. $79.73 is payable by the Owner.

Progress claim dated 20 May 2014 doe $83,656.46 – 7 days claimed $320.87

490 The Builder gave evidence that this claim was paid seven days late.

491 The Owner alleged this payment was two days late for which interest would be payable of $91.67. The Builder asked Mr Larsson in cross-examination whether approximately $90,000 was outstanding in May 2014, at around the time of the alleged suspension. Mr Larsson responded that he could not recall.

492 I prefer the Builder's evidence to Mr Larsson's on this point. The Owner must pay the Builder $320.87 for this item.

Progress claim dated 17 August 2014 for $48,345.01 – 2 days claimed $52.98

493 The Owner alleged the payment was not late and no amount was payable for interest.

494 I prefer the Builder's evidence and allow $52.98.

Second contract

495 The Builder's claims for interest under the second contract are as follows:

Progress claim dated 20 March 2014 for $19,698.94 – 5 days claimed	$53.97
Progress claim dated 18 July 29017 for $26,142.07 – 3 days claimed	$42.97

The Owner's response is that the contract is silent on when progress claims are payable other than to say that they must be made "on time".

496 I accept the Owner's interpretation of the contract. Clause 18 provides for interest should payments not be made "on time". It is for the Builder to prove what "on time" means, which is made more difficult by the inclusion of clause 16 which is an entire agreement provision.

497 I am not satisfied that the Builder has proven a failure to pay these two amounts on time, and make no allowance for interest under the second contract.

Amount allowed for interest

498 In accordance with the above reasons I allow $755.07 for interest on late payments under the first contract.

Damage to locks and gates caused by Owner - $300

499 I accept Mr Larsson's evidence that the "gate" referred to by the Builder was a sheet of reinforcing with black plastic behind it, approximately 1.5 m wide and 3 m high. Mr Larsson also gave evidence that he returned the Builder's chains and locks to him. The Builder neither cross-examined Mr Larsson on this point nor gave evidence to the contrary.

500 As I have found that the Owner repudiated the contract, she was not entitled to remove the locks and the sheet of reinforcing. However I accept Mr Larsson's evidence. In the absence of better evidence, I allow $50 to the Builder for damage to the sheet of reinforcing.

Loss of profit - $4,089.66

501 It is for the Builder to prove his loss of profit and he has failed to distinguish between the profit that would have been in his last payment and the proportion of payments already received attributable to profit.

502 I am not satisfied that the Builder has proven a loss of profit separate to the amounts that he would otherwise have been entitled to receive if the contracts had been completed.

THE OWNER'S CLAIMS AGAINST THE BUILDER

Missing items

503 The items which the Owner claims the Builder is responsible for are:

- bedroom light $225.00
- gas cooktop $1,462.23
- door handles $589.91
- clothes line $104.08.

Is the Builder responsible for the Owner's goods left on site?

504 The building contracts do not expressly provide for responsibility for goods or materials supplied by owners. Some interpretive assistance might be gleaned from clause 22 of the first contract, which requires the Builder to insure against "property loss" (not limited to the property of the Builder), but it must be loss "arising out of the building works". It is by no means clear that this includes unfixed goods and materials purchased by the Owner which are left on site. Further, clause 35 provides:

> Any unfixed goods or materials on the building site are the property of the builder.

505 I also make reference to the second contract, because it is possible that the bedroom light, and likely that at least some of the door handles fell under that contract. It contains the following surprising clause:

> **14. RISK**
>
> All materials are at the owner's risk once delivered to the site.

It follows that for any materials to which the second contract applies, the Builder is not liable unless the Owner can prove that he removed them.

First contract – bailment

506 In the absence of a clear provision regarding the Owner's goods, the law of bailment applies and the Builder would be a gratuitous bailee, as distinct from a bailee for reward. As Senior Member Steele said in *Italia v Lofaro* [2013] VCAT 1775:

> At common law, a bailee (the person in possession of the goods) has a duty to take reasonable care of the goods.

507 I therefore conclude that the Owner is not entitled to recover any amount from the Builder unless she proves a failure, on his part, to take reasonable care.

508 All the Owner and Mr Larsson have attempted to prove is that the items were in the care of the Builder and were found to be missing from site later. The Owner has therefore not proved her case with respect to the missing items, but some matters that arose during the hearing should be recorded.

Were these items lost while in the Builder's care?

509 In "Applicant's Response to Respondent's Submission of Evidence Dated 20 July 2017" handed up on 27 July 2017 the Owner states[25]:

> The Applicant has not alleged theft of the missing goods. The Applicant alleges that the Respondent had control of certain goods which the Applicant had independently paid for and delivered to [site] prior to 29 August 2014 but were not at [site] on 16 October 2014 at the time the Applicant took possession.

The Owner submitted that it was the Builder's responsibility to ensure the safety of the missing items safety. She said all the items claimed had been delivered to site but were not there on 16 October 2014.

510 A TV bracket was identified as missing then later returned by the Builder. I accept the Builder's evidence that he was given the bracket at frame stage to enable him to put the noggins in at the correct position to support the TV bracket. He said that he took it off-site and returned the bracket as soon as he realised that he had it.

511 At paragraph 34 of "Applicant's Submission of Evidence" handed up on first day there appears:

> I say on oath, that I did not remove any of the goods identified in my signed statement to Victoria Police on 7 November 2014 from the property … before or after 16 October 2014, nor did I instruct any other person to remove any of those goods from the property …. The goods were not located on the land when I entered the land on 16 October 2014.

512 It is not clear whose oath this is. There is no evidence that the Owner entered the site on 16 October 2014, so it seems that the words are Mr Larsson's.

513 Mr Larsson said in evidence that he believed that he had noted items missing on 16 October 2014 but he neither mentioned it to the Builder nor included it in his file note. Although I accept that 16 October 2014 was a difficult day for both parties, it would be surprising if a matter as important as missing property of the Owner was not mentioned by her husband, particularly as he did mention the downpipes. I am not satisfied that Mr Larsson noted missing items on that day.

514 Also, in "Applicant's Response to Respondent's Submission of Evidence Dated 20 July 2017" the Owner states "the Applicant has photographic evidence that some items were not in situ" [on 16 October]

515 Mr Larsson referred to the photograph which appears at OTB826 and said that it was taken by him on 27 August 2014. It shows the gas cooktop and kitchen sink, both in plastic, resting in their final positions. On the edge of the photograph there is the hand of a person who appears to be a worker holding what appears to be a caulking gun.

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25 Paragraph G-12

516 He also referred to the photograph at OTB849 which he said was taken on 16 October 2014. It shows the spaces for the kitchen sink and gas cooktop are empty. The photograph at OTB636 shows the boxes which Mr Larsson said contained the stove and dishwasher. The fact that the space for the gas cooktop was empty does not necessarily mean that it was absent from site. The sink space was also empty and there is no claim for that item. I also accept Mrs Priftis's evidence that they do not leave cook tops in place while tiling is being undertaken for fear of them being damaged.

517 The Builder gave evidence that on 22 October 2014 Mr Larsson notified him for the first time that there were various items missing from the site. The Builder's evidence was that it was his impression that Mr Larsson believed he had stolen them. The Builder's evidence continued:

> On … 19/11/14, I am fingerprinted and questioned at the Malvern police station. Six months later, I received notification from the police that due to insufficient evidence, my fingerprints will be destroyed and no further action will be taken.

518 In her final submissions the Owner said at paragraph 194:

> The Owner's husband made a statement to the Malvern Police and did not allege that the goods were stolen.

It would be surprising if the police were to take any action in the absence of an allegation of theft.

519 I consider the Builder's later admission that he did have the television wall bracket neither proves nor disproves the Owner's assertion that the Builder had some or all of the missing items. It supports the possibility that some items were off site in the Builder's possession. On the other hand, had the Builder removed all items, it would be surprising if he volunteered that he had one, but not the others.

520 I cannot be satisfied that the missing items were not on site on 16 October 2017, and I cannot be satisfied that they were otherwise in the Builder's possession. As I said above, the Owner's claim for these items fails because she has not proved that the items were lost because the Builder had them, or that he failed to take reasonable care of them.

Completion works and adjustments claimed by the Owner

521 When a builder is entitled to quantum meruit, the owner is not entitled to damages, or an adjustment for the incomplete work. However, properly assessed, quantum meruit will take into account the fact that some work has not been completed because, for example, if the front door has not been painted, the builder will not be entitled to quantum meruit for painting the front door.

Cost to complete

522 On the last of the hearing I asked the Builder how much completion would have cost him if he had been permitted to do so. His response was about

$7,000 ($6,871.24) in accordance with the Beck report. I remark that some items in the nature of costs to complete have already been taken into account above.

523 Mr Beck's evidence, at pages 7 and 8 of his report are that the cost to the Builder of completing the work are as follows:

- Sanding and polishing the floorboards – nil because the Builder was going to undertake this work at no cost to the Owner
- Remaining bathroom fittings from Reece - $968.44
- Electrical Variation V281315 (fit off) - $480.90
- Downpipes x 2 - $250
- Variation V281323 - $290.40 (this is considered under agreed variations)
- Variation V2813024 - $264
- Variation V281328 - $792
- Shower screen - $756
- Plumbing fit off - $750

524 In Schedule 2 to the Owner's final submissions, she calculates that the amount she was claiming for completion of the works is $26,145 and that the amount the Builder should have attributed to the cost of completion of the works as $18,536. This schedule was presented in evidence during the course of the hearing. It is surprising that this evidence appears to have been put together by the Owner or Mr Larsson rather than seeking to adduce evidence on this point from Mr Beadle, the quantity surveyor who gave expert evidence for the Owners.

Sanding and polishing floors

525 The parties agree that this was an item the Builder agreed to perform in accordance with the timber floor variation but it was not completed before the contract was terminated.

526 The Builder argued that the cost attributed by him for this item was nil because he was going to undertake it without charge. I accept the Builder's evidence. This item became part of the Builder's overheads. There is no allowance for it.

Remaining bathroom fittings from Reece - $968.44

527 Mr Beck relied on information from the Builder that there was a remaining sum of $968.44 to pay to Reece.

528 The parties agree that at least some of the bathroom and other plumbing fittings were obtained and paid for by the Builder.

529 The Owner's evidence is that she paid an account for $2,839.97 which was part of the Builder's obligations, and this is supported by a cash sale receipt for that sum in the name of David Virtue, which is at OTB444. The items were ordered on 25 October 2014, after the contract had been ended, and paid for on 27 October 2014.

530 All the items on the Virtue order are on the Builder's plumber's customer order (OTB164) except that the following item is shown as a credit by the Builder but included in the Virtue order. It is:

> Product code 200036, Posh Solus SS F/rim Trough.

531 It is noted that the amount allowed under the Builder's Specification at OTB93 was $2,928.64 inclusive of GST. The Builder's pleading in Schedule A was that items to the value of $2,378.80 were delivered and installed at the time of termination by the Owner and the taking into account variation V281327 for an additional $435.10 for these items, the amount allowable to the Owner was $968.44. The Builder and Mrs Priftis confirmed this at the hearing. The variation was one of the four signed by the Owner's solicitor on her behalf.

532 There was also a separate items for a toilet roll holder. During the hearing on 27 July 2017 the Builder agreed that there should be a deduction of $30.93 which I allow.

533 I prefer the evidence of the Builder and Mrs Priftis and deduct $968.44 plus $30.93; a total of $999.37 from the amount otherwise payable to the Builder.

Electrical "Variation V281315" – fit off - $480.90

534 The Owner claims $2,404.51 as "works equating to variation V2811315". The Builder denies this item and says that it was 90% complete. Mr Larsson gave evidence that "this was paid for separately and we are seeking reimbursement". At OBT452 – 469 there is evidence of a quote by Fuse Electrical dated 30 October 2014 for $4470 plus GST. The items in the quote are not broken down although, somewhat surprisingly, there is a breakdown provided at OTB454-455 which, it is understood, is the work of Mr Larsson. The amount billed to and paid by the Owner appears to have been $2,458.50.

535 Mr Floreani gave evidence that the hardware, lights and power points were installed under the Completion Contract. He said most of the hardware was on site and photographs taken on his first day show that the electrical "tails" were out, so the electrician could easily locate where the fittings were to be installed.

536 Mr Floreani said his firm installed all downlights where the tails came out of the ceiling. He said the same applied to the power points and the smoke detectors. He said there were no new installations, just fit-offs where the tails protruded.

537 Mr Beck asked Mr Floreani whether the works undertaken under the Completion Contract included electrical variation V2811315. Mr Floreani responded that the Completion Contract included the fit off for those works but not the rough in.

538 I note that between OTB401 and OTB420 the Owner has provided all possible cost to her for rendering, electrical fit off including materials and gas and stormwater plumbing. These documents are irrelevant because the relevant cost is the cost to the Builder of completion.

539 I accept the Builder's evidence that the cost to him of completing this part of the work was $480.90. I deduct $480.90 from the amount otherwise payable to the Builder.

Downpipes x 2 - $250

540 Mr Beadle costed this item at $660, He allowed for the supply and installation of five downpipes. Mr Floreani said he undertook installation as part of the Completion Contract. I accept the Builder's evidence that there were only two downpipes still to be installed. On Mr Beadle's evidence, this would be $264. I prefer Mr Beck's evidence and deduct $250 for this item from the amount otherwise payable to the Builder.

Variations V281323, V2813024 and V281328

541 These variations have been taken into account under "Agreed variations", as balancing additions and deductions, above. There is no further allowance for them.

Shower screen - $756

542 The parties agree that a shower screen which was to be provided under the first building contract was not provided. In a document dated 30 May 2013 from the Builder to the Owner, there was an item "Supply & install new Stegbar semi-frameless shower screen $1,479." This document is at OTB93.

543 No amount is attributed to the shower screen at page 3 of the specification for the first contract, where the entry is Supply & install 1 x semi-frameless shower screen". The Builder gave evidence that the cost of the shower screen was to be $765.50 which is the amount for a standard screen and he also remarked that the document referred to is not a contract document.

544 Mr Larsson gave evidence that the cost of the shower screen installed by the Owner was $948.20. I note that the screen to be installed was semi-frameless and allow the actual cost to the Owner. I deduct $948.20 from the amount otherwise payable to the Builder for this item.

Plumbing fit off - $750

545 I accept the Builder's evidence that there was approximately $1,000 left for him to spend to complete the plumbing fit off which included supply and

installation of the two remaining downpipes. In accordance with Mr Beck's evidence, I find that there was still $750 for the Builder to spend which I deduct from the amount otherwise payable to the Builder.

Further items regarding cost to Builder

546 There were a few other items the Owner claimed would have had to be completed by the Builder to finish the work. They were (excluding items already considered):

- Rendering house and front fence
- Rinnai Hot Water service
- Back step
- Site clean
- Door furniture
- HWS thermostat
- Rubbish bin

Rendering house and front fence

547 Mr Floreani said that the brickwork was complete but under his coordination the renderer levelled and rendered the front fence. He said the cost of the rendering was $2,967 which included rendering to the side fence. He added that he found asbestos on the front and side fences and estimated that removal would have cost approximately $500.

548 I accept the Builder's evidence that on 29 August 2014 he accepted a quotation from The Render Bender Pty Ltd to undertake the rendering under the contract for $2,025.54.

549 I deduct $2,025.54 for rendering.

Rinnai Hot Water service

550 The Owner claims $1,435 for the cost of supply and installation of the hot water service. The Owner's evidence is that she paid for the hot water service, however it is noted that the invoice was dated 28 October 2014, after the contracts were terminated.

551 The photographs at OTB688 and OTB689 were identified by Mr Larsson respectively as the cupboard into which the hot water service was to be installed and the hot water service after installation. Mr Floreani gave evidence that the hot water system was installed under the Completion Contract.

552 The Builder gave evidence that the hot water system was supplied and installed but was disconnected to allow the painter to finish. I accept the Builder's evidence and make no allowance for this item.

Back step

553 The Owner said that the height from the back door to ground level required a step which should have been included in the contract. The parties agree that it was not included in the contract. I find that if the step had to be provided, as the contract documents were provided by the Owner, it would be a variation.

554 It is also surprising that the Owner would claim for the back door step as Mr Larsson gave evidence that he provided a document to the Builder on 28 August 2014 with a specific reference to the landscaper installing the back step. The relevant document is at OTB23.

555 There is no allowance for this item.

Site clean

556 Mr Larsson gave evidence that the amount allocated to the site clean in Mr Floreani's contract was $500. Any building job will require a site clean at the end. In the absence of better evidence I allow $250 to be deducted from the amount otherwise payable to the Builder for site clean and any rubbish removal.

Door furniture fit off

557 Mr Floreani gave evidence that his firm hung and fitted off four doors including the front door. Mr Floreani said the four new MDF doors were on site. He said that the value of the work was approximately $400 to $500 and that most of the door furniture was on site although a few hinges were missing. He said that this did not include glazing the aluminium external doors.

558 Mr Floreani said that the front door had been hung but needed to be fitted off and he recalled that it had been sanded and painted. His recollection was he did not think the door had been re-sized but noted the old door had been rehung. It is noted that in the Builder's Specification commencing at OTB91, the amount for provision of new door furniture to all of the doors was $200 inclusive of GST.

559 The amount attributed by the Owner to "door furniture fit off" was $1088. In the absence of better evidence I deduct $250 for door furniture and any necessary fit off.

HWS thermostat and replacement light installation

560 The Owner claims $320 for these items. The Builder responded that they were not within the scope of the works, and Mr Floreani said he had no recollection of an extra thermostat. In the course of cross-examining the Builder and Mrs Priftis, Mr Larsson said that the thermostat was necessary for statutory compliance. The Builder replied:

> Not for the unit we were to install. The Owner bought a different unit to the Rinnai Infinity 26. In that unit the tempering valve is set at a fixed temperature.

561 I accept the Builder's evidence. I am not satisfied that the Owner has proven an entitlement to these items and I make no allowance for them.

Rubbish bin

562 The Owner claimed this amount as a cost to her after 16 October 2014. As she repudiated the contract she is not entitled to damages of this nature. There is no allowance for this item other than the allowance included in "Site clean".

Completion costs – the Emoljac Investments Pty Ltd contract

563 Because she repudiated the contract, the Owner is not entitled to the cost of her of completion. Nevertheless, substantial evidence was given by and cross examination undertaken of Mr Floreani, some of which deserves to be recorded.

564 Mr Floreani's company, Emoljac, entered a contract with the Owner dated 30 October 2014 ("the Completion Contract"). The amount charged on the Completion Contract was $14,000 plus GST, a total of $15,400. A copy commences at OTB381.

565 During concurrent evidence Mr Floreani said he did not see the contract entered between the Owner and Builder; he did not even see the specifications; he only saw the drawings.

566 I asked Mr Floreani how much, if any, cheaper this scope of works would have been if his company had been engaged to do all the works and this was just part of the works. His response was, about 15 to 20%. However, he also said that a number of the tradespeople he wished to employ were reluctant to take over the work of others, which meant that the price was somewhat more expensive than it otherwise might have been.

567 Mr Beck also gave evidence that if an independent contractor were completing the Builder's work, the cost would be between 15 and 20% dearer.

568 In answer to the Builder's question in examination in chief, Mr Beck responded that it is common for a small portion of the total works to be left for fit off, but when another builder, or another tradesperson takes over the charge is substantially higher than the charge for the tradespeople engaged for all the works.

569 Mrs Priftis asked Mr Floreani how many domestic building contracts he had undertaken in 2014. He responded that he only did this job and it was as a favour for the Owner and her husband, whom he knew, and that Mr Larsson also provided financial services to him.

570 Mrs Priftis then asked Mr Floreani about the scope of works which is on his company's letterhead at OTB424. Mr Larsson said that he had prepared it and gave it to Mr Floreani. On the next day of hearing Mr Larsson handed up a four-page submission of evidence, marked by the Tribunal as A 2. Part of that submission dealt with the provenance of the scope of works. Mr Larsson said that he has been a professional advisor to Mr Floreani for about 12 years and that Mr Larsson often prepares letters and documents for Mr Floreani on the latter's letterhead.

571 While I do not question the accuracy of Mr Larsson's statement, such an action would be appropriate when he is not a party, or related to a party, to a dispute for which Mr Floreani's evidence is relevant. In this proceeding, it is surprising that Mr Larsson would take a step that could mislead either the Builder or the Tribunal. If Mr Larsson had sent Emoljac a document or letter from himself or the Owner, there could have been no risk of misunderstanding. The revelation gives cause for concern regarding documents in this proceeding on the Emoljac letterhead. Further, Mr Floreani said under cross-examination that he did not know when the scope of works was printed; it had nothing to do with him.

572 Document OTB379 is a letter on Emoljac letterhead dated 16 December 2015 and seems to have been created for the purpose of this proceeding. It refers to a certificate of final inspection issued on 22 January 2015 and confirms that Emoljac has been paid the full sum of $15,400. Mr Floreani's evidence was that the final amount of $2900 was paid to his company in August 2015. When asked why the payment was so late, Mr Floreani said that it slipped his mind and that when he did his end of financial year reconciliation he realised there was a discrepancy.

573 Mr Floreani said he could not recall whether he had written the letter of 16 December 2015. He said he thought a draft might have been sent to him by Mr Larsson which he then corrected.

574 I conclude that in general I prefer the Builder's and Mr Beck's evidence to Mr Floreani's concerning the reasonable cost to the Builder to complete the works.

Securing the site

575 As the Owner repudiated the contracts, there is no allowance for this item.

Touch-up paint - $338.54

576 The parties agree that painting was completed and did not require any touching up. However, the Owner's claim is for small amounts of the paint to enable her to carry out touch-up work if any of the painted surfaces should be damaged in future. She could not direct me to any contract document that entitled her to this item but said that it is not unusual for painters to leave left-over paint for this purpose for owners.

577 In circumstances where the Owner's case depends on very strict interpretation of the contracts, I find this claim surprising. There is no allowance for it.

Fees for new building permit - $496.40

578 There is no evidence that if the Builder had completed the work a new building permit would have been necessary. As the Owner repudiated the contract, there is no allowance for this item.

Additional credits sought by the Owner

579 For completeness, I consider these items that had not been considered elsewhere.

Front door - $750

580 The Owner notes that there is a prime cost item for $750. She claims that as she provided the door and door furniture, there should be a credit of this sum. It is noted that the specification under the first contract has an item on the third page:

> Front door, lock and handle has a total allowance of $750 Inc GST.

581 The Builder's response is that the Owner supplied a second hand door of poor quality that was warped and approximately 100 years old. He claims that the door required three days additional painting and extra time for carpenters to prepare and install special hardware supplied by the Owner. The builder claims that the allowance of $750 was on the assumption that a new door would be installed and that the work involved to rectify and install the old door and special door furniture was in excess of $750.

582 The item in the specification appears to be for materials rather than materials and labour. To this extent the Owner succeeds. However, I accept the Builder's evidence that installation of this particular door and door furniture was far more expensive than would have been contemplated at the time the first contract was entered.

583 I note that variation V281307 concerns the entry door jamb and highlight window, but there is no variation concerning the door itself. I accept the Builder's evidence that the amount allowed for supply of the door was credited to rectification of the door. I am satisfied that the outcome is fair one and make no allowance for this item.

Gate intercom - $1,800

584 On page 4 of the specification for the first contract there is an item:

> Gate intercom system has an allowance of $1800 Inc GST to supply and install. Please note that this allowance includes 1 x unit and gate area and 1 x unit at kitchen area.

585 The Owner states that this prime cost item was supplied and installed by her and is claiming a credit of the full amount allowed in the specification. The

Builder's evidence is that the item was supplied and installed by him and that the control was left in a kitchen drawer. He said the external and internal units were ready to be fitted into the housing at handover stage and that the electrician had been paid in full by the Builder. Mr Larsson said that the photograph at OTB636 shows that the intercom had not been installed. This photograph is in black and white and is insufficiently clear to enable me to determine whether I should prefer Mr Larsson's evidence or the Builder's evidence. As the Owner has the onus of proving this part of her claim, I cannot be satisfied that the intercom had not been installed with the exception of fitting the internal unit at handover stage.

586 I accept the Builder's evidence that there was no further sum payable by him to the electrician. I make no deduction for this item.

Remove and replace front wall for bins - $1,320

587 This is the third of the three items concerning which the Owner obtained expert advice from Mr Beadle. This item was included in the specifications for the first contract as "partial demolition of front brick fence to allow access for bins". Mr Beadle said that based on conversations by telephone with Mr Larsson and the Owner's solicitor, he allowed for the removal and replacement of 2 m wide of wall. No evidence was given about the necessary width of wall to be removed and replaced in order to allow bin access.

588 Mr Larsson gave evidence that this work was never done, or, in accordance with the Owner's final submission "there was a need to remove part of the wall other than for bin access". This item only appears in the first contract and is not in the second contract. There is no variation for it.

589 I prefer the Builder's evidence that part of the wall was taken down to enable access for bins and that it was rebuilt before the contract ended.

590 There is no deduction for this item.

Gas meter relocation

591 Mr Floreani said that there were problems at the front fence because the gas meter had to be moved about 300 to 400 mm. The gate had been widened and the gas authority were concerned about the proposed relocation. Mr Beck said that until that day he had been unaware of this problem and that work of this nature would be a variation.

592 Mr Floreani said that the work involved approximately half a day of plumber's time and would not have cost more than a few hundred dollars.

593 I accept the Builder's evidence that the gas meter relocation was the responsibility of the Owner. There is no allowance for this item.

Total deductions from the amount payable to the Builder

594 These items are the cost to the Builder of completing the works, which are deducted from the amount the Builder would otherwise receive:

Remaining Reece fittings	$999.37
Electrical fit off	$480.90
Downpipes	$250.00
Shower screen	$948.20
Plumbing fit off	$750.00
Rendering	$2,025.54
Site clean	$250.00
Door furniture and fit off	$250.00
Total deduction	$5,954.01

Owner's delay claims

595 The Owner claimed $1,071.43 for liquidated damages and $11,550 for general damages for late completion. As I have found that the Owner repudiated the contract and also that time for completion had not expired by that date, there is no allowance to the Owner for these items.

Project co-ordination outside replacement builder's obligations - $2,640

596 As I have found that the Owner repudiated the contracts, this work would have been unnecessary had the contract not been repudiated therefore there is no allowance for it.

RECONCILIATION OF THE CONTRACTS

597 Although I asked the parties to consider the contract separately, because so many of the items were intertwined, it is appropriate I consider the contracts together.

Original contract sums

First contract	$343,880.97
Second contract	$65,663.14

Other addition items

"Unclaimed work"	$3,646.70
"Other items" – bulkhead	$1,500.00
Delay costs	$1,178.43
Interest under the first contract	$755.07
Damage to Builder's locks and gates	$50.00
	$416,674.31

Deductions

Variations – agreed	-$20,543.62	
Deduction for incomplete items	-$5,954.01	
Total deductions		-$26,497.63

Total

Payable	$390,176.68
Amount paid	-$381,179.00
The Owner must pay the Builder	$8,997.68

COSTS AND INTEREST

598 Costs and interest (under the claim as distinct from under the contract) are reserved, with liberty to both parties to apply. The attention of both parties is drawn to ss109 and 115B of the *Victorian Civil and Administrative Tribunal Act 1998.*

SENIOR MEMBER M. LOTHIAN