VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1646/2017

CATCHWORDS

Domestic Building Contracts Act 1995: claims by builder for final payment and variations; mutual allegations of repudiation of contract; counterclaim by owner for general damages for delay; and damages for defects and incomplete work.

APPLICANT	Leader Homes Pty Ltd (ACN 142 557 908)
RESPONDENT	Venkata Talluri
WHERE HELD	Melbourne
BEFORE	Member C. Edquist
HEARING TYPE	Hearing
DATE OF HEARING	25, 26 and 27 March and 10 April 2019
DATE OF ORDER	30 July 2019
CITATION	Leader Homes Pty Ltd v Talluri (Building and Property) [2019] VCAT 497

ORDERS

1. The Tribunal declares that the applicant is entitled to an award on its claim of $35,320.

2. The Tribunal also declares that the respondent has been successful on his counterclaim to the extent of at least $23,637.70 in respect of damages for defects and incomplete works, and that the respondent has an entitlement to delay damages which is yet to be quantified.

3. **The proceeding is listed for a further hearing at 10.00 a.m. on 3 September 2019 at 55 King Street Melbourne, before Member Edquist, with an allowance of half a day.**

4. At the further hearing the Tribunal will hear submissions regarding the quantification of the respondent's claim for damages.

5. **By 4.00 p.m. on 16 August 2019** the respondent must file and serve affidavit material in respect of its claim for damages for delay.

6. **By 4.00 p.m. on 30 August 2019** the applicant must file and serve response affidavit material in respect of the respondent's claim for damages for delay.

7. At the further hearing the Tribunal will also hear submissions regarding interest, and costs under s 109 of the *Victorian Civil and Administrative Tribunal Act 1998* and reimbursement of fees under s 115B of that Act.

8. **By 4.00 pm on 30 August 2019**, the Applicant and the Respondent must file and serve submissions regarding interest. Any such submissions must identify:

   (a) each sum in respect of what interest is claimed;
   (b) the date from which interest is claimed;
   (c) the date to which interest is claimed;
   (d) the applicable rate or rates of interest; and
   (e) the relevant calculations, demonstrated if convenient by appending a printout of calculations from a reputable interest calculating website.

9. As the entitlement of the applicant under its claim is to be set off against the entitlement of the respondent under his counterclaim when it is ultimately quantified, no order for payment of money by one party to the other will be made before the conclusion of the further hearing.

10. **By 4.00 p.m. on 16 August 2019** the applicant must deliver to the respondent the warranty documents for the appliances installed at the respondent's property, which are in the possession of the applicant.

11. **By 4.00 p.m. on 16 August 2019** the applicant must deliver to the respondent the garage remote and keys to the windows at the respondent's property at 64 Woodlea Boulevard, Rockbank ,Victoria.

12. The respondent must pay any hearing fee payable in respect of the further hearing. That fee, like other fees paid by the parties, may be the subject of an application for reimbursement in due course.

MEMBER C. EDQUIST

APPEARANCES:

For Applicant:	Mr F. Brimfield, of Counsel
For Respondent:	Mr Joshi, Solicitor

REASONS

INTRODUCTION

1 Mr Talluri owns a property at Woodlea Boulevard, Rockbank, Victoria ("**the property"**). In order to develop the property, he entered into a major domestic building contract dated 26 May 2016 ("**the contract"**) with Leader Homes Pty Ltd (ACN 142 557 908) ("**Leader Homes"**)

2 The contract price was $250,000. After the formation of the contract, the contract was allegedly varied in a number of respects.

3 Under the contract, Leader Homes was due to complete by 310 days of commencement. The Relevant Building Surveyor Mr Adnan Ramadan ("**the RBS"**) carried out an inspection of the property on 27 April 2017, and on 10 May 2017 issued an Occupancy Permit.

4 On 10 May 2017, Leader Homes issued its final claim to Mr Talluri in the sum of $25,000. Mr Talluri failed to pay the final claim, but on 24 November 2017 took possession of the property anyway and changed the locks.

Leader Homes's first claim

5 Leader Homes instituted proceedings, seeking damages for breach of contract. In points of claim filed in December 2017, Leader Homes asserted that Mr Talluri had breached the contract by failing to grant it an irrevocable licence to "free and uninterrupted access" to the property, withdrawing such access, refusing to pay all money due and owing under the contract, and taking possession of the property without paying the final claim without its prior written consent. Leader Homes sought damages of $30,000 in respect of the final claim of $25,000, and $4,500 in respect of a variation to supply and install an exposed aggregate concrete pathway ("**the Pathway Variation**") and $500 in respect of a variation to supply and install tiles to the shower bases in 2 bathrooms ("**the Shower Base Variation**"). A variation to supply and install Ultra Glazed cabinetry to the laundry ("**the Laundry Cabinet Variation**") was referred to but was not directly claimed as it had not been invoiced. However, an alternative claim was made in quantum meruit in respect of the works completed beyond the fixing stage, the Pathway Variation, the Shower Base Variation and the Laundry Cabinet variation. A fair and reasonable value for these works was put at $33,415.50 inclusive of GST.

Leader Homes's amended claim

6 Leader Homes filed amended points of claim in August 2018. The substantive change made was that Leader Homes claimed for a number of further variations, valued in total at $32,835. This valuation was based on a report provided by Trevor Jeffery dated 30 May 2018.

Mr Talluri's counterclaim

7 Mr Talluri made a counterclaim. Mr Talluri filed points of counterclaim in March 2018 in which he alleged that Leader Homes had failed to carry out the contract works in a proper and workmanlike manner and in accordance with all laws and legal requirements, and to use materials and goods suitable for purpose. The cost of rectifying these issues was put at $80,494, as particularised in a report prepared by Andrew Stuart Smith dated 22 February 2018. Other claims were made including claims that:

(a) a Bellini dishwasher which has not been installed, quantified at $449; and

(b) Leader Homes failed to contribute to the cost of the fence on the east side of the property quantified at $799.70. By way of completeness it is noted that Mr Talluri also contended that he was compelled to obtain certification of appliances by a private plumber at the cost of $1,500, but this claim was withdrawn at the start of the hearing.

(c) Leader Homes failed to provide warranty documents for the appliances installed at the property; and

(d) Leader Homes had failed to provide the garage remote and keys to the windows of the property.

8 Mr Talluri filed an amended counterclaim in October 2018. The substantive changes were:

(a) the cost of rectifying the issues identified in Mr Smith's report was reduced to $79,129;

(b) a claim that had been made regarding an alleged failure by the builder to install a hot water unit was withdrawn;

(c) the claim relating to the provision of a concrete slab suitable for an inappropriate soil classification was withdrawn;

(d) Mr Talluri claimed that the builder had failed to install a garage door of the correct colour, and sought damages of $1,540 inclusive of GST in respect of this item.

(e) a new claim was made relating to the cost of $1,615 to Mr Talluri of attending to certain items to make the property compliant with the requirements of the developer of the suburb in which the property is located, Woodlea.

(f) Mr Talluri asserted that due to Leader Homes's failure to complete the defects on time and accordingly handover the property, he suffered loss by way of interest on a loan, council rates and water rates without having had the benefit of occupation of the property between 18 May 2017-18 November 2018. This loss was put at $7,902.61.

9 At the start of the hearing the sum for defects claimed by Mr Talluri on the basis of Mr Smith's report was adjusted downwards from $79,129 to $76,929, by the exclusion of fees claimed by Mr Smith. It was properly

conceded that these fees would have to be dealt with as costs. Despite this change, the total claims pressed by Mr Talluri at the start of the hearing still stood at approximately $90,000.

10 At the hearing, a claim by Mr Talluri for a contribution from Leader Homes in respect of the west fence of $874 was re-enlivened.

THE HEARING

11 The hearing came on before me on 25 March 2019. Leader Homes was represented by Mr Brimfield of Counsel, and Mr Talluri was represented by his solicitor, Mr Joshi. The hearing continued over the following two days. There was a fourth day of hearing on 10 April 2019 during which final submissions were made. A site inspection occurred on the morning of the second day.

12 The hearing was significantly expedited by the fact that the director of Leader Homes, Mr Tekin Mailmail, had prepared a primary witness statement, and Mr Talluri had prepared a primary witness statement. Mr Mailmail also prepared a supplementary witness statement after he had seen Mr Talluri's statement. Leader Homes also called a cabinet maker, Mr Ihshan Daner, who adopted a witness statement he had prepared.

13 Expert witnesses were called in relation to Mr Talluri's counterclaim, which related to the cost of rectifying defects. Mr Talluri called Mr Smith. Mr Smith had produced successive reports, but adopted at the hearing the third of those reports, which was dated 30 October 2018. Mr Smith also put in a supplementary report during the running of the hearing, after the site inspection. Leader Homes called Mr Doug Turnbull in relation to the claim made by the Mr Talluri in relation to the porch and alfresco slabs, and otherwise relied on the evidence of a quantity surveyor/building consultant named Trevor Jeffery.

14 Mr Talluri was granted leave to have Mr Smith file a set of amended costings following the conclusion of the hearing. Mr Jeffery was allowed to file a supplementary report to take into account Mr Smith's new costings.

15 Regrettably, Mr Smith's final costings contained some arithmetic inconsistencies, which led to a further round of clarifying and response submissions. In addition, as there was uncertainty regarding Leader Homes's position regarding its obligation to contribute to fencing costs, it was given leave to clarify its position. Finally, Mr Talluri was given leave to file material relevant to the issue of whether a building permit would be required to allow him to carry out necessary rectification works. All these documents were filed and served within the allocated time limits.

THE ISSUES TO BE DETERMINED

16 It will be apparent from the above summary of the pleadings that a key issue was whether Mr Talluri breached the contract, thereby rendering himself liable to pay damages to Leader Homes .

17 On the other hand, if Leader Homes breached the contract by refusing to rectify defects and accordingly postponing handover, then Mr Talluri's claim for damages for delay must be dealt with.

18 Mr Talluri conceded that one way or another Leader Homes's final claim of $25,000 had to be taken into account. If it had become due and payable under the terms of the contract, as Leader Homes alleged, then the builder would be entitled to an order for payment of that sum plus interest, but any entitlement of Mr Talluri to damages could be set off against Leader Homes's entitlements. On the other side of the coin, if Leader Homes was not entitled to an order for immediate payment of the final claim, the value of the works performed by Leader Homes would still have to be taken into account in assessing Mr Talluri's entitlement to damages.

19 In addition to its claim for the final payment, Leader Homes pressed its claim for the Pathway Variation of $4,500, the Shower Base Variation of $500 and the Laundry Cabinetry Variation of $2,700 articulated in its original points of claim, and also insisted on payment of the further variations referred to in its amended points of claim valued at $32,835.

20 Mr Talluri's counterclaim was almost entirely concerned with defects. Each of the items of defective or incomplete work have to be examined in turn.

21 Finally, it will be necessary to resolve Mr Talluri's claim for damages arising out of the over-run of the contract in terms of time.

LEADER HOMES'S CLAIM THAT IT IS ENTITLED TO THE FINAL PAYMENT

22 The handover procedure in the contract is contained in clause 17. It is necessary to analyse the clause in some detail in order to understand the steps taken to affect handover, and I understand why handover was never effected.

23 Clause 17.1 of the contract provides:

> On Completion, the Builder will give to the Owner the Final Claim; AND
>
> if a building permit was issued for the Works a copy of the Occupancy Permit, if required, or in any other case a copy of the certificate of final inspection, if required, AND
>
> a written notice;
>
> (i) stating that the Works are complete and the date on which the Works reached Completion; AND
>
> (ii) requesting a final inspection of the Works with the Owner at a date and time specified in the notice.

24 It is clear from other subclauses of clause 17 that the issuing of a notice that the works are complete, with a request for a final inspection of the works with the owner, is a precondition to further steps in clause 17 being activated. For instance, clause 17.2 provides that if the builder has proposed a date and time for a final inspection, the owner may require the builder to change the time. However, if the owner does not notify the builder of an

alternative time, then the owner will be taken to be available to attend the scheduled final inspection.

25 Furthermore, under clause 17.3, if the owner either personally or through an agent does not attend the arranged final inspection, the owner will be deemed to have agreed that the works have reached completion, and the final claim shall be payable.

26 Under clause 17.4, if there is a final inspection, and the owner agrees that no defects exist and that the works have reached completion, then the owner must:

- sign a notice to that effect, and
- pay the final claim.

27 On the other hand, under clause 17.5, if at the final inspection the owner claims defects exist, or the works are in any way incomplete or not in accordance with the plans and specifications, then the owner must at that inspection give the builder a written list specifying such items, and the owner and the builder must sign this list and each must retain a copy. Relevantly clause 17.5 contains this proviso:

> Notwithstanding the fact that the Builder signed the list provided by the Owner, the Builder's signature is not an admission that the alleged defect or incomplete items exist in the Works.

28 It is clear that the creation of a defects list under clause 17.5 is critical, because of the wording of clause 17.6, which provides:

> The Builder will complete any necessary outstanding items listed on the signed defects list as required by this Contract within twenty-one (21) Days or if any necessary Materials are unavailable, within a reasonable period after receiving a signed defects list under Clause 17.5.

29 The obligation of the owner to pay the final claim is made conditional upon completion of outstanding items by the builder under clause 17.7, which provides:

> Upon completion of all necessary outstanding items stated in the defects list given under Clause 17.5 the Owner will pay the Final Claim to the Builder in accordance with Item 13 of the Appendix.

30 The importance of the owner paying the final claim is highlighted by clause 17.8, which is addressed below, at [52].

31 From a plain reading of clause 17.8, it appears that Mr Talluri would have become obligated to pay Leader Homes once he had taken possession or received the keys, unless he had obtained the builder's written consent to take possession, or had otherwise become entitled to do so under the contract or at law. I accordingly reject Mr Talluris' argument that the clause does not support Leader Homes's position.

Did the parties comply with clause 17?

32 Mr Talluri inspected the property with Mr Mailmail on 26 April 2017. The work was not completed at this point, and the owner sent an email to express his dissatisfaction. Importantly, he listed a number of defects he had identified in the works, including the front piers. He noted that these were clearly undersized, and were not brick piers as specified,

33 Mr Talluri arranged for an inspection to be carried out by an independent consultant, Mr Darren Love of Darbecca on 16 May 2017. Mr Love issued a report ("**the Darbecca report**") bearing this date. It seems that Mr Talluri did not appreciate the significance of this report, because he did not exhibit it to his witness statement even though he exhibited an email dated 16 May 2017 that confirmed that the inspection had taken place. However, the Darbecca report was referred to in evidence, and ultimately tendered. Mr Love was not called as a witness to be cross-examined about the observations he made in the report, but this did not constitute a denial of natural justice to the builder because the owner was not prosecuting its case on the basis of Mr Love's findings.

34 Leader Homes conceded that the Darbecca report constituted the defects' report contemplated by clause 17.5 of the contract. This concession was made notwithstanding that the report appears to have been produced *after* the site inspection. It certainly was not signed by both the owner and the builder as required by clause 17.5. Indeed, it could not have been signed by Mr Mailmail, as he did not attend the inspection with Mr Love, and Mr Love accordingly had no option but to look at the house from the outside only.

35 The Darbecca report recorded that the front piers had not been constructed in accordance with the contract. Mr Talluri does not need to rely on the report to establish this defect, however, as it was conceded by Leader Homes at the hearing.

The builder's response to the Darbecca report

36 Mr Mailmail gave evidence that he spoke to Mr Talluri about the Darbecca report, and said he rejected it as the defects alleged had not been assessed against the relevant Australian Standards. He also said that the owner indicated that he could not return to the site unless he was prepared to carry out rectification of the defects identified.

37 Mr Talluri did not refer to any conversation of this nature in his witness statement. As it is part of the builder's case that Mr Talluri repudiated the contract by failing to grant it an irrevocable licence to free and uninterrupted access to the property, alternatively withdrew free and uninterrupted access to the property, I must make a finding on the point.

38 In closing submissions, it was pointed out that Mr Mailmail's response to Mr Talluri's first expression of concern about defects was negative. Reference was made to the owner's lengthy email of 27 April 2017 in which he highlighted over two pages a number of defects in the property.

Reference was also made to Mr Mailmail's email in response of 28 April 2017, which bluntly referred the owner to the building contract. It was asserted that the plans and engineering documents clearly showed what had been built. Emphasis was placed by Mr Talluri on this passage:

> What has been agreed on by the contract and what has been given to you, is more than what has originally been negotiated. The agreed price was on 28 squares, however 28.67 squares has been built, therefore I'll re-amend the invoice and send you the variation you have to pay along with the final invoice before handing the property over.

39 Mr Talluri pointed out that Mr Mailmail's response to the assertion of the existence of defects was aggressive. He threatened retaliation in the form of a variation. The owner's concern was not lessened by the penultimate paragraph in this email, which was:

> In the event invoices are not paid in full or your refusing to take handover of the property which appliance have been installed on the day of the final inspection, I'll be engaging legal action against you in order to recover all costs associated. (Sic)

40 Mr Talluri was clearly not intimidated by this aggression. On 28 April 2017 he responded to Mr Mailmail's email. He complained about the delay in completing the building. He set out in a table the invoices that had been rendered by Leader Homes indicating when they had been paid, in order to refute an allegation that had been made by Mr Mailman that he was a slow payer. He addressed a dispute that had arisen about the gas service line. And he confirmed that the builder had agreed to build 28.67 squares for the contract sum of $250,000.

41 Soon after this, Mr Talluri emailed Mr Mailmail requesting another inspection, this time by an independent inspector. The builder responded by email dated 10 May 2017 confirming that he was available for the further inspection. However, he enclosed with this email an invoice for variations totalling $5,000 inclusive of GST. The variations referred to were for the aggregate pathway and the installation of tile shower bases in 2 bathrooms .

42 It appears that the inspection with the "Independent Inspector" (clearly Mr Love) was booked for 16 May 2017. It also appears from an email sent by Mr Talluri to Mr Mailmail that evening that Mr Mailman had not attended at the site, and an interior inspection could not take place.

43 What is notable about Leader Homes' correspondence during this period is that it remained absolutely silent about any commitment to return to site to carry out defects.

44 In the circumstances, I do not accept Mr Mailman's evidence that the reason he did not attend to any rectification work was that he had had his access revoked. There is no correspondence to this effect. Mr Talluri's email 20 on 24 April 2017, which first drew the builder's attention to the existence of defects, ended with this request:

> This time please finish all the work and confirm us final date and give a appointment for final inspection. This time **private inspector** will be inspecting on behalf of us.

45 From this email it is clear that Mr Talluri wanted Mr Mailmail to honour his contract and rectify defects.

46 On the other hand, it appears from the contents of Mr Mailmail's correspondence that he was almost outraged at the suggestion that there were defects in his work. The fact that Mr Mailmail was not prepared to attend a joint inspection with Mr Love, even though he had agreed to do so "in good faith", further evinced an intention not to take the complaints about defects seriously.

47 There was no evidence that Mr Mailmail was visibly deprived of access. He held keys to the property, and continued to control access to the property until the locks were changed in November 2017. There was no suggestion that Mr Talluri in any way barricaded the property to render access impossible. On the contrary, I think the evidence strongly suggests, and I find, that it was Mr Mailmail who was refusing to return to the site to carry out further work.

48 In all the circumstances, I find against Leader Homes in respect of the contention that its access to the site was withdrawn.

49 There was also no suggestion that prior to the dispute about defects arising, Mr Talluri had failed to give Leader Homes free and uninterrupted access to the property. I accordingly find against Leader Homes in respect of that particular contention.

The owner's obligation to pay the final claim

50 As noted above, Mr Talluri's obligation to pay the final claim was governed by clause 17.7. He was obligated to pay the final claim once "any necessary outstanding items" had been rectified by the builder.

51 As Leader Homes refused or neglected to rectify any outstanding items, even the front piers which it conceded at the hearing were defective, I find that Mr Talluri was under no obligation to pay the final claim until the stand-off between him and the builder about defects was resolved.

How could the impasse between the owner and the builder have been resolved?

52 The impasse between Mr Talluri and Leader Homes could have been resolved, and ultimately was resolved, by Mr Talluri taking possession of the property.

53 However, taking possession was not without consequence, as Mr Talluri was no doubt aware. Specifically, clause 17.8 per of the contract provides:

> The Owner will not take Possession of the Works or any portion of the Works and will not be entitled to the keys to the Works prior to payment to the Builder of the Final claim;

UNLESS

The Owner has obtained the Builder's written consent to take Possession; OR

is otherwise entitled to do so under this Contract or at law.

54 Mr Talluri did not proceed with undue haste, but he was concerned to resolve the situation. He deposed at [35] of his statement:

> In order to expedite speedy resolution and given my past experience with Gultekin (Mr Mailmail) I also lodged an application with DBDRV.

55 The certificate of conciliation issued by DBDRV evidences that the dispute was not resolved because the parties were unable to reach agreement at the conciliation conference, which was held on 17 October 2017. It was only after the dispute failed to resolve at DBDRV that Mr Talluri unilaterally took possession of the property and changed the locks. He explained this action at [37] of his statement in these terms:

> As I was expecting that the house will be ready by June 2018, I had given 2 months notice in April 2018 to my landlord. Due to delay in handover I delayed vacating the rental property and extended it month by month. For almost a year I was paying rent, mortgage, utility charges for both houses, council rates and water rates. As I am [a] single income earner I was under extreme financial stress and therefore I was left no option but to take over possession of the property on 29 November 2018. (Sic)

56 It is to be noted that Mr Talluri, at [37] of his statement, says he took possession on 29 November 2018. He clarified this date to be 29 November 2017 in oral evidence. Mr Mailman quibbles with this date, suggesting in his first witness statement at [25] that the owner took possession on about 24 November 2017.

The obligation of the owner to pay the final payment upon taking possession

57 At the hearing, the Tribunal's decision in *Knight v Marras*[1] was discussed. The relevance of this decision was that it concerned an amended version of the MBA standard form major domestic building contract. Clause 17 in the contract in that particular case was very similar to the clause 17 contained in the contract made between Leader Homes and Mr Talluri in the present case, which was also an amended MBA standard form major domestic building contract. In particular, clause 78 in the contract under consideration in *Knight v Marras* was effectively identical to that in the present case. At [56] of *Knight v Marras*, the Tribunal stated:

> From a plain reading of clause 17.8, it appears that the owner becomes obligated to pay the builder once the owner has taken possession or received the keys, unless the owner has obtained the builder's written

[1] [2018] VCAT 1046.

> consent to take possession, or is otherwise entitled to do so under the contract or at law. …

58 Leader Homes submitted that the construction given to clause 17.8 in *Knight v Marras* was correct. Mr Joshi did not convince me that it was not. I accordingly propose to adopt it in the present case.

59 Mr Talluri did not contend that he had Leader Homes's permission to take possession on 29 November 2018. On the contrary, the builder had made it plain to the owner by its email of 10 May 2017 that if the invoices (that is to say the final payment and the variation invoice enclosed with the email) were not paid in full "no possession of the property will be granted". Furthermore, Mr Talluri did not contend that he was otherwise entitled to possession under the contract or at law.

60 Accordingly, following the interpretation of clause 17.8 articulated in *Knight v Marras* I find that upon taking possession, Mr Talluri became obligated to pay the final claim.

61 This finding is made, notwithstanding that both Mr Talluri and Mr Mailmail are both aware that the brick piers, at least have to be rectified. The reason is that, as was explained in *Knight v Marras* at [72]:

> [T]he obligation to pay created by clause 17.8 co-exists with, but is separate to, the owner's entitlement to have defects rectified, or if the builder refuses to rectify them, to bring a claim for defective work.

Was the owner in breach of the contract for taking possession and then not paying the final claim once the obligation to do so had arisen under clause 17.8?

62 As found, on taking possession Mr Talluri became liable to pay the final claim. It follows that, when he did not pay the final claim, Mr Talluri breached the contract.

Leader Homes' contention that Mr Talluri repudiated the contract?

63 Although Leader Homes in its amended points of claim asserted that Mr Talluri had breached the contract in four specific ways, alternatively by evincing an intention to be no longer bound by the terms of the contract, it was not asserted that Mr Talluri had repudiated the contract.

64 That Leader Homes was asserting repudiation became clear only in its final submissions, when it was contended by Mr Brimfield that the owner had repudiated the contract by a *combination* of three different courses of action. These were:

(a) refusing to allow the builder on-site to fix defects unless all defects were fixed;

(b) refusing to pay the final claim; and

(c) taking possession of the works without having paid the final claim.

Did Mr Talluri repudiate the contract?

65 Under clause 22.1 of the general conditions of contract, Leader Homes would have been entitled to serve notice of intention to terminate the contract in respect of any alleged breach of contract by Mr Talluri. However, the builder did not issue any such notice. Accordingly, the builder must be relying on an entitlement at common-law to terminate the contract on the basis that the owner had evinced an intention not to be bound by the terms of the contract.

First finding regarding repudiation

66 Leader Homes's argument regarding repudiation appears to rely on the simultaneous adoption by Mr Talluri, of three courses of action, namely the alleged revocation of the contractual licence of access to the site, the failure to make the final payment, and taking possession of the works without the prior consent of the builder prior to making the final payment.

67 I have rejected above Leader Homes's argument on the first point.[2] As it appears to be insisting that Mr Talluri's behaviour must be looked at holistically, the builder's argument must fail.

68 However, lest I misunderstand the builder's position, and it maintains that it can still assert common law repudiation even though it has lost on the first point, I turn to address the other two points. In my view, they must be dealt with together, because on my analysis of clause 17 of the contract, a failure to pay the final claim is not necessarily a breach of the contract. There is only breach of contract if the obligation to pay the final claim has arisen. For this reason, the issue I must now consider is whether Mr Talluri repudiated the contract by taking possession of the works without paying the final claim.

Findings regarding second and third contentions taken together

69 Mr Joshi contended on behalf of Mr Talluri that he could not have repudiated the contract by taking possession of the works even without making payment of the final claim, because of clause 17.9 which provides:

> If the Owner takes Possession of the Works or any portion of the Works where not entitled to do so under this Contract or at law, the owner will be liable to the builder for any loss or damage resulting therefrom.

70 Mr Joshi's argument was centred on the words "where not entitled to do so under this Contract or at law". He submitted that because the clause contemplated taking possession without entitlement, such taking of possession could not constitute a repudiation of the contract.

71 In my view, clause 17.9 is concerned with the transfer of risk in the works once the owner takes possession. Such an interpretation is consistent with clause 17.11, which provides

[2] See paragraphs 44-48 above

> Upon the Owner taking Possession of the Works, the Owner will maintain the Works in a good, fit and proper condition for the duration that the Owner remains in Possession of the Works for a period not exceeding ten (10) years.

72 However, I accept Mr Joshi's submission. Clause 17.9 contains an acknowledgement that there are circumstances where the owner might take possession of the works without making payment of the final claim. This acknowledgement means that in taking possession in such circumstances the owner is not evincing an intention not to be bound by the terms of the contract, precisely because the owner is behaving in a manner contemplated by the contract. This remains the case even though, independently of clause 17.9, the owner has come under an obligation to pay the final payment through the operation of clause 17.8.

73 I accordingly conclude that the owner did not repudiate the contract merely by taking possession even though the final claim had not been paid.

Mr Talluri's fallback argument

74 If I am wrong about this conclusion, I note that in any event, under clause 22.3 of the contract, the builder may not terminate the contract unreasonably or vexatiously if the builder itself is in substantial breach of the contract.

75 There is an argument that Leader Homes was not in substantial breach of the contract by reason of refusing to remedy defective work. This argument is based on clause 20.1 of the contract, which appears to draw a distinction between a number of specified breaches of the contract, including a refusal to remedy defective work, and a substantial breach of the contract. (My emphasis).

76 However, I consider that in refusing to return to the site to undertake any rectification work of a clear and significant defect such as the undersizing of the front piers, which Leader Homes conceded existed, it was acting unreasonably.

77 Mr Talluri's failure to pay the final claim was directly related to Leader Homes's refusal to rectify defects including the front piers. I accordingly consider that any attempt by the builder to bring the contract to an end relying on an alleged repudiation in these circumstances would be unreasonable, and hence ineffective. I find Leader Homes did not lawfully terminate the contract by reason of the owner's alleged repudiation.

LEADER HOMES REPUDIATED THE CONTRACT

78 I have found that Leader Homes was responsible for the stand-off with Mr Talluri because it refused to return to site to carry out any defect rectification at all. Because Leader Homes had an obligation to rectify "all necessary outstanding items", its failure to rectify the front piers, at least, constituted a breach of the contract. I accordingly find that Mr Talluri

lawfully ended the contract for the builder's breach. This makes it necessary to consider Mr Talluri's claim for damages for delay.

MR TALLURI'S CLAIM FOR DAMAGES FOR DELAY

79 Mr Talluri contends that Leader Homes's breach of the contract in refusing to rectify any defects at all led to a delay in handover, which did not take place until 29 November 2017.

80 Mr Talluri, at [38] of his witness statement, asserts that he suffered loss by way of interest on a loan, council rates, water rates and electricity bills without having the benefit of occupation of the property for the period 18 May 2017, being the date of the occupancy permit, to 18 November 2018, totalling $7,902.61.

Leader Homes's defences

81 Leader Homes did not question Mr Talluri's figures specifically, but contested liability on three legal bases. It also had a fallback factual argument. The first legal point is that there was no relevant breach of contract. The second is that the owner failed to mitigate his loss, by not taking occupation earlier than 18 November 2017. The third is that the claims are too remote, and are not recoverable having regard to the second limb of the rule in *Hadley v Baxendale*. I now consider these legal defences in turn.

No relevant breach of contract?

82 According to Mr Talluri's pleading, the relevant breach was the Leader Homes' "failure to complete the defects on time and handover the property".

83 I find that Mr Talluri has established a relevant breach of contract, as the operation of the contract creates the relevant nexus between the failure of the builder to complete the defects on time and the late handover of the property. Specifically, clause 17.7 provides that the owner's obligation to pay the final claim arises upon completion of "all necessary outstanding items" on the defects list which came into existence after the final inspection under clause 17.5. Leader Homes conceded that the Darbecca report constituted the defects list, even though it was not signed by Mr Talluri and it at the final inspection. The refusal of the builder to attend to any of the items on the defects list constituted a breach of contract by Leader Homes which renders it liable for damages to Mr Talluri.

Failure to mitigate

84 Leader Homes's argument is that Mr Talluri could have resolved the stalemate by making payment of the final claim, and taking possession at a point much earlier than November 2017.

85 Mr Talluri's response was to acknowledge that he could have resolved the impasse by taking possession of the works, as he ultimately did, but that he wanted to resolve the dispute using the correct procedure first. Accordingly,

he took the builder to DBDRV. It was only after the unsuccessful conciliation conference in October 2017 that he resolved to break the impasse by taking possession.

86 I accept Mr Talluri's evidence on this point. I consider that it was appropriate for him to attempt to resolve the dispute by following the DBDRV dispute procedure, and he is not to be financially prejudiced by having done so.

87 Following the unsuccessful DBDRV process, it was reasonable for Mr Talluri to wait several weeks before taking possession unilaterally. Mr Talluri did not give specific evidence about the short period of delay before he changed the locks and took possession, but he had given evidence that his family was living in alternative accommodation on a tenancy from month-to-month, and it is reasonable to infer that notice had to be given before that tenancy was vacated.

88 I find that Mr Talluri did not fail to mitigate his loss, as contended by Leader Homes.

Losses too remote to be recovered under the second limb of the rule in *Hadley v Baxendale*

89 Mr Brimfield did not fully articulate his argument, but it is clear that he was referring to the rule regarding recovery of damages articulated by Baron Alderson in the famous case of *Hadley v Baxendale*[3] as follows:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract.

90 *Hadley v Baxendale* is usually cited to support the proposition that damages for breach of contract fall into two classes, namely direct damages, and special or indirect damages. In his final submissions, Mr Brimfield

[3] (1854) 9 EXCH 341

confirmed the argument he was advancing was that the losses of the type complained of by Mr Talluri fell into the second class of damages, and were too remote to be recoverable.

91 I reject this argument. The contract made between Mr Talluri and Leader Homes was for the construction of a house. A house is an economic asset. It is made to be occupied. If it is occupied by its owner, then the owner will bear the burden of having to pay any mortgage over the property together with rates, taxes and insurance premiums associated with the property. However, the owner will not have to pay rent elsewhere. On the other hand, if an owner occupier is deprived of possession of their house because handover is delayed by reason of any breach of contract on the part of the builder, the owner will have to pay rent for alternative accommodation. In my view, this expense is entirely foreseeable in the usual course of things, and accordingly falls squarely within the category of direct damages contemplated by the first limb of the rule in *Hadley v Baxendale.*

92 I accordingly hold that Mr Talluri is entitled to recover damages. However, the damages are not in respect of mortgage payments, council rates, water rates and electricity bills, as claimed, but in respect of alternative accommodation.

The factual defence based on time

93 I have acknowledged that Leader Homes raised a fallback argument. This is that even if the claim for damages is legally made out, the relevant delay should be measured not from May 2007, but from the date upon which it should have completed the contract works, as completion would have triggered the obligation to hand over the works.

94 I accept this argument. I now turn to an assessment of the date upon which Leader Homes should have completed the works.

95 Pursuant to clause 8.1 of the contract, the builder must do everything that is reasonably possible to ensure that the construction of the works will start within 14 days of receipt of relevant documents including valid and current building and planning permits. This issue was discussed at the hearing, and I was referred to the building permit which was issued on 18 August 2016. Leader Homes contended that it was obligated to commence work within 14 days after this. I accept this contention, and find that the work should have commenced on 1 September 2016.

96 Under the contract, Leader Homes's obligation was to complete the works by the completion date, which is calculated by reference to the actual commencement date and the construction period set out in Item 9.2K of the appendix. The construction period allowed was 210 days. 100 total delay days were identified in the schedule to the contract. The total allowance for construction was, accordingly, 310 days. Mr Brimfield on behalf of the builder indicated that this resulted in a completion date of 8 July 2017. This date was conceded by Mr Joshi on behalf of the owner at the hearing.

97 As a result of this concession, Mr Talluri's claim for delay damages was adjusted, so that the relevant figures were to be assessed between 8 July 2017 and 18 November 2017.

98 I have found above that Mr Talluri's has suffered a financial loss in the nature of rent for alternative accommodation. Damages in respect of this rent is recoverable by reason of Leader Homes' breach of contract in failing to rectify defects and make the property available to handover by the contract date. I have also found that the claim is to be assessed for the period 8 July 2017-18 November 2017. However, I note that although Mr Talluri deposed he was living with his family in rented accommodation, he did not give details of the rent that was paid.

Finding

99 In circumstances where:

(a) Mr Talluri has established an entitlement to damages, but

(b) Leader Homes's attack on the figures used by Mr Talluri as the basis for his delay claim was limited to questioning the period of time for which the figures should be applied, rather than their nature, I consider that this is an appropriate case to give leave to Mr Talluri to present further evidence regarding the cost of alternative accommodation in affidavit form. Relevant supporting documentation can be exhibited. In order to afford natural justice to Leader Homes, it will be given the opportunity to present its own evidence on the point, and to cross-examine Mr Talluri on his evidence.

THE COUNTERCLAIM / DEFECTS

100 Before turning to the alleged defects, it is convenient to address two preliminary matters. The first is this.

Relevance of Leader Homes's offer to rectify defects

101 In relation to a number of individual items, Mr Mailmail accepted liability, but advised that Leader Homes was ready, willing and able to fix the item.

102 The issue of termination of the contract has been discussed above. Having regard to the fact that the contract is at an end, the builder does not have a right to return to the site and fix any particular defect.

103 It was not suggested that the cost to Leader Homes of rectifying any defect was to be the measure of damages in respect of that item. If this submission had been made, I would have rejected it in any event. I have found that Leader Homes was the party in breach of the contract. Mr Talluri is entitled to be put in the same position that he would have been had the contract been properly performed by Leader Homes. He is entitled to have defects rectified by a third party, and he is entitled to an award of damages assessed on that basis.

104 The parties contested the case on the basis that in respect of any defect either Mr Jeffery's or Mr Smith's costing to rectify would be accepted. Quantification is, accordingly, approached on this basis.

105 This brings me to the second preliminary issue, which is the issue of the rates to be used in assessing the cost of rectification.

What rates are to be used in assessing the cost of rectification?

106 Different approaches to costings were taken by Mr Smith on behalf of Mr Talluri and Mr Jeffery on behalf of Leader Homes. Mr Smith gave evidence that he kept his own records regarding labour costs, based on the jobs with which he was involved each year. Where inflation was relevant he used figures based on those issued by the Bureau of Statistics. He noted that this is the same database that Rawlinsons use. To the basic hourly figures, he added allowances for leave, long service leave and tools of trade. He also made it clear that if a particular trade had to attend at site, an attendance for the whole day would be allowed, rather than for part of a day, as he suggested this reflected the reality of how trades charge.

107 Mr Jeffery on the other hand said he had extracted his trade range from the Rawlinson cost guide for housing, industrial and small commercial projects. Where appropriate, he used slightly higher rates. When questioned, he conceded that the rates have been applied on an hourly basis, not a daily basis.

108 The differences in rates established using these different methodologies was significant. Mr Smith's rates were set out at [9.2] in his report, and Mr Jeffery were set out at [3.3.1] of his report. For ease of analysis, the rates are set out as follows:

Category	Mr Smith's hourly rate	Mr Jeffery's hourly rate
The Carpenter	$85	$65
General trades	$84	Not stated
Labourer	$64	$55
Licensed trades	$80	Not stated
Painting & decorating	$72	$65
Electrician	$81	$75
Plumber	$80	$75

109 Although I regard the rates set out as proposed by Mr Smith to be on their face reasonable, I am concerned that he has based them on his own records which were not disclosed. Mr Jeffery's rates on the other hand were derived from a published guide, Rawlinsons, and I propose to adopt his rates set on the basis that they have been identified on the more transparent basis.

MARGINS

110 Mr Smith proposed an allowance of 10% for contingency. This was not attacked during the hearing, and I will allow it. Mr Smith also proposed a margin of 25%. Again, this was not attacked at the hearing, and I will allow it. I note that the total of the contingency and margin is 35%, which is not an unusual total loading to be sought in a domestic building case at the Tribunal.

111 Now the relevant rates and margin have been identified, I turn to the individual defects.

DEFECTS

Item No 1-The roof

112 Mr Talluri's allegation was that the roof had been installed in the wrong colour. Architectural Drawing A3 shows the charcoal grey roof tiles are to be used. The roof installed was brown.

113 Mr Talluri's contention was that Leader Homes who had built the house next door had mistakenly put the next door's roof of his house, and vice versa.

114 Mr Mailmail vigorously disputed this. He said that Mr Talluri was concerned that there would be too much grey if the roof was installed as charcoal. Mr Talluri had sent a text saying that he was thinking of a brown roof. He then sent a picture of a roof specifying a particular colour.

115 Mr Mailmail said that he could not supply this particular roof because it was terracotta, and the specified roofing tile was concrete. He dropped off a sample of a brown concrete tile at Mr Talluri's home and said that Mr Talluri, by telephone, approved its use.

116 Mr Talluri disputed this and said that if terracotta tiles could not be used, then he wanted charcoal grey tiles.

117 I find that Leader Homes' position is consistent with the limited documentary evidence which is available.

118 Mr Talluri fails in respect of this particular claim.

Items No 2 & 5 - Front porch and al fresco concrete slabs

119 The issue here is that Mr Smith contended that Building Permit Architectural Drawing No. A2 and Structural Drawing S2 both show that slabs to the rear Al Fresco and the Front Porch area of the house are to be 100 mm thick infill slabs. If this contention is right, then the slabs which have been constructed are non-conforming because they have been constructed as paving. They are granulated, and they sloped, and they may not be 100 mm thick.

120 The primary expert called by Leader Homes in respect of this defect was Mr Doug Turnbull, a consulting engineer. On this issue, Mr Jeffery deferred to Mr Turnbull's expertise.

121 Mr Smith contended that the shading on the plan indicated that the paving was to be on the same level as the house slab. This particular point was rejected by both Mr Turnbull and Mr Jeffery.

122 Mr Turnbull gave evidence, and adopted the report that he had prepared in August 2018. The substance of his evidence was that:

> (a) Structural Drawing No. 2 does show that the Al Fresco and the Front Porch were to have "100 thick infill slab with SL82 Top, F'c = 25 MPa"; [see 9.2]
>
> (b) Architectural Drawing No. A 4 nominates "infill" to the Al Fresco and the Front Porch areas; [see 9.3]
>
> (c) It is acknowledged that Mr Smith's report shows a photo of the slab in the Al Fresco area with a comment that it is "sloping paving" which is not conformed to the Building Permit Drawings and that the report also shows a photo of the slab in the Front Porch area with the same comments; [see 9.4]

123 Mr Turnbull's opinion is that:

> the concrete slab provided as "*paving slabs*" are equivalent in structural form to the "*infill slabs*" nominated on the Building Permit Drawings. The actual thickness and reinforcement would need to be shown as non-equivalent to that specified to demonstrate non-conformance. Both "*infill slab*" and "*paving slab*" are terms relating to independent single thickness slabs which are not part of the building structural slab (a waffle slab). [see 9.5]

124 At the hearing, Mr Turnbull augmented his evidence by noting that the engineering drawing called for an infill slab within the meaning of AS2870. He said he found this confusing, as this Australian Standard is relevant to class A and Class S soils. However, this house is on a Class H site, where the soils are highly reactive. AS 2870 is not relevant. In his view, the paving slabs are appropriate for their setting.

125 Mr Smith also gave oral evidence at the hearing about the slab. He highlighted that Mr Jeffery had conceded that the slabs were not constructed with the required 100 mm thickness. I accept this point, and find that the slab did not conform to the drawings. They accordingly required rectification.

126 Mr Smith said rectification involved complete demolition and reconstruction of the porch slabs. I do not accept this is the case. Mr Turnbull's evidence at the hearing was that the slabs are fit for purpose, that is to say, fit to be used by people and bikes.

127 Mr Jeffery opined at [3.3.2] of his report that:

> If it is found that the Owner's claim has merit then a suitable solution would be to chip the surface of the installed slabs to provide a bond for a new topping slab that will provide the required concrete look of a paving slab.

128 I accept Mr Jeffery's contention that the creation of a topping slab is an appropriate mode of rectification. This is a significant conclusion, because it obviates the need to discuss in detail Mr Smith's supplementary costings, prepared following the site inspection on the second day of the hearing, that partitioned the costs relating to the porch slab, the porch foundation and the alfresco slab. It also makes it unnecessary to consider the subsequent attack on those costings made by Leader Homes in its supplementary submissions.

129 The only point I make about that exchange is that Mr Smith argued in a one-page submission, filed in response to the builder's supplementary submission, that his costing of 30 October 2018 had been based on the information provided at that time. The later costing included a separate costing for demolition and reconstruction of the porch foundations, which had been identified as an issue.

130 Leader Homes's position regarding the foundations, put at the hearing and confirmed in a supplementary submission, is that the need to demolish and replace the foundations was not established by evidence. It was highlighted that Mr Smith had conceded that any issue with the foundations could not be confirmed until demolition had taken place. I accept this argument, and make no allowance for the demolition and reconstruction of the porch footings.

131 I turn again to Mr Jeffery's assessment of the cost of rectifying the front porch and alfresco slabs. He stated at [3.3.2]:

> The cost to provide a 50mm topping slab including chipping the existing slab will be in the order of $45 per cubic metre therefore the cost of changes that would be 22 to cubic metres at $55 =$1,210.

132 I consider that this figure must be augmented by the addition of builder's margin of 25%. This margin takes the total to $1,512.50 which I round down to $1,500. Allowing for the addition of GST, I award Mr Talluri **$1,650** in respect of rectification of the slabs.

Item 4 - Porch brick piers

133 Mr Talluri asserted that the Architectural Drawing A2 and Structural Drawings S2 & S6 showed the piers were to be made of brick. Leader Homes conceded that they were not made of brick, but initially contended that this was not a serious non-compliance with the contract because an occupancy permit had been granted. At the hearing, liability for the defect was conceded. As to quantum, the amount assessed by Mr Jeffery was conceded. Reference to the schedule of Mr Jeffery's final report on costing indicates that he assesses the costs at $3,451.

134 Mr Smith in a supplementary report produced following the inspection on 27 March 2019, costed this particular item at $7,295 (inclusive of GST), including a contingency of 10% and a margin of 25%.

135 For the reasons given above at [105-108] I prefer Mr Jeffery's assessment of rates to Mr Smith's. However, the substantial difference between Mr Jeffery's total costing and that of Mr Smith cannot merely be attributed to

rates. Firstly, I consider that Mr Smith's scope more accurately reflects the works that will be required in removing and rebuilding the brick piers. In this regard, I refer to the allowance that has made for the bi of $750 to cover the cost of removal of 3m³ of rubble. Mr Jeffery allowed $210. I think Mr Smith's allowance is more realistic. Secondly, Mr Smith has allowed for a contingency of 10%, and a builder's margin of 25%, both of which I have indicated at [109] I will allow. Mr Jeffery contended for a contingency amount limited to 5%. Thirdly, Mr Smith also argued that second hand bricks would suffice as they are be rendered. This is true, but Mr Talluri is entitled to new bricks under the warranty implied by s 8(b) of the *Domestic Building Contracts Act 1995*.

136 Although I accept Mr Smith's scope of works, his assessment must be adjusted to allow for the application of Mr Jeffery's rates. The relevant calculations relate to bricklayers, labourers and renderers. Mr Smith allowed for 32 hours of bricklayer's work and none for a labourer. Mr Jeffery opined there was 12 hours' work for a bricklayer and 6 hours demolition work for a labourer. Mr Smith said there was 8 hours work for a renderer and Mr Jeffery agreed, but allowed a lower rate.

137 As I have said, I prefer Mr Smith's scope, but acknowledge that a labourer could do demolition and rubbish removal. I allow a day's work by a labourer at Mr Jeffery's rate of $55, a total of $440. This reduces the bricklayer's allowance to 24 hours. At Mr Jeffery's rate of $65, this comes to $1,560. 8 hours work by a renderer at Mr Jeffery s rate of $65 comes to $520. The total allowance for labour is, accordingly, $2,520.

138 Mr Smith allowed $100 for sand, cement and lime. He also allowed $440 for four cans of render, at $110 per 4L can. I regard these figures as reasonable. The total figure for materials is accordingly $540. I have already noted I accept Mr Smith's figure of $750 for bin hire.

139 The total figure for labour, materials and bin hire is $1,290. When the cost of labour is added in, the base cost of fixing the piers is assessed at $3,810. To this figure must be added contingency of 10% (rounded to $380) bringing the total to $3,840. I then add 25% for margin ($960), giving a new subtotal of $4,800. GST brings the grand total to **$5,280**.which I award to Mr Talluri for the brick piers.

Item 4A Building permit

140 Mr Talluri was given leave to submit materials in relation to the question of whether a building permit would be required to rectify the piers.

141 The material was duly filed. I was referred by Mr Talluri's solicitor to Rule 23 of the (Building Regulations) 2018. This provides:

> **Exemptions from building permits**
>
> A building permit is not required under the Act for the buildings and building work specified in column 2 of the Table in Schedule 3.

142 I was also referred to Item's 3 and 4 of Schedule 3.

Item 3 exempts repair, renewal or maintenance of a part of an existing building, if the building work:

> (a) will not adversely affect the structural soundness of the building, and does not include—
> (i) (not applicable)
> (ii) underpinning or replacement of footings
> (iii) the removal or alteration of any element of the building that is contributing to the support of any other element of the building; and
> (b) is done using materials commonly used for the same purpose as the material being replaced; and
> (c) (not applicable)
> (d) (not applicable)

143 Item 4 exempts alterations to a building, if the building work:

> (a) will not adversely affect the structural soundness of the building, and does not include—
> (not applicable)
> underpinning or replacement of footings; or
> (iii) the removal or alteration of any element of the building that is contributing to the support of any other element of the building; and
> (b) (not applicable
> (c) (not applicable)
> (d) (not applicable)
> (e) (not applicable)

144 I consider that Item 3 is engaged because the rectification of the piers will involve removal or alteration of an element of the building that is contributing to the support of another element of the building. I also consider that Item 4 is engaged for the same reason. I accordingly find that the claim for damages in respect of the building permit is made out.

145 Obtaining a building permit was costed by Mr Smith at $3,500. Mr Jeffery on the other hand costed a building permit for simple small building works with two inspections at $1,700. I note that neither party produced a quotation from a building surveyor. Having regard to the small scale of the job, I regard Mr Jeffery's estimate as more reasonable, and allow **$1,700** for this item.

Item 5 Sealing of paving slabs

146 Mr Smith contended in his primary report that in breach of AS372 7.1 2006, a flexible sealant had not been installed between the porch slab and the abutting structure (the dwelling). A similar claim was made in relation to other joints.

147 Leader Homes's defence was that the relevant Australian Standard was only a guide, and not mandatory.

148 I prefer Mr Smith's opinion that the Australian Standard must be adopted.

149 Mr Smith has allowed $1,785 for this item. The basic cost is a day's work by a labourer at $85 an hour ($680) plus $500 worth of sealant. To the base figures, contingency of 10% plus the builder's margin of 25% have been added.

150 I substitute Mr Jeffery's rate for a labourer at $55, and award $440 for 8 hours' labour. I prefer Mr Smith's assessment of materials of $500 over Mr Jeffery's suggested $200 for an 8 hour job. Labour and materials therefore come to $940. To this I add 10% ($94) for contingencies to achieve a subtotal of $1,034. I then add 25% for margin ($258.50) to arrive at a final figure of $1,292.50. I round this up slightly to $1,300 (as to do otherwise would be to suggest that the figure has been arrived at with scientific accuracy). Finally, I add GST of $130, and award **$1,430** to Mr Talluri in respect of this item.

Item 6 - Incomplete paving

151 This claim was withdrawn on the second day of the hearing, and no comment is required.

Item 8 - Timber beams front porch; Item 10-Timber beams near laundry porch; Item 11 -Timber beams near laundry porch #2; Item 12-Timber beams painting.

152 Mr Talluri's allegation regarding painting is that only undercoat paint had been applied to the beams.

153 Mr Jeffery's response to the allegation regarding the painting of the beams was that they had been painted with a topcoat.

154 The allegation that the beams had been painted in undercoat only was not substantiated by scraping back the paint to establish whether there was only one layer. However, I was satisfied from my inspection, on balance, that only an undercoat had been applied. Mr Talluri's allegation regarding painting accordingly is made out.

155 The other defects alleged by Mr Talluri were that the respective beams had not been trimmed in a workmanlike manner. These issues were pointed out by Mr Smith at the inspection, and were manifest.

156 In these circumstances, I allow all these claims.

157 Mr Smith addressed costings at section 6 of his report. In order to rectify the painting, he said that a painter at $72 an hour would be required for 8 hours. The total labour costs accordingly was $576. In addition, 4 x 4L cans of paint at $110 each would be required, a total of $440.

158 Subject to adopting Mr Jeffery's rate for a painter of $65 per hour, I accept these figures. The total allowance for labour is $520. I think Mr Jeffery's allowance for 10L of paint is too conservative. I allow the claim for $440 for paint, which brings the subtotal to $960.

159 I now turn to the carpentry aspect. Mr Smith allowed a day's work at $85 but Mr Jeffery contended 6 hours at $65 was appropriate. I allow 8 hours at $65, or $520. This brings the base cost to $1,480.

160 To this figure contingency of 10% is to be added, making a new subtotal of $1,628. When builder's margin of 25% or $407 is added, the subtotal is $2,035. Allowing for GST of $204, the grand total is $2,239. I round this up, and award **$2,250** to Mr Talluri in respect of Items 8, 10, 11 and 12.

Item 9 - Eaves opening

161 Mr Talluri's allegation was that there was a gap in the eaves near the laundry. Mr Mailmail acknowledged this, but said Leader Homes remained ready, willing and able to fix the defect. For the reason already explained, this offer is not relevant.

162 I deal with the claim substantively by noting that Mr Smith appears to have subsumed his costing of this item into the costing of the other beam issues, and so no separate award could be made in respect of this item, even if liability were to be established. I note that any separate award would have been minor in any event.

Item 13 – Painting of garage door

163 Mr Talluri's allegation here was not that the garage doors had been painted the wrong colour, but that they had been painted with undercoat only.

164 The builder disputes this, saying that the paint was not an undercoat, and had been painted to match the colour of the fascias and roof gutters.

165 From my observation at the inspection, I am not satisfied that undercoat only has been used. I accordingly disallow this aspect of Mr Taluri's claim. It is clear from the Scott Schedule that Mr Talluri is also complaining that the inside of the large garage door has not been painted. There is no separate costing by Mr Smith in respect of this item in his early reports. The cost was presumably wrapped up with other painting items, at [6] of his costings. Mr Smith in his final report of 27 March 2019 includes a separate costing for the item of $2,382. This includes an allowance for removing the door and sending it to the factory for repainting. I am not prepared to contemplate an award for this item, as to do so would be to deny Leader Homes natural justice. This costing, if it was to be considered, should have been proposed before the hearing. I allocate one hour to painting the rear of the large garage door left in position, and apply the painter's rate identified by Mr Jeffery of $65. I allow $35 for paint, to arrive at a base cost of $100. I add no contingency, as the scope of works is clear. However, I add builder's margin of 25% to arrive at a subtotal of $125, and add GST of $12.50. I round the award up to **$140**.

Item 14-Garage door installation

166 The owner's second complaint about the garage door was that the mountings had not been properly fixed into the brickwork. Rather, they had been fixed into the mortar.

167 Mr Smith augmented the evidence contained in his report with evidence at the hearing that he had been involved in the case where the collapse of a garage roller door system had resulted in a person being paralysed. He was, understandably, very concerned about this issue.

168 Mr Jeffery's, on behalf of Leader Homes, dismissed this concern, on the basis that there was no sign that the structure was pulling away from the wall.

169 I find for Mr Talluri in respect of this item, on the basis that it is good building practice to secure fastenings such as dyna bolts into brickwork, not into mortar.

170 Mr Smith allows for this work in a miscellany of items at [6] of his costing report. He allows for a day's work by a carpenter at $85 per hour. From this allowance I allocate four hours. I apply Mr Jeffery's rate of $65 an hour, and cost the labour of $260. I allow no contingency because the scope of work is limited, but will allow margin of 25%, which will increase the total to $325. Adding GST of $32.50, I arrive at a total of $357.50. I round this figure up, and award **$360** to Mr Talluri.

Item 15 - Garage floor unclean

171 The nature of this allegation is self-evident. Mr Mailmail admitted the allegation, but said that Leader Homes remained ready, willing and able to clean the floor. I put this irrelevant offer to one side.

172 Mr Smith presumably was referring to this issue as well as others when he referred in [6] of the costing section of his report to "Clean splatter paint and plaster". However, he did not allow a specific timeframe for this work, although he did suggest that a painter would be involved.

173 I will allow one hour's labour for this item, calculated at Mr Jeffery's rate of $55. I do not think a painter has to undertake the cleanup. Because of the straightforward nature of the task, no contingency is allowed, but builder's margin of 25% will be, adding $14 (rounded up from $13.85). To the subtotal of $69, GST will be added, and award **$75** (rounded down from $75.90) to Mr Talluri in respect of this item.

Item 16 - Porch architraves

174 Mr Talluri complained that there was a gap in the architrave. Mr Mailmail acknowledged this, but said that Leader Homes was ready, willing and able to fix the defect. As noted, this offer is not relevant.

175 Mr Smith referred to this item at [6] of his report, but no specific allowance was made for the porch architrave.

176 Mr Jeffery allowed for rectification of a number of items in a general allowance of $260 for painting calculated at $65 an hour.

177 I allow 2 hours for this item at $65 an hour, together with $30 for paint, a total of $160. Because of the limited nature of the work, I exclude contingency, but allow builder's margin of 25%, bringing the subtotal to $200. I allow GST, and award Mr Talluri **$220** in respect of this item.

Item 17- Windows #1 and Item 18 - Windows #2

178 Mr Talluri's first complaint in relation to the windows was that the rubber seals had shrunk. The second complaint was that the rubber seal had become dislodged around the windows.

179 Mr Mailmail conceded the defects, and offered to fix the problems. As explained, this offer is irrelevant.

180 Mr Jeffery included this item in his allowance for fixing a number of items which he costed, in total, at $260. Mr Smith allowed for this item in section 5 of his report, but made no separate assessment of it.

181 I will make an allowance for two hours work at $55 per hour, being Mr Jeffery's rate for a labourer. I make no allowance for contingency, having regard to the simple nature of the works. To the base figure for labour of $110, I add margin of 25%, bringing the subtotal to $37.10. I then add GST, and award **$150** to Mr Talluri (rounded down from $151.25).

Item 19 - Windows #3

182 Mr Talluri's third complaint about the windows was that no rubber seals had been installed at the expansion joints.

183 Leader Homes' defence, articulated in Mr Jeffery's report, was that the contract documents did not require that rubber seals be installed at the edge of the windows. Mr Jeffery, at the hearing, confirmed the statement made in his report that he had contacted the manufacturer of the installed windows, and the manufacturer had informed him that the construction method used would not void any warranties in relation to the window.

184 In circumstances where Leader Homes clearly recognised that good building practice required it to install expansion joints in the brickwork, it is surprising that it disputes that an expansion joint is required between a static window frame and the adjoining brickwork, which will be prone to expand. I find that the defect complained of is made out.

185 Mr Smith has allowed for the removal of the relevant window and its replacement with two windows, and the necessary resealing, at [7] of the costing section of his report. The windows are costed at $650 each, which I regard as reasonable. Two days' work by a carpenter and $85 an hour are claimed for the removal and replacement of the windows, and $200 is assessed, and $200 allowed for materials in respect of new architraves (as the removed architrave will need to be replaced) and paint.

186 I accept Mr Smith's assessment of two days' work by a carpenter will be required, but cost this at Mr Jefferys rate of $65 per hour, or $1,040. I accept the assessment of $200 for materials other than the windows, and add $1,300 for the replacement windows. The base figure accordingly is $2,540. To this I add contingency of $254 to get a new subtotal $2,974, which I round up to $2,800. Adding contingency of 25% ($700) I get a new total of $3,500 for replacing the windows.

187 Mr Smith also allowed for two days painting and for 4 x 4 L cans of paint at $110 per can. I allow 16 hours painting at Mr Jeffery's rate of $65 per hour which is $1,040. I also allow for paint, as assessed by Mr Smith at $440, to get to a subtotal of $1,480, which I round up to $1,500. I add contingency of 10% to bring the total to $1,650, and add 25% margin of $412.50 to get to $2,062.50. I add GST, and allow Mr Talluri $2,250 in respect of painting of the windows (rounded down from $2,268.75)

188 In summary, the total allowed in respect of the replacement of the windows and painting is ($3,500 plus $2,250=) **$5,750**.

Item 20 - Windows #4

189 Mr Talluri contends that window packaging was still evident in an installed window. This was clear at the inspection. Mr Mailmail admitted liability, and said Leader Homes remained ready willing and able to fix the problem. I ignore this offer.

190 However, I note this is a very minor issue that can be fixed by any unskilled worker in a short period. I allow **$100** in respect of this item inclusive of margin and GST.

Items 21, 22 and 23-Brick mortar #1, #2 and #3

191 In respect of each of these items, Mr Mailmail accepted liability and said his company was willing to repair the defects. Again, I put this offer to one side.

192 Mr Smith allowed for them in a composite allowance, in which the item was wrapped up with others.

193 Mr Jeffery said that it would take a bricklayer 4 hours of work at $65 per hour to fix these defects. I accept this assessment and calculate labour of $260. I excluded contingency because of the simple scope of the work, fit and build a margin of 25% ($65) yielding a subtotal $325. I have GST of $32.50 to reach a grand total of $357.50. I round this up and award Mr Talluri **$360** in respect of these items.

Item 24 - Front door

194 Mr Talluri had contended that the front door was undersized, being 2.04 m high when it should have been 2.4 m high. However, he withdrew the claim at the hearing, and no further discussion is required.

Items 25-28-Masonry out of alignment; Item 29 - Hot water system #1; Item 30 - Hot water system #2

195 Mr Talluri initially claimed that the rear wall masonry was out of alignment by a margin in excess of the allowance stipulated in the VBA Guide to Standards and Tolerances. It was claimed that the wall was 13mm out of alignment. This would have put the wall well outside the margin of 5mm the builder conceded applied under AS3700. At the hearing Mr Talluri's allegation was adjusted down to 6mm. Ultimately, at the hearing, the claim was withdrawn.

196 Mr Talluri also asserted that the pressure relief valve had not been plumbed to the drain. He also asserted that the pressure relief valve was leaking and that the installation provided was not suitable. Each of these claims was withdrawn at the hearing.

Item 31 - Gas fixture wall penetration

197 The issue here was that the gas pipe exiting the house wall in the alfresco area, which had been intended to be attached to a barbecue, had not been capped properly. Mr Mailmail accepted this complaint, and said that Leader Homes was prepared to rectify it. This offer is not relevant.

198 Mr Smith appears to have allowed for the defect in his composite allowance for miscellaneous plumbing in [6] of the costing section of his report. Mr Jeffery did not provide a separate costing for this item, presumably because it would take a plumber only a few minutes to do the work. I make no separate allowance for this minor item, as the work could be done by a plumber brought to the site to perform other work.

Item 32 - Stormwater

199 Mr Talluri's complaint here was that a cap was missing on the storm water drain. Mr Mailmail accepted this, and was prepared to address the issue, but I put the offer to one side.

200 Mr Smith has presumably allowed for the defect in his composite costing under the heading "miscellaneous plumbing".

201 Mr Jeffery indicated that this would be a 10 minute job, but acknowledged that a plumber would charge a minimum callout fee of $125 and charge $10 for materials. He accordingly allowed $135.

202 Clearly the issue is minor, and I regard Jeffery's assessment that it would take 10 minutes work to be accurate. I make no allowance for this defect, as it will be rectified by the plumber who attended the site to perform more major works.

Item 33 -Toilet exhaust fan

203 The allegation here was that the toilet exhaust fan installed was very noisy as a result of being a high-speed fan.

204 Leader Homes argued that the contract did not specify which type of fan was to be installed. It was contended that the exhaust fan was fitted in accordance with the contractual requirements and was fit for purpose.

205 I accept Leader Homes's contention, and allow nothing for this alleged defect.

Item 34 - Taps and sinks

206 The allegation here was that the taps and sinks were not as required by the contract. This was disputed by Leader Homes. The claim was withdrawn on the third day of the hearing.

Items 35, 36 and 38 - Minor paint defects

207 Mr Talluri's first complaint related to a minor paint defect in the bathroom where a screw had punched through. The second issue related to paint splashes in the house. The third issue also related to drips and paint splashes in the house. Mr Mailmail accepted these complaints, and offered to address them. As noted, this offer is not relevant.

208 Mr Smith allowed for these items in his composite allowance. Mr Jeffery did not provide a separate costing in relation to these complaints.

209 Doing the best I can on the circumstances, I allow **$200** inclusive of contingency margin and GST in respect of these items.

Item 39 - Architraves

210 The complaint here was that the architraves had been installed with unacceptable mitre cuts. Leader Homes dispute this.

211 The relevant architraves were not pointed out to me at the inspection, and accordingly I consider that the alleged defects have not been demonstrated by Mr Talluri. The claim is rejected on this basis.

Item 40 - Wardrobe door handles

212 The door handles attached on the wardrobes are not of the lever style, but door knobs. Leader Homes contends that they are fit for purpose and that the contract made no particular nomination in respect of the type of knob to be installed. I have checked the specification, and accept the builder's contention on this point. Accordingly, I dismiss this claim.

SUMMARY OF AWARDS IS MADE IN RESPECT OF DEFECTS

213 In respect of defects, I have made the following awards in respect of the following defects:

Items No 2 & 5 - Front porch and al fresco concrete slabs:	$1,650
Item 4 The brick piers:	$5,280
Item 4A-Building permit:	$1,700
Item 5 Sealing of paving slabs:	$1,430
Items 8, 10, 11 and 12 - Timber beams	$2,250
Item 13 Garage door:	$140

Item 14-garage door installation:	$360
Item 15 Garage floor unclean:	$75
Item 16 Porch architrave:	$220
Item 17- Windows #1 and Item 18 - Windows #2:	$150
Item 19-Windows#3:	$5,750
Item 20-Windows#4:	$100
Items 21, 22 and 23-Brick mortar #1, #2 and #3:	$360
Items 35, 36 and 38 - Minor paint defects:	$200
GRAND TOTAL:	**$19,665**

MR TALLURI'S CLAIMS IN RELATION TO INCOMPLETE WORKS

Dishwasher

214 The first of these claims related to a Bellini dishwasher which has not been installed, quantified at $499. This claim was conceded by Mr Mailmail at the hearing, and an allowance of $499 was confirmed in the Leader Homes's builder's first submission. I award **$499** in respect of it.

East side fence

215 The second claim was that Leader Homes failed to contribute to the cost of the fence on the east side of the property quantified at **$799.70.** Leader Homes, in its opening, conceded this issue.

West side fence

216 Although early in the hearing Mr Talluri seemed to concede that Leader Homes had paid a contribution for the west side fence, the matter came up again late in the hearing. In supplementary submissions dated 10 April 2018 Leader Homes conceded the obligation to pay an additional $874 for fencing costs, in addition to the amount already conceded in respect of the east side fence. I award **$874** in respect of the west side fence.

Developer's requirements

217 The remaining claim made in the pleading was the cost, put at $1,615, of Mr Talluri attending to certain items to make the property compliant with the developer's requirements. This claim was put forward in Mr Talluri's amended counterclaim dated October 2018, at [17], as follows:

> On or around September 2018, the Developers (Woodlea) inspected the property to ascertain if the dwelling was constructed in accordance with the Developer approved plans. On or around 19 September 2018 the Developers in an email demanded that Applicant attend to the following items in order to make the property compliant:-
>
> • All capping must be removed off boundary fences and gates.
>
> • Driveway is not built in accordance with the stamped approved plans.

> • The plain concrete path is not on your approved plans. Please note plain concrete is not permitted and all hard surfaces must not exceed 40% of the total area of your front yard.

218 I note that the developer's approved drawings were included in the building permit, and they are therefore incorporated in the contract.

219 This claim was not contested by the builder in its final submissions. Accordingly, I accept it, and award Mr Talluri **$1,615** in respect of this claim.

Certification

220 At the outset of the hearing, the claim for certification of appliances, which had put at $1,800, was withdrawn.

Study nook

221 The allegation here was that Leader Homes had not supplied a bench top to a study look as required in Drawing A2. At the hearing, Mr Jeffery acknowledged that the drawing indicates that a desktop was required. In its closing submissions, the builder conceded liability for **$185**. I make an award in this amount to Mr Talluri for the study nook.

MR TALLURI'S NON-MONETARY CLAIMS

222 Mr Talluri made 2 non-monetary claims against Leader Homes. The first was that it had failed to provide warranty documents for the appliances installed at the property. The other was that it had failed to provide the garage remote and keys to the windows of the property.

223 Both these claims were conceded by Leader Homes at the opening of the hearing. I will make appropriate orders.

SUMMARY OF MR TALLURI'S CLAIMS

224 I have found that Mr Talluri is entitled to damages in respect of defects of $19,665. I have also awarded in respect of incomplete works a total of $3,972.70 comprising $499 for the dishwasher, $799.70 in respect of the east side fence, $874 in respect of the West side fence, $1,615 in respect of the developer's requirements and $185 in regards to the study nook. The crystallised amount to be allowed on the counterclaim is accordingly $23,637.70.

LEADER HOMES' CLAIM FOR VARIATIONS

225 Leader Homes made claims for variations at different points. As noted, on 10 May 2017, it submitted with the final claim an invoice in the sum of $5,000 covering the Pathway Variation and the Shower Base Variation. At some point after this, the Leader Homes sent to the owner an adjusted invoice from Master Built Kitchens Pty Ltd in the sum of $11,066 which include $2,700 in respect of the Laundry Cabinet Variation. These three variations were referred to in Leader Homes's initial points of claim filed in December 2017. On 12 August 2018 Leader Homes claimed further

variations in connection with an upgrade of the kitchen bench, an upgrade to flashbacks, an upgrade of the living area wall, an upgrade of floor tiles, an upgrade of cornices and an upgrade of the bricks (collectively "**the Miscellaneous Variations**").

SECTION 38 OF THE DOMESTIC BUILDING CONTRACT ACT 1995.

226 As both sides rely on s 38 of the *Domestic Building Contract Act 1995* it is appropriate to set it out in full. It provides as follows:

> 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) VCAT 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.

SUB- SECTION 38(2)

227 Leader Homes relied in respect of all but two of the variations on ss 38(2). This entitles a builder to carry out an owner's variation if it will not require a permit, it will not cause any delay, and will not add more than 2% to the original contract price. For convenience, I refer to this as "the 2% Rule". Leader Homes, in its closing submissions at [8], conceded that the Pathway Variation and the change of the floor tiles ("**the Floor Tiles Variation**") each fall outside the 2% Rule.

228 Leader Homes also conceded that in relation to the Pathway Variation and the Floor Tiles Variation, neither of the notices contemplated by ss 38(3) had been given. However, it argued that ss 38(6)(b) should be applied in its favour, and recovery for the respective variations should be allowed on the basis that it would not be unfair to Mr Talluri for it to recover in each case.

229 Mr Talluri met Leader Home's argument based on the 2% Rule head on, contending that the starting point in assessing the builder's entitlement to recover under s 38 of the *Domestic Building Contract Act 1995* is for the owner to give the builder a notice outlining the variation the owner wishes to make, pursuant to ss 38(1). Mr Talluri contended that in relation to each of the variations, no relevant notice had been given under ss 38(1).

The factual context

230 Before I address the claimed variations individually, it is relevant to set out the factual context in which the dispute about variation arises. As noted, the Pathway Variation and the Shower Base Variation were invoiced on the same day that the final claim was invoiced. The Laundry Cabinet Variation sits in a different position, as it was never invoiced. It was first claimed in Leader Homes's original points of claim filed in December 2017. The Miscellaneous Variations sit in a different category, because they were never invoiced, and only brought to Mr Talluri's attention when Leader Homes filed its amended points of claim in August 2018.

231 Naturally, Mr Talluri is sceptical about the variations. It was put twice to Mr Mailmail that he only raised the variations in response to Mr Talluri's claims. Mr Mailmail denied this. I do not accept Mr Mailmail's denial, at least in so far as some of the Miscellaneous Variations are concerned, because it conflicts with the documentary record. The relevant facts are that

the parties had fallen into dispute regarding rectification of defects by May 2017. Mr Mailmail issued his final claim and the variation invoice covering the Pathway Variation in the Shower Base Variation on 10 May 2017. There is controversy about what happened in relation to the Laundry Cabinet Variation. This will be canvassed in detail below, but for present purposes it is to be noted that the first invoice received from the cabinet maker did not include the variation to the laundry cabinet, and a second invoice was issued.

232 The situation regarding some of the Miscellaneous Variations can fairly be described as remarkable. None of them were the subject of any written request from Mr Talluri. He broadly denied requesting them orally. Mr Mailmail said he documented the variations in a note book, which he said was his usual practice. However, he could not produce the notebook for this project. His explanation was that he had given it to his former solicitor, and it was being held by the solicitor under a lien. Furthermore, Mr Mailmail did not assert, even in general terms when the parties fell into dispute in May 1917 or within any reasonable period afterwards, that money was outstanding for undocumented variations. The Miscellaneous Variations were not mentioned in the original points of claim, and only came to light only in August 2018, when the proceeding had been on foot for eight months.

233 The only rational explanation, in my view, is that Mr Mailmail combed the plans and specifications looking for items where the as-built works were different to those specified, and then invoiced them. As will be seen below, I am satisfied that some of the variations invoiced at this time were genuine, because of the nature and the circumstances in which they came about. However, I am not satisfied that all of the Miscellaneous Variations were requested.

234 Mr Mailmail conducted himself in a way that placed the owner in a difficult position. Mr Talluri was confronted, some 15 months after the builder had left the site, with a claim for a number of variations, some of them very significant. They had not been documented, and Mr Talluri largely insisted he knew nothing about them. The total value of the variations claimed, according to the summary provided by Leader Homes during the hearing, was $23,759. As noted, only two of those variations exceed the 2% Rule.

235 The difficulty faced by Mr Talluri was compounded by the fact that Leader Homes contended that each of the variations was to be treated separately, and those that were under 2% of the original contract sum did not have to be documented. This difficulty was highlighted when Mr Talluri's solicitor acknowledged that in *Downing v Cipcon*,[4] Judge Macnamara, sitting as a Vice President of the Tribunal, had expressed the view that because the evidence disclosed that the variations to be considered by him had been the subject of separate negotiation at different times, they were to be treated as separate variations.

[4] [2013] VCAT 344

Does an owner's notice under s 38(1) have to be in writing?

236 Because Mr Talluri's defence to each of the builder's claims made under the 2% Rule was centred on the argument that there had been no request for a variation from Mr Talluri, and because it was clear that there were no written requests, I initially understood the argument being put was that a notice given by a building owner who wishes to vary the plans or specifications set out in a major domestic building contract must be a notice in writing.

237 I consider this argument is worthy of attention, having regard to the language employed in the section, which talks of "a notice outlining the variation the building owner wishes to make."

238 Furthermore, there are other indications in the text of s 38 that any notice must be in documentary form. For instance, under ss 38(1) "the building owner …must give the builder a notice outlining the variation the building owner wishes to make." It is be emphasised that the notice must outline the variation, which suggests the notice is a physical thing. If this was not the intention, Parliament could simply have legislated that "the building owner must outline the variation". This analysis is supported by the use of the word "notice" in other parts of s 38. For instance, under s 38(3) the builder must give the building owner either a notice under (a) which gives notice of the effect, delay impact and cost of the variation or (b) a notice of the builder's refusal or inability to carry out the variation. Again, it is to be highlighted that the notice itself has work to do, suggesting it must be in documentary form. A further example is to be found in ss 38(5), which prohibits a builder from giving effect to any variation asked for by a building owner unless either:

(a) the building owner gives the builder a signed request for the variation attached to a copy of the notice required by ss (3)(a); or
(b) ss (2) applies.

For present purposes, the words to be noted are "a copy of the notice required…".

239 Support for the argument that any notice given under ss 38(1) must be in writing can also be found in the language of section 37, which deals with variation of plans or specifications by the builder. Sub-section 37(1) provides that a builder who wishes to vary the plans and specifications set out in a major domestic building contract must give the building owner notice specifying certain matters. As far as I am aware, it has never been contended that a ss 37(1) notice does not have to be in writing.

240 My preliminary view is that the proposition that a notice of variation given under 38(1) must be in writing is consistent with ordinary principles of statutory interpretation. In this respect I refer to the discussion of this topic in the context of the *Domestic Building Contract Act* by Garde J in *Fullinfaw v Neil Fletcher Design Pty Ltd*[5]. I note the conspicuous emphasis

[5] [2019] VSC 142

on fairness identified by Garde J in the objects of the Act set out in s 4. I also note Garde J's reference to the consumer protection aspects of the legislation identified by Kyrou J in *JG King Pty Ltd v Patel*[6] including restrictions to the circumstances in which a builder can charge more than the contract price.

241 Finally, I note that Section 35 of the *Interpretation of Legislation Act 1984* requires that when interpreting a provision of an Act, a construction that would promote the purpose or object underlying the Act is to be preferred to a construction that would not promote that purpose or object.

242 However, I propose to make no finding about the matter. I adopt this course for these reasons. Firstly, although I initially understood Mr Talluri's argument to be based on the proposition that a notice under ss 38(1) had to be in writing, this proposition was inconsistent with the importance that Mr Talluri's solicitor placed on Mr Mailmail's failure to produce the notebook, in which he said he had recorded the variations. The point here is that the notebook would not be critical if the builder's claims for variations were doomed from the outset for want of written notification by the owner. Secondly, the issue was not addressed in the written submissions handed up on behalf of Leader Homes on the last day the hearing. Accordingly, for me to make a finding about the issue in the absence of any submissions concerning it give rise to a concern that natural justice had been denied. Thirdly, in *Downing v Cipcon Pty Ltd*, which has already been referred to, Judge Macnamara had to consider amongst other things the operation of s 38 of the *Domestic Building Contracts Act*. His honour came to a view contrary to the preliminary view that I have just expressed, as is apparent from [39] in his decision, which relevantly reads:

> As previously noted, there has been no documentation of these variations at all. As a matter of characterisation the particular items seem to have arisen in two ways, first, an unsolicited request for change made by the owner or on his behalf. Secondly, a suggestion by the builder to the owner of a particular piece of additional work or variation from plan which was accepted by the owner and then requested by the owner. In those circumstances, in my view, all of the variations with which we are dealing are properly to be characterised as variations or alleged variations made at the request of the owner and therefore within the general purview of Section 38. Other sections deal with variations made on the initiative of the owner.

243 Finally, it is not necessary for me to make a decision in this proceeding on the question of whether a building owner is notice given under s38(1) must be in writing, because the case can be decided on other grounds.

LEADER HOMES'S ARGUMENT BASED ON THE 2% RULE

244 The argument regarding the 2% Rule, is expressed in the following terms in its closing submissions at [8]:

[6] [2014] VSC 58

> Each of the variations, except the exposed aggregate pathways and the upgrade of floor tiles equal less than 2% of the Contract Price ($5000). Nor did any of the variations involve a delay to completion of a variation in the building permit issued. As a result the Builder was under no obligation to document the variations in writing or seek the owner's approval.

245 The thrust of Leader Homes's argument is that where the 2% Rule applies, it is relieved that the obligation to undertake the process of documenting the variation under ss 38(3).

246 In my view, this argument is misconceived. By its terms, s 38(2) only applies to a variation which has been notified under ss 38(1). It follows that the question to be determined in respect of any variation, whether it falls under the 2% Rule or not, is whether the variation has been requested by the owner.

ISSUES OF CREDIT

247 An overarching issue in the dispute about variations is that Mr Mailmail insisted that they were requested, but Mr Talluri in each case disputed this. In these circumstances it is appropriate for me to say something about the view I have formed about the creditworthiness of the principal witness. I have indicated that I do not accept Mr Mailmail's evidence that he did not raise variations in response to Mr Talluri's claim regarding defects. For the reasons outlined above, I think it is clear that after the dispute arose, Mr Mailmail went through the contract carefully in order to identify potential variation claims. However, that is not to say that none of the claims he ultimately identified was justified.

248 A sustained attack on Mr Talluri's evidence was made on behalf of Leader Homes in its final submissions. It was highlighted that Mr Talluri had asserted in his witness statement, at [27] that he had not inspected the house prior to 27 April 2017. I accept Leader Homes's contention that this was demonstrated to be false by a picture taken by Mr Talluri at frame stage. Furthermore, an inspection without Mr Mailmail's permission was acknowledged in an email from Mr Talluri to Mr Mailmail dated 27 October 2016. Another instance of untruthful evidence from Mr Talluri came when he was asked whether he had approached Kinghorn Constructions in January 2016. He denied this, but the falsity of this denial was demonstrated when an email from Mr Talluri to that other builder dated 25 January 2016 was put into evidence.

249 In these circumstances, I approach the evidence on the basis that neither principal witness was necessarily telling the truth. Where there was a conflict of evidence, I will determine the issue, if possible, on the basis of corroborating documentary evidence.

CONSIDERATION OF THE VARIATIONS

The Pathway Variation

250 Mr Mailmail's evidence about this variation is to be found primarily at [9] of his witness statement. Here it is said Mr Talluri requested him to construct a pathway using exposed aggregate concrete. This was a variation, as the plans and specifications did not include a pathway, and no allowance for this had been made in his quotation. At [8], he added that the variation was performed during the period February 2017 to April 2017. The work was carried out by Chantelle Dickon trading as Four Seasons Earth Moving, and the sum of $4,500 for it was invoiced as part of a larger invoice dated 25 March 2017. (Refer paragraph [11].) The sum of $4,500 was in turn invoiced to Mr Talluri on 10 May 2017, as part of an invoice covering this and the Showerbase Variation.

251 Leader Homes seeks recovery not of the $4,500 invoiced, but on a quantum meruit. In this, it relies on the assessment Mr Jeffery who in his revised report dated 7 September 2018 opines that when the builder additionally included paving to the perimeter of the house and to the laundry around area, 60 m² extra paving was required. At $95 per square metre, the total value of the variation was contended to be $5,700.

252 In Leader Homes's final submissions, the amount claimed was increased to $6,840. This represented Mr Jeffery's assessment, with 20% margin added.

Was there a variation?

253 Mr Jeffery does not provide much assistance in his report because he does not refer to the plan or specification to which he made reference. However, I note that in the project specification dated 26 May 2016, under provisional sums, there is reference to "Driveway 60 meters - By Builder - Allowance by Builder Exposed Aggregate". This specification is consistent with the site plan (Sheet A1) which indicates there is to be an exposed aggregate concrete driveway in charcoal.

254 On the basis of this documentation I am satisfied that there has been a variation to the contract.

Was a request for the variation made?

255 Mr Talluri addressed this variation at [32] of his witness statement. He says upon receiving the variation invoice on 10 May 2017, he emailed Mr Mailmail asking for an explanation. Mr Talluri asserted that if he was been charged for exposed aggregate concrete instead of concrete, then it was Mr Mailmail's mistake.

256 Judging from this comment, it is possible that Mr Talluri misunderstands the nature of the variation being claimed. He goes on to state:

> As per the Plan and we both agreed for Exposed Aggregate Concrete only for Driveway and front side, And normal Concrete round the house walkway. (Sic)

257 From this, it is clear that he was aware that Leader Homes was going to construct a concrete pathway. His quibble is that it was constructed of exposed aggregate concrete rather than standard concrete. On this basis, I find that Mr Talluri requested the variation.

258 Because the amount claimed for the variation exceeds 5% of the contract sum ($5,000) the 2% Rule cannot apply. The variation was not documented as required by ss 38(3). Accordingly, if Leader Homes has any entitlement in relation to this variation, it must be under the second route contained in s ss 38(6).

Consideration of ss 38(6)

259 Sub-section 38(6) sets out two routes under which a builder may recover monies in respect of a variation asked for by a building owner. The first is where the builder has complied with the section. That route is not available in the present case, because Mr Talluri did not request any variations in writing and the 2% Rule cannot come into operation. The second route is where the Tribunal is satisfied regarding certain matters.

260 It is relevant to have regard to what Judge Macnamara set about ss 38(6) in *Downing v Cipcon Pty Ltd*. At [37), having commented that s 38 is "a fairly complex provision" His Honour went on to say:

> Its most important provision is to be found in sub-section (6) which provides that failure to comply with the requirements of the section deprives a builder of an entitlement to recover money with respect to variation unless the Tribunal is satisfied that there are exceptional circumstances or significant or exceptional hardship for the builder and that it would not be unfair for the owner to be required to pay the money. The effect of this sub-section would appear to be that, whilst it does not in terms provide that non-compliance with the section deprives a builder of the contractual claims for variations which the builder would otherwise have, the effect is to downgrade the builder's claim with respect to a variation not documented in accordance with the section to a discretionary restitutionary entitlement in the Tribunal with what appears to be almost a presumption against recoverability.

261 The first enquiry under ss 38(b)(i) is whether there are exceptional circumstances or that Leader Homes would suffer a significant or exceptional hardship if it is denied payment by reason of non-compliance with s 38. As the circumstances in which the builder finds itself are of its own making, I consider that no exceptional circumstances exist in connection with this variation. However, I am satisfied that if Leader Homes was to be denied payment, it would suffer exceptional hardship because on any view the value of the variation is significant.

262 As the builder has jumped the hurdle in ss 38(b)(i), it is necessary to consider whether it would not be unfair to Mr Talluri for Leader Homes to recover money for the variation.

Finding on liability

263 I have already found that the concrete pathway was an extra. Being of 60 m² in dimension, it will no doubt be of significant utility to Mr Talluri and his family. For these reasons, I find that it would not be unfair for Mr Talluri to pay for the variation.

Quantum

264 I now turn to quantum. I consider the best evidence of the value of the concrete is the amount charged by Mr Mailmail when he first raised the variation invoice namely, $4,500. I put this to the builder's Counsel at the hearing, and in my view he had no satisfactory answer.

265 In any event, I reject Leader Homes's claim for $5,700 plus margin, as it is based on the proposition that the builder is entitled to recover on a quantum meruit. This entitlement was not established. I have found that it was Leader Homes rather than Mr Talluri, which repudiated the contract.

Award

266 I award to Leader Homes **$4,500** in respect of the Pathway Variation based on Mr Mailmail's valuation at the time he issued the variation invoice.

The Shower Base Variation

267 At [4] of his witness statement Mr Mailmail deposed:

> On or about 16 February 2017, during an inspection of the Works of the Property completed pursuant to the Fixing Stage, Venkata asked that Leader supply and install tiles to the shower bases in the main bathroom and the en-suite.

268 In Leader Homes amended points of claim it is noted that the shower bases had been specified as standard on the marble S/Line, so the request amounted to a variation. This is verified by Mr Jeffery.

> The tiling of the shower bases was carried out by Aytac Koc trading as A F Tiling. $500 for the shower bases was invoiced by Mr Koc on 26 March 2017 as part of a larger invoice.

269 It is noted that Mr Jeffery valued the shower base variation at $700.

270 Mr Talluri's response to the shower base variation is to be found in his email of 10 May 2017, where he protests:

> I don't understand, why you are charging extra for Tile ensuite shower base. Please explain. After bargain we both agreed and made a deal for Total Amount t $250,000. Which is Fixed Price and Turn Key. Now, at the time of handover you are charging me extra. What for? It's totally unfair and illegal. Please take this invoice back.

Was there a variation?

271 I am satisfied that has been a variation, because the specification clearly shows that the shower bases in the bathroom and the ensuite were to be

"standard polymarble S/Line S/Base 900 x 900" and the shower bases were tiled.

Did Mr Talluri request the variation?

272 I am also satisfied that Mr Talluri requested the variation. I note there was a direct conflict of evidence on this point, but in circumstances where the work was invoiced by late March 2017, and invoiced in May 2017, I am, on balance, inclined to accept Mr Mailmail's evidence in preference to that of Mr Talluri.

273 In respect of this variation, the 2% Rule assists Leader Homes, and I am prepared to allow the variation in principle.

274 Even if this was not the case, and Leader Homes's route to recovery was limited to ss 38(6), I would have been prepared to allow the claim, because the builder has been invoiced by the tiler $500 for the variation. Accordingly, the builder could suffer exceptional hardship if the variation were not allowed. The remaining issue, if ss 38(6) applies, is whether it would not be unfair to Mr Talluri for Leader Homes to recover for the variation. Because he and his family will have the benefit of the tiled shower bases, it would not be unfair for him to have to pay for them.

Quantum

275 I now turn to quantum, I reject Leader Homes's claim that it be paid on a quantum meruit, for the reasons explained above. The best evidence of the value of the work is the amount invoiced by Mr Mailmail. For this reason I award **$500** to Leader Homes in respect of the Shower Base Variation.

The Laundry Cabinet Variation

276 Mr Mailmail addressed this variation at [6] of his witness statement in the following terms:

> On or about 18 December 2016, during an inspection of the Works at the Property completed pursuant to the Lock up Stage, attended by Venkata [Talluri] and myself, Venkata asked that the cabinet in the laundry match the cabinetry in the kitchen which is fabricated from Ultra Glaze.

277 The work was performed by Master Built Kitchens Pty Ltd and $2,700 was charged for it, as part of a larger invoice dated 1 March 2017.

278 Confusingly, at [16.6] of his witness statement, Mr Mailmail indicated that the upgrade of the laundry cabinet had been decided by Mr Talluri at a meeting at the cabinet maker's factory. This appears to be inconsistent with the statement made at [6]. However, as we shall see below, there was a question as to whether this statement related to the alleged Ultra Glaze upgrade, or to an alleged upgrade of the laundry trough.

279 Mr Talluri addressed the laundry cabinet variation in his witness statement at [18]. He denied that he requested any variation to the laundry cabinet. At [19] he deposed that on 30 January 2017 he got a phone call from the

cabinet maker Ihsan Daner, of Master Built Kitchens, who asked him to attend at his office for discussion regarding cabinet doors and stone bench top selection. Mr Talluri said that he had told Mr Daner that the selections had been done in May 2016, but he was informed by Mr Daner that he needed to do the selection again because of the long delay. At [20] he confirmed that around 3 or 4 February 2017 he went to see Mr Daner. He was shown three colour options, none of which matched what been selected in May 2016. He selected a new colour from the range. As Mr Mailmail had unilaterally changed the agreed arrangement for eight overhead cabinets, he sent an email to Mr Daner dated 3 February 2017.

280 Under cross-examination, Mr Mailmail confirmed that there had been a meeting with Ihsan. He was not sure of the timing. He suggested it was "December-January… before the fixing stage". The purpose of the meeting was to discuss the cost of the upgrade. When asked about the cost, Mr Mailmail responded that he couldn't remember, but that it was on the Master Built Kitchens invoice.

281 Leader Homes called Mr Ishan Daner. Mr Daner adopted a witness statement he had prepared. The substance of his statement was that on or about 4 February Mr Mailmail and Mr Talluri met with him at his factory in Campbellfield for the purpose of discussing in particular the upgrade of the laundry cabinet. The upgrade involved changing from a stainless steel trough to Ultra Glazed cabinetry with a built-in trough. Mr Daner deposed that he told Mr Talluri that the cost of the upgrade was $2,700 plus GST. Mr Daner also deposed that Mr Talluri confirmed that he was to go ahead with the upgrade.

282 Mr Daner was cross-examined. From this it became clear that he had met with Mr Talluri twice. There had been an occasion on 23 May 2016 when Mr Talluri had visited him at his factory. He confirmed that there had been a second meeting in February 2017 at which Mr Mailmail had been present. I comment that subject to a slight disagreement with Mr Talluri about the date of the second meeting (Mr Talluri said that it was on 3 February), his evidence was consistent with that of Mr Talluri.

283 Significantly, Mr Daner indicated that two upgrades had been discussed at the meeting. The first was $2,700 for the laundry cabinet. The second was $1,200 for a kitchen bench with waterfalls.

284 Mr Daner was asked about his invoices. Curiously, there are two invoices numbered 197 issued on 1 March 2017. The first iteration was for $7,360 plus GST, a total of $8,096. The works described were:

> Kitchen, bathroom, unsuite (sic), dry, Ultra glaze……. $7,360

285 The second invoice was for $10,060 plus GST, a total of $11,066. Here the description of works had changed to:

> Kitchen, bathroom, unsuite (sic), Ultra glaze…… $7,300
>
> Laundry overhead cabinets 40mm stone bench top… ….. $2,700

286 Mr Daner explained that he had reissued his invoice when Mr Mailmail had told him that he had not billed for the variation. He could not recall when this had been done, as it was "a long time ago".

287 Mr Daner was referred to the email that had been sent to him directly by Mr Talluri dated 3 February 2017. This referred to a variation to the overhead cabinets in the laundry, changing it to 4 doors from 2 doors. It also suggested that Mr Mailmail had agreed at the first meeting to provide a full cabinet with a bench top in the laundry. He was asked about his email sent in response a few minutes later, in which he said that it would be best if Mr Talluri mentioned the 4 door cabinet to Mr Mailmail because he had been instructed to do 2 doors.

Did Mr Talluri request an upgrade to the laundry to Ultra Glaze?

288 The answer to this question presumably is "yes", because the laundry was ultimately constructed using Ultra Glaze.

Was any such request a request for a variation?

289 However, I do not think there was a request for a *variation* regarding Ultra Glaze. I say this because I think Ultra Glaze was ultimately included in the subcontract made between Leader Homes and the cabinet maker Master Built Kitchens. On 1 March 2017 Master Built Kitchens invoiced Leader Homes $7,360 for " Kitchen, bathroom, unsuite (sic), dry, Ultra glaze". It is to be noted that Ultra Glaze was included in that price. Accordingly, I do not accept that Mr Mailmail later contacted Mr Daner to request an amended invoice just because Ultra Glaze had been left out.

290 Moreover, reference to the second iteration of the invoice indicates that the additional amount of $2,700 charged did not relate to "Ultra Glaze" but to "Laundry overhead cabinets 40mm stone bench top". This is clearly a separate item. I return to this point below.

Finding

291 I conclude, accordingly, that no award is to be made to Leader Homes in relation to the upgrade of the laundry cabinet to Ultra Glaze.

The kitchen bench

292 At [16.3] of his witness statement Mr Mailmail said:

> Upgrade of Kitchen Bench occurred in mid January 2017. Venkata rang me and said he had seen waterfalls at his friend's place and said it looked nice and asked that I upgrade his kitchen bench.

293 Leader Homes relies on Mr Jeffery's report to illustrate that this is a variation. The specification required the kitchen bench top to finish 900mm above the floor. The waterfall bench top constructed returns directly to the floor on both sides.

294 This variation was not invoiced. It was claimed for the first time in Leader Homes's amended points of claim dated 12 August 2018, which were

served about 18 months after the work was performed. The variation is valued by Mr Jeffery at $1,500.

Did Mr Talluri request an upgrade to the kitchen bench?

295 Although Mr Talluri denied requesting this variation, I am satisfied that it was requested. Putting aside the fact that I do not put much weight on Mr Talluri's evidence, he did not dispute Mr Jeffery's opinion that the bench had been constructed in a manner different to the specification.

Was the request a request for a variation?

296 Although I am satisfied that Mr Talluri did request an upgrade to the kitchen bench, I am not satisfied that the change should ultimately be treated as a variation. This is because Master Built Kitchens invoiced Leader Homes $7,360 on 1 March 2017 for "Kitchen, bathroom, unsuite (sic), dry, Ultra glaze". I highlight that the kitchen was included in that price. In these circumstances it is hard to see why in December 2017 Mr Mailmail saw fit to raise a variation regarding the kitchen cabinetry.

Finding

297 I find against Leader Homes in respect of this variation.

The upgrade of splashbacks

298 Mr Mailmail refers to the splash backs at [16.4] of his witness statement where he says:

> Upgrade of Splash backs occurred during the time the house was being painted. At this time, Venkata attended site and called me over the telephone that he would like glass splashbacks. He confirmed over the telephone the colour he wanted. I recall he had asked about this upgrade previously, at the early stages of the construction phase. I recall I advised him at the time that it will be at an extra cost. At the time, he advised he would wait until the end of the construction, and if he had the money or saves up by then, he will advise then as to whether to go ahead with the splashback.

299 Mr Jeffery in his report explained that the specification required 400mm of wall tiling to the bench top as splashbacks. Accordingly, the installation of glass splashbacks is a variation. Mr Jeffery valued it at $1,750.

Did Mr Talluri make a request for this variation?

300 As noted, Mr Talluri denied this variation. For the reasons given, I do not place great weight on this denial. However, it is not in issue that there was a change to the specification.

301 Leader Homes tendered an email from Mr Mailmail to Mr Talluri dated 13 March 2017 seeking advice as to the colour he wanted for the kitchen splashback. The response sent a couple of hours later was that the splashback was to be "Mara Red". This may explain why a change was made.

302 However, there is no indication in Mr Mailmail's email that a variation was involved. This would have been a perfect opportunity for Mr Mailmail to say this. In these circumstances, I am not satisfied that the change was going to have a monetary impact. I am also not satisfied that a change from a tiled splashback to a glass splashback would have cost Leader Homes $1,750, as assessed by Mr Jeffery. Reference to Mr Jeffery's report indicates that he has assessed the cost of glass back splash backs at $1,750, but there are no workings attached, and there is no indication that he has allowed a credit to Mr Talluri in respect of the omission of the tiled splashback.

Finding

303 I find against Leader Homes in respect of this variation.

The upgrade of the living area wall cupboards

304 At [16.5] of his statement, Mr Mailmail explained that the specification for the living area wall cupboards did not include pigeon pockets on the side. He deposed:

> Venkata had visited another property that I had built which had the additional pigeon pockets and requested I do the same as an additional to the upgrade. I had advised Venkata that I will be charging extra for the materials and labour involved.

305 Mr Jeffery in his report "concerning "Variation 6" appeared to address a different issue. He noted that the contract drawings require continuous cupboards to the living room wall. He noted, there is a recessed workspace including a stone worktop. He valued this upgrade at $2,200. As far as I can see, this is not claimed by Leader Homes as a variation. Mr Mailmail addresses a different issue in his statement at [16.5].

Finding

306 This claim is dismissed for lack of evidence.

Upgrade of laundry cabinet

307 The evidence about this claim is sparse. At [16.6] of his witness statement Mr Mailmail deposed that:

> Upgrade of Laundry Cabinet had been decided by Venkata before the kitchen cabinets were installed at a meeting at the cabinet maker's factory.

308 Even this short statement creates difficulties, because it is not clear what "upgrade" is being referred to. The claim for the alleged upgrade to Ultra Glaze has been dealt with.

309 Mr Jeffery noted in his report that although the specification required a stainless steel laundry trough, a joinery cabinet with a stone top was installed. It is possible that this is what Mr Mailmail was referring to at [16.6]. Mr Jeffery assessed the value of this variation at $1,250.

310 Mr Talluri denied requesting this variation. For the reasons given, I place little weight on his denial.

311 It is clear that was a substantive discussion at Mr Daner's factory regarding the exact nature of the cabinetry is to be constructed. Mr Daner's company Master Built Kitchens performed the work, and invoiced Leader Homes $7,360 on 1 March 2017.

312 Mr Daner himself was not, initially at least, concerned about this price. His evidence was that he only reissued the invoice, adding $2,700 plus GST, at the request of Mr Mailmail.

313 Reference to the second iteration of the invoice indicates that the additional amount of $2,700 charged relates to "Laundry overhead cabinets 40mm stone bench top". The invoice is, accordingly, consistent with the proposition that there was a variation.

314 However, the timing of the issue of the second iteration of the invoice raises a question about whether the was truly a variation. The first invoice was issued on 1 March 2017. By 10 May 2017 Mr Mailmail was a position to issue a final claim invoice, and an invoice for two other variations, but had not identified the alleged issue with the laundry cabinet. Mr Mailmail caused the proceeding to be issued in December 2017. Even then, the alleged variation had not been identified. The claim was only notified when the builder's points of claim were amended in August 2018.

Finding

315 In circumstances where Mr Daner did not confirm the variation when he responded to Mr Talluri's email of 20 February 2017, I cannot be satisfied on the balance of probabilities that there was a variation in relation to the laundry cabinet bench top. I accordingly find against Leader Homes in relation to this variation.

The floor tile variation

316 Mr Mailmail's evidence in relation to the floor tiles, at [16.7] of his statement, was that the request for a variation was made after the painter had finished his works, and after the cabinetry stone had been installed.

317 Mr Jeffery noted that the specification required for tiles to be installed at the prime cost amount of $20 per square metre. In the event, 600 x 600mm floor porcelain tiles were installed. Accordingly, I am satisfied that a change in the specification did occur. Two issues, however, stand in the way of Leader Homes's recovery.

Was the change requested by Mr Talluri?

318 Mr Talluri denied making any request to vary the floor tiles. Because of my concern about Mr Talluri's credit, I place little emphasis on this denial. However, Mr Jeffery stated that 600 x 600 porcelain tiles are more expensive to purchase, and are more expensive to lay, than the originally specified tiles. I accept this, and observe that it is inherently unlikely that

the Leader Homes would have made this significant change for its own convenience. On balance I am satisfied that the change was requested by Mr Talluri.

Did Leader Homes establish a claim under ss 38(6)?

319 Mr Jeffery valued the variation of $5,175. This means that the Leader Homes cannot rely on the 2% Rule. Its route to recovery must be under ss 38(6). The first enquiry under ss 38(6)(b)(i) is whether there are exceptional circumstances. I can identify none. This leads us to enquire whether the builder would suffer a significant or exceptional hardship if the claim were to be denied.

320 Mr Jeffery reached his valuation on the assumption that 115 m² of tiles were involved. The cost was said to be $45 per m². Whether this was the total cost, or the marginal extra cost is not clear. Whether $45 per m² is correct or a mistake in addition is also questionable, because Mr Jeffery's report refers to the cost of the upgrade of floor tiles as being $15 per m² for supply and $20 m² for installation, which of course is a total of $35 per m².

321 The contract, in clause 9.6, requires the contract price to be adjusted for amounts expended in excess of prime cost or provisional sum allowances. It is not clear whether this procedure was followed. There was no evidence that it was. Clause 9.6 indicates that prime cost and provisional sum adjustments are to be made dynamically during the course of the works, and the adjustments are to be added to the contract price and paid to the builder "in the next payment payable under this Contract". This certainly did not occur. The objective evidence accordingly points to there being no relevant prime cost or provisional sum adjustment necessary.

322 Even if I am wrong about this conclusion, and Leader Homes could establish some detriment for the purposes of ss 38 (6)(b)((i), I consider that it would be unfair to Mr Talluti to allow Leader Homes to recover the variation at this stage. I say this because there is a question as to whether Mr Talluri new, even if he requested that the floor tiles be varied, that there would be a cost implication. Mr Mailmail's statement at [16.7] refers to a request to change the floor tiles being made. It does not suggest that Mr Mailmail explained to Mr Talluri that the change would have a cost implication. For this reason, I find that Leader Homes does not, in respect of the Floor Tile Variation get through the final gateway created by ss 38(6)(b)(ii).

Finding

323 I have found that Leader Homes has failed at both the hurdles presented by both ss 38(6)(b)(i) and (ii). The claim for the Floor Tiles Variation is dismissed.

The upgrade of the cornices

324 Mr Mailmail deposed at [16.8] of his witness statement that:

> Upgrade of cornices was requested at lock-up stage as he had seen it at another one of my properties. I paid the lock-up carpenter extra to have all noggings installed at the end of the walls as it will be square set cornice finished throughout. I advised Venkata it will be at an extra cost of around $3,000 which he advised me he would work it out at the end.

325 Mr Jeffery confirmed that the square set cornices installed were a variation, as the specification required 50m cornices. Mr Jeffery valued this variation of $3,600, on the basis that 240 m of cornices were required, and at an $15 per metre.

326 Mr Talluri denied he requested this variation.

327 On balance, I am prepared to accept Mr Mailmail's evidence that this variation was requested by Mr Talluri, as it makes little sense for a builder to undertake such an expensive variation without instructions. This is not the sort of variation which might be undertaken by a builder for its own convenience. According to Mr Mailmail's description of the work, it was necessary to have extra noggings installed at the end of the walls in order to secure the square set cornices.

328 As I am satisfied that Mr Talluri requested this variation. As its value is under $5,000, Leader Homes can rely on the 2% Rule. I comment that I would have been disposed to have allowed the claim under ss ss 38(6) in any event. The claim is allowed, subject to quantification.

Quantum

329 I accept the evidence of Mr Jeffery regarding the value of the upgrade. Accordingly, I award to Leader homes $3,600 plus margin of 20%, a total of **$4,320**, in relation to the upgrade of the cornices.

330 However, it is appropriate that I make a comment about timing, as it may be relevant to any later request for interest made by Leader Homes. Mr Mailmail's evidence was that the upgrade to the cornices was requested at lock up stage. However, even if I accept Mr Mailmail's evidence that he informed Mr Talluri that there would be an extra cost of around $3,000, as he deposed, the variation was not carefully costed at this point. Moreover, it should have been billed at the completion of the fixing stage, and this did not occur. It was not even billed when the final claim was invoiced in May 2017, even though the pathway variation and the shower base variation were invoiced at this point. As noted, the variation was only pressed in August 2018.

331 In these circumstances, there is an argument that if any claim for interest is made by Leader Homes then interest should not run until the date seven days after the invoice was notified, that is to say seven days (being the time for payment of progress claims under the contract) after the amended points of claim were served on 12 August 2018. I make no finding on this now, however, as it is appropriate to hear submissions from the parties on issues of interest generally and on this topic in particular.

The upgrade of bricks

332 According to Mr Mailmail's statement at [16.9], the upgrade of the bricks occurred when Mr Talluri chose to go for an upgrade at $0.10 extra per brick. Approximately 10,000 bricks were used. The date of the instruction from Mr Talluri was not stated.

Did Mr Talluri make a request to upgrade the bricks?

333 Mr Talluri denies the variation. For the reasons noted, I place little weight on his denial. The fact that the bricks were changed to a more expensive type objectively suggests that there was a variation.

334 Mr Jeffery valued the variation on the basis that 10,000 bricks were used, but curiously valued the variation at $3,000 rather than $1,000, which was Mr Mailmail's valuation.

335 Even on Mr Jeffery's valuation, the claim comes under the 2% Rule and it is not necessary to consider the application of ss 38(6). However, I would have been inclined to have allowed the claim under that subsection in any event.

336 I turn now to quantification. Mr Mailmail's evidence was that the variation was worth $0.10 a brick. I think this is the best evidence on this issue, and I reject Mr Jeffery's alternative costing of $0.30 a brick. Mr Jeffery has confirmed Mr Mailmail's estimate that 10,000 bricks were involved, and accordingly I am satisfied that the variation is worth **$1,000**. I award this sum.

337 Turning to ss 38(6)(b)(ii), I do not think it is unfair to expect Mr Talluri to pay for the upgrade. I say this even although the change of the type of brick to be used occurred, accordingly to Mr Mailmail's own evidence, "as there was not much of a selection based on my original allowance". It is fair for Mr Talluri to pay for the type of brick he ultimately selected.

338 I note however that this is a variation which should have been addressed under clause 9.6 of the contract. The resulting variation should have been passed through to Mr Talluri at the next payment claim, which would have been the lock up stage claim. This is a matter which may be relevant to any argument about interest.

SUMMARY REGARDING VARIATIONS

339 I have found against Leader Homes in respect of each of the claimed variations save for the Pathway Variation where I have awarded $4,500, the Shower Base Variation where I have awarded $500, the upgrade of the cornices, where I have awarded $4,320, and the bricks in respect of which I have awarded $1,000. Leader Homes is entitled to **$10,320** in respect of these variations.

SUMMARY OF LEADER HOMES'S CLAIMS

340 Leader Homes in respect of its claim is entitled to an award of $25,000 in relation to the final claim together with $10,320 in respect of variations. The total award to which the builder is entitled is accordingly **$35,320**.

ORDERS

341 I have noted above at [224], that Mr Talluri's crystallised claims stand at $23,637.70. Mr Talluri is also entitled on his counterclaim to an award of a damages in respect of delay in an amount to be determined.

342 It is appropriate that the amount due under the claim and a counterclaim should be set off. Until the quantification of Mr Talluri's delay claim is completed, it is inappropriate to order that one party should pay any money to the other.

343 For now, I will declare that Leader Homes is entitled to an award in its claim of $35,320. I will also declare that Mr Talluri has been successful on his counterclaim to the extent of at least $23,637.70 in respect of damages for defects and incomplete works.

344 I will list the proceeding for a further hearing at which submissions can be made regarding the quantification of Mr Talluri's damages claim. In order to avoid if possible a further hearing regarding costs and other matters, I will also receive updated submissions regarding interest, costs and reimbursement of fees at that further hearing.

MEMBER C EDQUIST