VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP843/2017

CATCHWORDS

DOMESTIC BUILDING; Owner and builder entered into a major domestic building contract for construction of extension to an existing house and the renovation of part of the existing house; separate contracts entered into for further works; claim by owners for damages for defects under the major domestic building contract and another contract; claims by builder for balance of monies due under the major domestic building contract and for monies due under the other contracts; assessment of damages for defects; assessment of builder's entitlements; amounts due to builder to be set off against larger amount due to owners.

FIRST APPLICANT	Ms Wenjun Li
SECOND APPLICANT	Mr Michael Jiang
RESPONDENT	Mega Constructions (Aus) Pty Ltd (ACN: 120 510 410)
WHERE HELD	Melbourne
BEFORE	Member C Edquist
HEARING TYPE	Hearing
DATE OF HEARING	21, 22 and 23 February, 7 and 8 March 2018
DATE OF ORDER AND WRITTEN REASONS	24 April 2018
CITATION	Li v Mega Constructions (Aus) Pty Ltd (Building and Property) [2018] VCAT 641

ORDERS

1. The respondent must pay to the first applicant damages of $142,143.
2. The first applicant is liable to pay to the respondent damages of $22,106.
3. The respondent's entitlement to damages of $22,106 under Order 2 is to be set off against the first applicant's entitlement to damages of $142,143 under Order 1, with the net result that the respondent must pay to the first applicant the sum of $120,037.
4. Issues of interest, costs and reimbursement of fees are reserved.

5. The first applicant has leave within 60 days to file and serve a written submission regarding interest. Any such application may be made in writing, or at any cost hearing. Any application in writing must set out the basis upon which interest is claimed, and the applicable interest rates, and all relevant calculations.
6. The first applicant and the respondent each have leave to apply within 60 days for an order for costs.
7. The first applicant and the respondent each have leave to apply within 60 days for an order for reimbursement of fees paid, under s 115B of the *Victorian Civil and Administrative Tribunal Act 1998*.

MEMBER C. EDQUIST

APPEARANCES:

For first applicant:	Ms W. Li, in person
For second applicant:	Mr M. Jiang, in person
For respondent:	Mr M. Lei, director

REASONS

INTRODUCTION

1 Wenjun Li and Michael Jiang (together, "**the owners**") own a substantial Art Deco house in Lansell Crescent, Camberwell, Victoria. In 2012 they decided to extend the property, and after seeking tenders engaged Mega Constructions (Aus) Pty Ltd ("**the builder**") to carry out the works. On 3 April 2013 Ms Li and the builder signed a major domestic building contract ("**the house contract**") with a contract price of $382,000. Mr Jiang was not a party to the house contract.

2 The house contract did not work out well, and the owners have come to the Tribunal seeking damages for breach of the house contract, alleging that the works were defective and incomplete, and that the contract ran over the agreed construction period. The owners also seek to recover from the builder damages in respect of a number of items.

3 During the course of the hearing it became clear that the parties had entered into at least four contracts. The works under the house contract were completed in August 2014 and on 26 August 2014 an occupancy permit was issued. The second contract was made in 2015 for the construction of a concrete driveway and a retaining wall on the west side of the house, and a pathway on the east side of the house ("**the driveway contract**"). The third was for the renovation of a garage ("**the garage contract**"). The fourth and final contract was for the replacement of a fascia and downpipes at the front of the house ("**the fascia contract**").

4 The parties fell into dispute, and it is common ground between them that the builder left the site on or about 15 December 2015.

5 The parties went to mediation under the auspices of the Consumer Affairs Victoria in or about May 2016, but their disputes were not resolved.

6 The owners initiated this proceeding in June 2017.

THE HEARING

7 The proceeding came on for hearing on 21 February and continued on 22 February, 23 February, 7 March and 8 March 2018. Ms Li and Mr Jiang appeared in person. Both gave evidence. They called two experts. Their primary expert witness was Mr Salvatore Mamone, an architect. They also called Mr Brent Clune, who described himself as a ventilation consultant.

8 Mr Lei appeared on behalf of the builder. He gave evidence himself, and called as an expert Mr Ling Lin. He called no other witness.

OVERVIEW

Primary issues

9 The primary issues under the house contract and the driveway contract are concerned with defects. If the existence of defects is established, then the cost of rectification of those defects must be determined. The owners' several claims for damages must also be determined. These include $1,101.66 for the removal of a rag for downpipe, $660 for having repairs done to the roof of the existing house following damage caused by the builder, $350 being the cost of having a building consultant attend to inspect a warping timber floor, $260 being half the sum which they had to pay the local Council to amend their planning permit, $225 being half the sum which they had to pay their draughtsman to amend the plans, and $710 which they had to pay to the local council for having the crossover repaired.

The owners' total claim

10 The total monetary claim made by the owners when they commenced proceedings was $225,059.19 inclusive of defects, liquidated damages and expert's fees. In addition they sought general damages, costs (other than expert's fees) and interest.

The builder's position

11 The builder's director, Mr Ming Lei, accepts that some of its works require rectification, but disputes other defects. The builder counterclaims for the balance allegedly due under each of the driveway contract, the garage contract, and the fascia contract. The total of these claims is just over $24,000. There is no claim by the builder for the balance of the house contract sum.

12 The builder also seeks payment of $318.18 for removal of two cupped floorboards from the living room floor, at a point well after he had completed the house contract works.

Further issues

13 With respect to the driveway contract, there is an issue as to whether it was made by the builder with Ms Li alone, or whether she and Mr Jiang were parties to the contract. It is also necessary to establish whether the contract was a major domestic building contract, or a contract made between the purchaser of goods or services and a supplier of goods or services.

14 If the contract is a major domestic building contract, the Tribunal has jurisdiction by operation of section 53 of the *Domestic Building Contracts Act 1995,* and the primary enquiry will be whether there has been a breach of the express warranties regarding quality of the works contained in clause 10.1 of the house contract, which are also implied into the contract by operation of s 8 of the *Domestic Building Contracts Act 1995*. If the contract is one for the supply of goods and services, the Tribunal has

jurisdiction, as any dispute arising will be a consumer and trader dispute within the meaning of s 182 of the *Australian Consumer Law and Fair Trading Act 2012*. In this case, the Tribunal's enquiries will centre on the application of the implied guarantee arising under s 60 of the Australian Consumer Law ("**the ACL**").

15 There are issues arising with respect to the garage contract and the fascia contract identical to those arising with respect to the driveway contract.

WITNESS IMPACT STATEMENT

16 On the final day, after I had indicated that the hearing had concluded, Ms Li asked if she could hand up an "impact statement" prepared by her daughter. I answered that she could not, because the hearing had concluded. In saying that, I was mindful that the daughter had not attended on any day during the hearing, and was not present at that point.

17 Following the hearing, Ms Li sent an email to the Tribunal indicating that the impact statement had been sent to the Tribunal on the night of 7 March 2018. Ms Li said she thought the registrar would print the statement and place it on the file.

18 I confirm that the impact statement has not been considered by the Tribunal. Firstly, and most importantly, it was tendered after the hearing was closed, and leave to tender it was refused in Mr Lei's presence. For the impact statement to be taken into evidence, the hearing would have to be reopened, and Mr Lei would have to be given the opportunity to cross-examine the author of the statement.

19 There is no basis to reopen the hearing to discuss whether the impact statement should be admitted into evidence, as the owners have made no claim for loss of amenity, or for damages for stress or inconvenience. As an impact statement, the document appears from its title to be irrelevant to the issues in the case.

THE MAIN EXPERT WITNESSES

20 The experts called on behalf of the owners was Mr Salvatore Mamone, an architect. He had submitted an expert's report on the letterhead of the company Inspect Direct Pty Ltd. It was evident from his report that he held a bachelor's degree in architecture. At the hearing he indicated that he graduated from University of Melbourne. He had since become a registered building practitioner, and also had become registered as an inspector with the VBA. He summarised his career, and said that he had been a consulting architect since 2002. On this basis I find that he was appropriately qualified to provide evidence as an expert in a case of this nature.

21 The expert witness called by Mr Lei on behalf of the builder was Mr Ling Lin. Mr Lin had not provided a written report prior to the hearing, and it was necessary to investigate his qualifications to provide expert evidence at the hearing. It came out that Mr Lin held a bachelor's degree in architecture

from the Guandong Institute of Technology. He graduated in 2002. Since arriving in Australia, he had qualified as a draughtsperson, and had qualified as a registered building practitioner in that category.

22 Although Mr Lin held relevant academic and registration qualifications, he did not appear to be familiar with the role of an expert witness. This was apparent from the nature of the investigations which he said he had carried out when inspecting the site with Mr Lei on 21 November 2017. He said that before the inspection, he had been informed that there was a dispute, and in particular that the floor had a fault, but he had not been given a copy of Mr Mamone's report. He said that his inspection centred on the floorboards. He went around the exterior of house, and saw there were ventilation vents on both sides. He inspected the cupped floorboards, but did not take a moisture measurement. He said he had only "a quick walk upstairs. In these circumstances, even if I was prepared to accept that he was qualified as an expert, he had equipped himself by the nature of his investigations to give evidence in relation to the floorboards and the subfloor ventilation only, and even that evidence was very limited. Mr Lin's evidence is discussed below.

23 The upshot is that the builder, in effect, came to the hearing without the benefit of having evidence available from a suitably qualified expert who had carried out appropriate investigations, and who accordingly could assist the Tribunal in assessing whether there were defects, and if so, what it would cost to fix them.

24 In these circumstances, the only evidence available to counter the expert evidence of Mr Mamone was that of Mr Lei himself, who of course was not an independent witness.

THE HOUSE CONTRACT

25 The house contract executed by Ms Li and the builder on 3 April 2013 was a standard form MBA contract styled HC (Edition 1-2007). The contract incorporated by reference a specification, a set of 3 plans which were not identified in detail, but were drawn by "PVC", and one page of engineer's computations prepared by P Biviano. At the hearing the parties agreed that the plans drawn by "PVC" were those prepared by drafting service called Mister Plan Man, of which Mr Peter Cvetkovski was the principal. Although Mr Cvetkovski had been introduced to the owners by Mr Lei, it was clear that he had been engaged by the owners to prepare the plans required for a building permit, and accordingly Ms Li, rather than the builder, was responsible for the design of the new extension.

26 The building permit for the project was applied for by the builder as agent. Wen Jun Li was identified as "the owner" in the application. The building permit was issued on 30 April 2013.

27 An occupancy permit was issued in August 2014, and the owners took possession in early September 2014.

THE FORMATION OF THE OTHER CONTRACTS

28 It was common ground between the parties that, at the outset of the project, they discussed doing certain works after the house contract had been completed. For this reason, the contract expressly excluded the driveway concreting, the landscaping, and renovations to the existing house including the pantry, the laundry, the bathroom, and demolishing the stair and bedrooms.

29 Accordingly, it was not surprising that Ms Li gave evidence that it was her expectation that the builder would return to the site to carry out the further works contemplated by the parties.

THE GARAGE CONTRACT

Who were the parties to the garage contract?

30 The garage contract was constituted primarily by an email quoting $39,000 for the job sent by the builder to Ms Li, and a conversation which occurred on site at which the quotation was accepted.

31 Ms Li acknowledges that she is named as the owner builder in the Building Practitioners Board Certificate issued on 10 October 2014 in respect of the construction of the garage, and accepts that she alone entered into the garage contract with the builder.

32 The scope of work, according to Mr Lei, included demolition, concreting, brickwork, electrical work and painting.

Did the *Domestic Building Contracts Act 1995* apply to the garage contract?

33 It is necessary to make a determination about this matter because the contract was not in writing, it was not signed by the parties. Accordingly, if it is a major domestic building contract, it is "of no effect" by virtue of s 31 (2) of the *Domestic Building Contracts Act 1995*.

34 The issue must be determined by reference to section 5 of the *Domestic Building Contracts Act 1995*. This provides relevantly:

> (1) This Act applies to the following work—
>
> (a) the erection or construction of a home, including—
>
> (i) **any associated work** including, but not limited to, landscaping, paving and the erection or construction of any building or fixture associated with the home (such as retaining structures, **driveways,** fencing, **garages,** carports, workshops, swimming pools or spas); and (ii) …
>
> (b) the renovation, alteration, extension, improvement or repair of a home;
>
> (c) any work such as landscaping, paving all the erection or construction of retaining structures, **driveways**, fencing,

> **garages,** workshop continentals or spas that is **to be carried out in conjunction with the renovation, alteration, extension, improvement or repair of the home**.-(My emphasis)

35 Ms Li conceded that the garage contract was entered into well after the house contract had been settled. As the works were carried out after, rather than in conjunction with the house contract works, I conclude that the contract cannot be classified as a *major domestic building contract* as defined in the *Domestic Building Contracts Act 1995*, even though its value was well in excess of $5,000.

36 However, as the contract was made in trade and commerce between a consumer and a supplier, it attracts a guarantee that the services will be rendered with due care and skill under s 60 of *The Australian Consumer Law* ("**the ACL**").

If the contract is a major domestic building contract?

37 In case I am wrong in concluding that the garage contract is not to be classified as a major domestic building contract, for the reason that the garage was both immediately adjacent to the existing house and attached to it, it is appropriate to explore the alternative position.

Section 31 of the *Domestic Building Contracts Act 1995*

38 Section 31 of *the Domestic Building Contracts Act 1995* mandates that a *major domestic building contract* must contain certain provisions. For instance, it must be in writing, be dated, set out in full all the terms of the contract, and the detailed description of the work to be carried out, and include the plans and specifications for the work. It must state the names and addresses of the parties; and state the registration number of the builder and set out details of the required insurance. It must also state when the work is to start and when the work will be finished and state the contract price.

39 Section 31(2) of the Act provides that:

> A major domestic building contract is of no effect unless it is signed by the builder and the building owner (or their authorised agents).

40 As the total value of the work was more than $5,000, it was clear that this is a situation where a written major domestic building contract containing all the matters required by s 31(1) of the Domestic Building Contracts Act should have been used.

41 Because s 31(2) of the Domestic Building Contracts Act provides that a major domestic building contract is of no effect unless it is signed by the builder and the building owner, the builder will not be able to sue on the contract, if it is such a contract, to recover the balance of the contract sum allegedly due.

42 Although it has no enforceable contract, the builder would have an entitlement under the law of restitution to be paid where:

(a) he performed services and provided materials for the benefit of Ms Li;

(b) he expected to be paid the agreed sum;

(c) Ms Li expected that she would have to pay him at least the agreed sum;

(d) Ms Li received significant benefits by the performance of services and the provision of materials by the builder; and

(e) Ms Li would be unjustly enriched if she were allowed to receive these benefits, without paying an appropriate amount for them.

43 The Tribunal has jurisdiction under s 53(2)(b)(iii) of the *Domestic Building Contracts Act 1995* to order the payment of a sum of money by way of restitution.

44 What the builder is entitled to be paid in these circumstances is to be assessed on a *quantum meruit*. Derived from Latin, this phrase means the builder is entitled to be paid a reasonable amount for the services performed and the materials provided. In assessing this reasonable amount, it is appropriate to take into account the reasonable cost of rectifying any defects in the works.

THE DRIVEWAY CONTRACT

Who were the parties to the driveway contract?

45 The third contract was for the construction of a concrete driveway on the west side of the house, a retaining wall along the driveway, the installation of agricultural drains, and a concrete path on the east side of the house.

46 Mr Lei gave evidence that this contract was formed about 10 months after he finished the house. The driveway contract was not in writing. It was constituted by a series of conversations between Ms Li, Mr Jiang and Mr Lei. Ms Li highlighted that Mr Jiang conducted the negotiations with Mr Lei. Ms Li and Mr Jiang contend that they were both parties to the contract.

47 In Mr Lei's view, the counterparty to the builder was Ms Li. He says that at the time the contract was entered into, Ms Li was an owner builder and he was acting as her subcontractor.

Finding regarding parties to the driveway contract

48 From their evidence, it appears that Mr Jiang and Ms Li had given no particular thought to the question of who was contracting with the builder regarding the driveway and associated works. Mr Lei on the other hand was very clear that he was contracting with Ms Li, and with Ms Li only.

49 I consider it highly relevant that Ms Li was the only owner named in the house contract, and that after that contract was concluded, she was the party

named as the owner builder in the Building Practitioners Board Certificate for the construction of the garage. Ms Li accepts that she alone entered into the garage contract with the builder. These matters suggest that it was the intention of the parties that the further works would be conducted by Ms Li as an owner builder.

50 In the circumstances, I infer that Mr Jiang and Ms Li had agreed that it was Ms Li who would enter into all the contracts regarding the renovation of their house and its surrounds.

51 I find that Ms Li, alone, entered into the driveway contract on behalf of the owners.

Scope of the driveway contract

52 As noted, the scope of the driveway contract was not reduced to writing before the works were carried out. However, the nature of the material to be supplied and the works to be performed is reflected in an email sent by the builder to Ms Li on 29 October 2015. The builder supplied a truck of crushed concrete, a truck of dirt, and 4 cubic metres of concrete and materials for the retaining wall. The work performed, according to the email, included digging a trench for brickwork in the front yard, excavation, placing footing steel, and setting up and pouring concrete. At the hearing Mr Lei gave evidence that before the driveway was poured, he installed a stormwater drain and the drainage pits which serviced the driveway.

Price of the driveway contract

53 No fixed price was negotiated before the works were undertaken. The arrangement reached was that the builder will be reimbursed for materials supplied, without any loading, and will be paid for labour costs incurred. The rate agreed for concrete was $65 per m^2.

Did the *Domestic Building Contracts Act 1995* apply to the driveway contract?

54 As noted, s 5 of the *Domestic Building Contracts Act 1995* in effect provides that the Act applies to the erection of any building associated with a home such as a garage if it is carried out as part of a contract for the erection or construction of a home, *or* if it is carried out in conjunction with the renovation, alteration, extension, improvement or repair of a home.

55 Ms Li says that the driveway contract was a contract for the performance of domestic building work because it was related to the house contract. She highlights the fact that in the specifications for the house contract, the need for a drive and landscaping works was highlighted, and these works are identified as separate works. She also points out that the driveway contract included, at her husband's insistence, stormwater pits in order to ensure that the driveway drained effectively away from the house.

56 Mr Lei, on the other hand, contends that the contract was a separate contract. He emphasises that the works were expressly excluded from the

house contract, and that the works were performed at a later time, approximately 10 months after the conclusion of the house contract.

57 On the basis of the evidence, it seems to me quite clear that the driveway contract was a separate contract. Both parties agree that the driveway and the landscaping were expressly excluded from scope of the house contract works. If these works had been carried out contemporaneously with any part of the house contract works, there would have been an argument that they were carried out in conjunction with those works. However, in circumstances where they were not carried out with, or even immediately after the house contract works, but were carried out almost a year later, they must be separate works.

58 I accordingly find that the works covered by the driveway contract are not domestic building work for the purposes of the *Domestic Building Contracts Act 1995.*

59 However, as the driveway contract was formed in trade and commerce between a consumer and a supplier, it attracts the guarantee created under s 60 of the ACL that the services will be rendered with due care and skill.

The fascia contract

60 The last contract made between the owners and the builder related to the demolition of the fascia at the front of the existing house, and its replacement, together with the replacement of the associated gutters and downpipes. As the contract was concerned with the renovation, alteration or improvement of an existing home it is governed by the *Domestic Building Contracts Act 1995* by virtue of s 5(1)(b). As the value of the work exceeded $5,000, the contract is a *major domestic building contract* as defined in the Act.

61 The fascia contract, as a major domestic building contract, is of no effect because it was not signed by the builder and the building owner, by operation of because s 31(2) of the *Domestic Building Contracts Act.* The analysis of the builder's entitlements in this situation set out with respect to the garage contract applies. That is to say, although it has no enforceable contract, the builder will be entitled under the law of restitution to be paid a sum assessed on a *quantum meruit*. This remedy will be available because the builder performed services and provided materials for the benefit of Ms Li in circumstances where he expected to be paid, she expected to pay him, she received benefit from the performance of work and the provision of materials by the builder, and she would be unjustly enriched if she were allowed to receive those benefits without paying an appropriate amount for them.

DAMAGES

62 At the hearing neither side was legally represented. Accordingly, I took time to explain that the general rule for the recovery of damages for breach

of contract was that the innocent party was entitled to be put in the same position as they would have been had their contract being fulfilled, as illustrated by the High Court in *Bellgrove v Eldridge*[1]. The parties were also told about the exception that arises where the proposed rectification work is not necessary and reasonable, and how the extent of that exception had been examined by the High Court in the latter case of *Tabcorp Holdings v Bowen Investments.*[2]

63 Martin CJ (with whom Buss JA and Newnes AJA agreed) in the Court of Appeal in Western Australia in *Wilshee v Westcourt Ltd*[3], conveniently summarises the principles I endeavoured to explain to the parties. The Chief Justice said this about assessment of damages in a case of breach of contract, at [61]:

> [T]he Australian law applicable to issues of this kind has been elucidated by the decision of the High Court of Australia in ***Tabcorp Holdings Ltd v Bowen Investments Pty Ltd*** (2009) 83 ALJR 390; [2009] HCA 8. That case concerned a claim for damages by a landlord as a result of breach of a covenant in the lease by the tenant carrying out work, which resulted in the substantial remodelling of the foyer of the building leased without the approval of the landlord. The trial judge held that there had been a breach of covenant, but awarded damages in the sum of $34,820, being the difference between the value of the property with the old foyer, and the value of the property with the new foyer constructed by the tenant. On appeal, the Full Court of the Federal Court of Australia had increased the judgment sum to $1.38 million, made up of $580,000 to reflect the cost of restoring the foyer to its original condition, and $800,000 for loss of rent while the restoration work was taking place. The High Court upheld the decision of the Full Court.
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> 62 In doing so, the High Court emphatically rejected the proposition that a party entering into a contract was at complete liberty to break the contract provided damages adequate to compensate the innocent party were paid - in the ***Tabcorp*** case being damages in the amount of the diminished value of the landlord's reversionary interest. Rather, the High Court reaffirmed the 'ruling principle' [13] that the measure of damage at common law for breach of contract was that stated by Parke B in ***Robinson v Harmon*** [1848] EngR 135; (1848) 1 Exch 850, 855; [1848] EngR 135; (1848) 154 ER 363, 365:
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> > The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.

Martin CJ continued:

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1 (1954) 90 CLR 613;[1954] HCA 36
2 [2009] HCA 8
3 [2009] WASCA 87

> 65 The earlier decision of the High Court in ***Bellgrove v Eldridge*** [1954] HCA 36; (1954) 90 CLR 613 stands firmly against the proposition that diminution in value is the ordinary measure of damages awarded against a builder as a result of departure from a building contract. In that case, a builder who had breached his contract in respect of the composition of the concrete in the foundations of the building and in respect of the mortar used in the erection of its brick walls, asserted that the relevant measure of damage was the difference between the value of the house and land as constructed, and the value which it would have had if the building contract had been performed. That contention was rejected. In the joint judgment of Dixon CJ, Webb and Taylor JJ, it is observed that the ordinary measure of damage is the cost of the building work which is required to achieve conformity with the building contract (617 - 618). If that work requires the demolition and reconstruction of the house, then, subject to one qualification, that is the appropriate measure of damage.
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> 66 The qualification to which the High Court referred in ***Bellgrove*** was that 'not only must the work undertaken be necessary to produce conformity, but that also, it must be a reasonable course to adopt' (618). On the facts of ***Bellgrove's*** case, the High Court was of the view that insistence upon the performance of the remedial work by demolition and reconstruction was entirely reasonable given the nature of the breaches of the building contract.

As to the exception created by ***Bellgrove's*** case, Martin CJ said:

> 69 In ***Tabcorp***, the High Court also elucidated and explained the qualification of 'unreasonableness' established by the earlier decision ***Bellgrove***. It established that this qualification is only to apply in 'fairly exceptional circumstances ... only ... where the innocent party is "merely using a technical breach to secure an uncovenanted profit"...' [17] (quoting from ***Radford v De Froberville*** [1977] 1 WLR 1262 (Oliver J).

RATES AND MARGIN

64 In respect of defects, the owners relied on the report Mr Mamone as the basis for claiming damages. Mr Mamone, in respect of each defect he considered existed, had prepared a detailed costing based on the work "being carried out by a small to medium sized builder with access to the required trades, suppliers and subcontractors." He broke the work down into trades, and used what he regarded to be the appropriate hourly rate. He also made an allowance for materials as required.

Hourly rates

65 It is necessary to discuss hourly rates. Mr Mamone used a rate of $85 per hour for licensed trades such as electricians and plumbers, $75 for painters and plasterers, $75 per hour for general trades, and $65 an hour for labourers. These rates were exclusive of GST.

66 Mr Lei, at the hearing, accepted that $85 an hour was reasonable for an electrician or a plumber. He also accepted a rate of $75 an hour for a plasterer. However, he said painting was charged on square metre basis, and suggested $45 per square metre was appropriate. He also said tilers charged on a square metre basis, and that for a tiler $45 a square metre was appropriate, save where porcelain was being installed, where $60 per square metre was appropriate. The major controversy, however, concerned labourers, as Mr Lei said he could get a labourer for $250 a day. For an eight hour day, that meant the hourly rate was about $31.

67 The range of rates suggested by Mr Mamone appears to me to be reasonable, and not out of line with the rates I have come across in hearing many other domestic building cases in the Tribunal, save for the rate for a labourer. I accordingly accept Mr Mamone's rates for each trade, other than a labourer, for the purposes of calculation of rectification costs.

68 Mr Lei was challenged to produce a witness who said he was prepared to work as a labourer for $31 an hour. Although he had ample opportunity to do so, he failed to call any such witness.

69 I gave the parties guidance about the rule in *Jones v Dunkel*[4] early in the hearing. In circumstances where the rate to be allowed for a labourer was obviously an important issue, and where Mr Lei had the advantage of a break between the first three days the hearing and the final two days in which he might have identified a witness regarding the matter, it might well have been open to me to have drawn such an adverse inference against the builder to the effect that the evidence of any witness he called regarding the appropriate hourly rate for a labourer would not have assisted his case. However, I do not draw any adverse inference. It is possible for me make a determination about appropriate hourly rate on another basis.

70 Mr Mamone questioned the rate at which Mr Lei said he could engage a labourer. Mr Mamone clarified that his rate for a skilled labourer related to a properly trained individual who was used to using equipment and who had relevant OHS and site induction training.

71 As the builder is off the site, and Ms Li will have to engage another builder to undertake necessary rectification work, I think Ms Li is entitled to recover damages based on reasonable market rates. Although it may be that Mr Lei has the ability to get labouring work done at a rate lower than that proposed by Mr Mamone, a rate of $31 is lower than I recall having have encountered in hearing many other domestic building cases in the Tribunal. On the other hand, I consider $65 to be a particularly high rate for a labourer, and out of kilter with the normal range I have experienced. In all the circumstances, I will allow only $50 per hour plus GST for a labourer.

[4] (1959) 101 CLR 298

Contingency and margin

Contingency

72 Is also necessary to discuss contingency and margin. Mr Mamone has allowed 10% contingency. I consider that, generally speaking, contingency is not necessary where the small scope of work concerning a specific defect has been identified. Accordingly, I propose not to allow the recovery of a sum for contingency, except in exceptional circumstances.

Margin

73 As to margin, a rate of 25% was used by Mr Mamone to allow for preliminaries, warranties, overheads, supervision and profit. This is a reasonable figure, and indeed is less than the figure for margin often claimed in the Tribunal. I find that recovery of a margin of 25% is appropriate, and I will apply it when assessing damages for defective work.

GST

74 GST of 10% must be added to each item in respect of which Ms Li is entitled to compensation.

75 With these principles in mind, I now turn to a discussion of the issues arising under each of the contracts.

THE HOUSE CONTRACT-DEFECTS

Ventilation issues [6 & 3.6]

76 The parties agree that the most important issues were those relating to sub floor ventilation and the subsequent damage to the floors. On this basis, they will be discussed first.

77 Mr Mamone addressed ventilation issues in section 6 of his report. Other than saying that a number of sub floor vents were blocked by floor framing members and by wall sarking paper, he was unable to provide primary evidence about the issue.

78 Mr Mamone had referred to a report prepared by CPD. This report, dated 13 May 2016, was put into evidence. It had been prepared by Mr Brent Clune. Mr Clune was called by the owners and gave evidence by telephone as he was interstate. He confirmed the opinion expressed in his report that the existing air vents were found to be severely restricted by the close proximity of bearers on both sides of the extension. He noted that crossflow ventilation was further compromised by the patio wall, which did not have any air vents.

79 Mr Clune's observations about the obstruction caused by bearers were borne out by photographs tendered by Ms Li on the fourth day of the hearing. She gave evidence that on Sunday, 25 February 2018 she had got under the house and taken the photos. These photographs were tendered

with the agreement of Mr Lei notwithstanding that they were taken after the joint inspection by the parties and the Tribunal. Ms Li had painstakingly counted the number of air holes in each air vent which had been blocked by paper or bearers. In respect of five vents on the west wall, and the six vents on the east wall, she calculated that 52.42% of them were blocked.

80 I accept Ms Li's evidence, and note that it is entirely consistent with Mr Clune's more general observations.

81 I note that the draughtsman who prepared the contract plans notated on the drawing that ventilation of 7,300 mm² was to be allowed per (lineal) meter. The builder had installed, with the permission of the owners, old-fashioned terra cotta vents which had double that capacity, but installed them only approximately every two lineal metres. Mr Lei says that he complied with the specification in this way.

82 The builder's explanation does not take account of the fact that no ventilation was available from the rear, because of the construction of the alfresco, or patio, area. The builder took no step to compensate for this by installing more air vents during the course of construction.

83 Ms Li gave evidence about this point. She deposed that she spoke to the architectural draughtsman who prepared the plans, Peter Cvetkovski, who said that additional vents should be placed at the sides of the house.

84 Mr Lei emphasised that when he was called back to site to address the ventilation issue, he put additional weep holes in. Ms Li confirmed this, adding that the weep holes were added in July 2015.

85 Mr Lei gave evidence that he thought the construction of the weep holes in addition to the existing vents would provide sufficient ventilation.

Finding

86 In my view, Mr Lei has not been vindicated in this respect. I note that at the inspection, the subfloor area still contained damp soil which smelled musty. I these circumstances, I accept the owners' contention and find that the subfloor crossflow ventilation is still inadequate.

The level of the front yard paving

87 Mr Lei sought to divert attention away from the inadequate number of vents by drawing attention to the fact that the concrete paving in the front yard, which had been installed by the owners after he left the site, was higher than the vents at the front of the house and would accordingly enable stormwater to enter the sub floor area. This point was also made by Mr Lei's expert witness Mr Lin in the one page "Property inspection report" which he brought to the hearing, and which was tendered on behalf of the builder. I do not think this issue is relevant. Firstly, there is a significant distance from the front of the house to the area I accessed at the inspection, which was immediately inside the subfloor access door on the east side of the house towards the rear. Secondly, although I did not go under the

extension to check, it is reasonable to expect that the subfloor of the existing house is physically separated from the subfloor of the extension by the original foundations on the south end of the old house.

The owners' failure to build promptly a retaining wall

88 At the hearing, the builder also highlighted an argument which had been raised in its points of defence. This was that when he left the site he had warned the owners that they must construct a retaining wall complete with agricultural drains connected to the stormwater drainage system in order to "prevent flooding water damage to the subfloor area of the house".

89 The owners raised two arguments as to why the late construction of the retaining wall - which clearly took place months after the builder left the site-was not relevant. The first is that it was not inadequate ventilation that caused the dampness, but the fact of the builder had allowed water to enter the construction site, and had caused it to remain trapped there because the excavation for the foundation peers was not backfilled, and the soil level within the envelope of the subfloor area was not made higher than the external soil level.

90 Secondly, their evidence was that damage the floorboards was noticed on 28 September 2014, which was just over a month after the occupancy permit was issued on 26 August 2014. In these circumstances, the builders warning about the retention wall, if it was relevant at all, was given far too late.

91 I accept the first argument put forward by the owners, as one of the photographs they tendered showed a set of brick foundation piers set in a trench which had not been back filled.

92 I also accept the second argument, as even though Mr Lei at the hearing did not accept that cupping of the flooring have been notified as early as 28 September 2014, he did concede that it had become apparent within "three months". Even on Mr Lei's view of the evidence, the construction of a retaining wall with agricultural drains would not have altered the fact that the subfloor was already materially damp at the time construction of the extension was complete.

Rectification

93 Having regard to my finding that the subfloor ventilation is inadequate, it is necessary to determine what methods of rectification is appropriate.

94 The remedy proposed by CPD was that mechanical ventilation should be installed. The builder strongly contested this, asserting that it was not necessary because the moisture levels had been stabilised.

Have the subfloor moisture levels stabilised?

95 There was conflicting evidence about this issue. Mr Clune in his report of May 2016 said the moisture readings taken from the polished timber

flooring in the kitchen living area registered a moisture content in the range 25-28%.

96 Against this, the builder pointed out that the inspector appointed by the VBA, Mr Nick Kukulka, had inspected the dwelling in April 2016 and had found the water content in the boards to be small. The Kukulka report, which was tendered by consent even though Mr Kulklka was not called, contains a photograph of a water meter showing a reading "indicating a dry subfloor".[5] Mr Lei pointed out that when Mr Mamone went to the site in February 2017, he measured the floorboard moisture saturation at 12%.[6] Mr Lei also emphasised that when the parties and the Tribunal had carried out their inspection on the second day of the hearing, his own reading of moisture in the floorboards indicated that the moisture level was back to normal.

97 On balance, I accept that the situation has stabilised. However, the reality is that the subfloor area still smells musty. I find that the sub floor ventilation is inadequate, and this constitutes a defect.

Method and cost of rectification

98 In considering what solution should be adopted, it is appropriate to note that the floor in the kitchen and living room has been affected by moisture arising from the subfloor area. This has resulted in cupping and consequential damage to some of the kitchen fittings. This cupping, and the consequential damage, was readily apparent at the inspection, and was not contested by Mr Lei.

99 It will be necessary for the owners to undertake expensive rectification work in order to replace the kitchen floor and living room. They are entitled to have peace of mind when they do this, and accordingly I consider that is appropriate to award damages to the owners and allow the cost of installation of mechanical ventilation. This, I note that the cost was quoted by Mr Clune on 14 May 2016 at $3,640 plus GST, or just over $4,000.

100 Mr Lei contested the need for mechanical ventilation, but did not question the cost or suggest an alternative. I find that the owners are entitled to damages of $3,640 exclusive of GST in respect of rectification of the subfloor ventilation issue.

Damage to the floorboards in the open kitchen, dining/family room.

101 This major defect was discussed by Mr Mamone at paragraph [8.00] of his report. He observed floorboards were peaking along the length of their joints. The peaking ranged "in height up to approximately 3.5 mm to 4.00 mm in parts".

102 The peaking remarked on by Mr Mamone was clearly visible at the hearing. In my view, the floor is palpably defective and must be replaced.

[5] Kukulka report, page 9.
[6] Mamone report, paragraph 8.1.5.

103 Turning to the question of the builder's liability, I note that Mr Mamone opined that the cause of the peaking was a direct result of high moisture levels within the subfloor, with the subfloor ground retaining high levels of moisture.

104 The linkage between the build-up of moisture in the subfloor and damage to the flooring was indirectly contested by the builder, when the expert witness he called, Mr Ling Lin, gave evidence. Mr Lin acknowledged that the floorboards were not smooth, as they were crushing each other and some had curved upwards. He suggested two possible reasons for this. One was that the floorboards have been made wet. The alternative was moisture arising from the subfloor. Mr Lin indicated that he thought that ventilation might not be sufficient.

105 Under cross-examination Mr Lin agreed that he had not done a calculation to assess whether the ventilation installed would be sufficient. When pressed, he agreed that he could only be confident that there was proper ventilation if he carried out measurements and did calculations. He conceded that he was at the site for only 28 minutes. He could not say from observation that the vents were not blocked. He agreed he had merely assumed they were clear.

106 When Mr Lin was shown a photograph of brick foundation piers standing in a trench which had not been backfilled, he agreed that this was not good building practice, as the trench should have been filled "to grade away".

107 This concession supported the owners' proposition that the manner in which the builder had constructed the foundations had contributed to the retention of moisture under the new extension. Furthermore, Mr Lin's evidence that he had not carried out measurements and calculated the effectiveness of the ventilation that the builder had installed did not assist the builder either.

Rectification of the floorboards

108 Turning to the method of rectification, I note that Mr Mamone opined that the drainage and crossflow ventilation issues previously discussed would have to be addressed in order to allow rectification to proceed.

109 Mr Mamone then says that the floorboards have to be removed, and replaced. Much consequential work will be involved, including removal of the kitchen appliances, including disconnection of the plumbing to the sink, the taps in the kitchen wastes, decommissioning of all electrical power points, the removal of the kitchen island and the kitchen cabinets, the removal of the family room credenza, and the removal of timber skirting boards. After the floor has been replaced, it will have to be sanded and polished. The kitchen will have to be reassembled. A new Caeser stone bench top will be required, as it will be destroyed during removal. The kitchen will have to be re-plumbed, and power points recommissioned. The credenza will have to be put back, and skirting boards will have to be

replaced. The skirting boards will have to be painted, and the walls painted to match. The total cost of all this work is calculated by Mr Mamone to be $28,126.

110 Mr Lei contested liability, again asserting that the owners had not constructed a retaining wall in a timely manner, but did not make any serious attack on Mr Mamone's costings. I have already rejected the builder's defence based on the lack of a retaining wall.

111 In the absence of any criticism of Mr Mamone's assessment, I find that it is reasonable, with one qualification. This is that following the inspection, I can see no justification for the walls to be repainted. The cost of this particular item was $840. Accordingly I reduce Mr Mamone's assessment from $28,126 to **$27,286**, and award the reduced sum to the owners in respect of the cost of rectifying the flooring.

Other house contract defects

112 Having dealt with the key issue of subfloor ventilation, it is convenient now to deal with the other defects arising under the house contract in the order in which they appear in Mr Mamone's report. The number in the heading that follow indicates the paragraph in Mr Mamone's report where the defect is discussed. Damages awarded are, in this section of the decision, referred to without the addition of margin and GST. Margin and GST will be added to the total of the sums awarded as damages, which is calculated in schedule 1.

Defects at the front of the house

Metal alloy letterbox [Mr Mamone's item 1]

113 The first defects identified by Mr Mamone in his report concerned the metal alloy letterbox. This had been inserted at an angle in its brick pillar. Furthermore, the cover plate had fallen off, and there was no back cover. In his written defence, Mr Lei disputed that this item was part of his contract. However, at the hearing, he relented, and accepted responsibility.

114 Mr Mamone said that the relevant rectification work included removing and replacing the letterbox. His costing for taking the top of the brick pillar apart, removing the letterbox, reinstalling a new letterbox at the correct angle, and rebuilding the pillar and cleaning brickwork is $760, exclusive of contingency, margin and GST. I regard this costing as reasonable, and find that the owners are entitled to damages of **$760** in respect of the letterbox.

Defects on the east side of the house

Right Hand Side/North end of metal fascia [2.2]

115 Mr Mamone opined that the RHS/North end of a metal fascia at ground floor level is not capped, and that this will potentially allow water and pests to enter the ground floor roof and the wall cavity.

116 Mr Lei disputed liability, asserting in his defence that this work was not part of his company's contract. At the inspection, he explained that a cap had been placed but had been disturbed by an electrician engaged by the owners after he had left the site. The owners disputed this, and pointed out that the relevant works constituted part of the builder's scope of electrical works. I accept the owners' evidence on the point, and find for them.

117 As to rectification, I note that Mr Mamone says that to affix a capping will take two hours work at $85 an hour, which is consistent with the engagement of a roof plumber. I award the owners **$170** in respect of this item.

Hole in roof directly above the open ended fascia [2.3]

118 As with the previous defect, Mr Lei disputed that this work was part of the builder's contract. However, as I have accepted that it was the builder's electrician who had removed the fascia end cap, I find on balance that it was a tradesperson engaged by the builder who had left a hole in the roof above the open ended fascia.

119 Mr Mamone costed the necessary rectification work, which involved capping and flashing the roof at the base of the gable, at $230, comprising two hours at $85 an hour, plus $60 of materials. As I accept that the work will require a roof plumber, and I accept this costing. I award the owners **$230** in respect of this item.

Lead flashing installed along top edge of terra cotta roof tiles not properly formed [2.4]

120 Mr Lei also contended that this work was not part of the builder's contract, but when presented with photographic evidence at the hearing, he accepted that it was. Accordingly, I find that fixing the flashing running along the extension was part of the builder's work. I accept a defect exists in the flashing, and I accept Mr Mamone's estimate that it will take a roof plumber an hour to address the issue. I allow **$85** to the owners in respect of this item.

Exceptionally poor blending of render with exceptionally rough finish [2.5]

121 Mr Mamone noted in his report at that there had been exceptionally poor blending of the render. At the inspection it was clear that there had been no attempt to match the texture of the existing render in the old house with the render placed over the new extension. Mr Lei said in his defence:

> Subject to further investigation and will rectify if required.

122 As the builder in its defence appears to concede that rectification is appropriate if the defect is established, and as the existence of the defect was confirmed at the inspection, I find for the owners in respect of the issue.

123 I note that Mr Mamone costed rectification at $960, on the basis that 12 m² of render had to be rectified at a cost of $80 m². Mr Lei did not criticise this costing, and I award **$960** to the owners in respect of the rendering issue.

Downpipes left covered in plastic [2.6]

124 Mr Mamone noted that all three downpipes on the east side of the house had been left covered with protective plastic, which had degraded over time and stuck to the surface. Parts of the plastic had peeled off displaying an exceptionally poor finish. He said that all the protective plastic had to be removed on the pipes, and the pipes had to be cleaned without being damaged. He costed this work at $260, based on four hours work by a labourer at $65 an hour.

125 The builder accepted the existence of the defect in its defence, and I find for the owners in terms of liability.

126 As to quantification, I accept that the four hours work by a labourer will be necessary, but apply a rate of $50 per hour, as previously indicated. Accordingly, I award **$200** in respect of this item.

Downpipe located at LHS end of east side of house is damaged [2.7]

127 In its defence, the builder contended that the pipe was not damaged at handover, but noted that it would fix the pipe "as a favour". Whilst this is, strictly speaking, a denial of liability, the agreement to fix the pipe - which is inconsistent with that the denial of liability - tips the balance in favour of the owners in circumstances where there is a contest about liability.

128 Mr Mamone costed rectification of this defect at $200, based on two hours work by a plumber, plus materials of $30. I award **$200** to the owners in respect of this issue.

Mortar smears to brickwork [2.8]

129 Mr Lei at the hearing conceded that the mortar smears had to be removed. Mr Mamone assessed the cost of cleaning off mortar smears at $360, based on four hours work at $75 an hour plus materials. The costing was not criticised, and I award **$360** to the owners in respect of this item.

Sub floor vents [2.9]

130 Mr Mamone indicated that four of the terra cotta sub floor vents installed by the builder on the east side of the house required replacement. Mr Lei said that they had been approved by the owners prior to installation.

131 Mr Lei at the hearing conceded that the vents were second hand. Mr Jiang said that the owners did not know they were second hand. When questioned by me, however, he agreed that this was not a problem, but the fact that they were marked with paint was.

132 Mr Lei agreed that the paint should have been removed. He said that he did not do this, as the owners were not complaining. The issue was not picked up in the final inspection.

133 The cost of rectification was discussed. Mr Lei disputed Mr Mamone's costings. He said that removal could be effected within one hour by a general tradesperson charging $75 an hour. He conceded $130 was an appropriate costing for replacement of the vents. I consider Mr Lei's costing to be more reasonable than Mr Mamone's, and I award the owners **$205** for this item.

Pipe penetrations [2.10]

134 Mr Mamone noted that pipe penetrations from the hot water unit and ducted heating unit had not been properly sealed or capped. He costed rectification- which involved removal of mortar, the sealing of the penetrations with a flexible UV silicon sealant, and the placing of metal alloy escutcheon plates - at a total of $385.

135 The existence of the defect was accepted by the builder in its defence, and also by Mr Lei at the hearing. I allow damages of **$385** to the owners in respect of this item.

2000 litre slimline rain tank not installed [2.11]

136 Mr Mamone observed that the builder had not installed the 2000 litre slimline rain tank in accordance with the permit drawings.

137 At the hearing Mr Lei contested liability, confirming the point made in the builder's defence that it had been agreed with the owners that the water tank would be deleted from the contract, and that the builder would install an evaporative cooler instead.

138 The owners' position was that they were entitled to receive the evaporative cooler under their contract.

139 When I pointed out to the parties that the contract contained a procedure in clause 12 for the contract to be varied at the request of the owner, and a corresponding procedure in clause 13 for the contract to be varied at the request of the builder, the parties confirmed that no relevant documentation had been produced under either of these provisions.

140 Ms Li deposed that the contract required the builder to install a cooling system with seven outlets. The builder was requested to extend the system to the two original bedrooms in the existing house, which would have involved the installation of two additional outlets. Ms Li said that, under pressure from the builder, she had paid 50% of the cost of the cooling system installed even though it was contained in the contract. She did not seek a refund of this 50%, but emphasised that the payment had been made even though the provision of a cooling system was in the contract.

141 As it is clear that the owners are right about the contract requiring a cooling system to be installed[7], I find that they are entitled to a credit in relation to the water tank which has not been installed.

142 In assessing the credit to be awarded, I note that Mr Mamone costed the supply of a tank at $800, and materials needed for connecting the tank to cisterns at $360. He also assessed that it would have taken 8 hours work at $85 an hour, or $680 (for a plumber) to have installed and connected the tank, making the total cost $1,840.

143 Mr Lei at the hearing gave inconsistent evidence about the relevant costings. On the fourth day, he asserted that the cost of supplying and delivering a tank would be $700, and that the cost of installation would be $250. On the final day, when he was summarising his position about defects, he testified that $800 was a reasonable price for the water tank, but disputed the cost of connection and the cost of materials. He said that installation would take a plumber 4 hours and $85 an hour, or $340, and that only $150 in materials would be required rather than $350. However, he brought no quotations to back up his views. In circumstances where Mr Lei's own evidence was inconsistent, I place little reliance on it.

144 I accept Mr Mamone's evidence as to quantification, and award the owners **$1,840** in respect of the builder's failure to install the specified water tank.

Defects in concrete path [2.13 and 2.14]

145 Mr Mamone noted a number of defects relating to the concrete path. They are dealt with below, under the heading "Driveway Contract", as a scope of work under this contract including the concrete path on the east side of the house.

No clothes line [2.15]

146 Mr Mamone noted that the builder had not installed a clothesline in accordance with the permit drawings. At the hearing, it was conceded by the owners that there was now insufficient room to place the clothes line in the intended position on the east side of the house, and the owners sought a credit in respect of its deletion from the contract.

147 Mr Mamone costed the supply of a clothesline at $280, and said that it would take a labourer at $65 an hour for 2 hours to install a clothesline.

148 In its defence, the builder said that the owners had agreed to the deletion of the close line. However, it was clear from the specification that a close line was required to be installed by the builder.[8] Mr Lei conceded liability at the hearing, but contested the $280 was a reasonable figure. However, he did not tender any quotation evidencing a lower price. In these circumstances, I accept Mr Mamone's costing regarding the provision of a clothesline. However, I am prepared to only allow $50 an hour for 2 hours of labourer's

7 See contract specification under "additional", item 5.
8 See contract specification under "additional", item 12

time, and accordingly award **$380** for this item. This compares with the $410 claimed by the owners on the basis of Mr Mamone's costing.

Defects on the south side of the house

Tiled alfresco floor is retaining water (inadequate drainage) [3.1]

149 Mr Mamone noted that the alfresco floor was retaining water during and following rain. He considered that the tiles were depressed, and had inadequate grade to enable them to drain. He noted that the required gradient was one in 100. He said it would be necessary to rip the tiles up and replace them. On the basis that appropriately coloured floor tiles would not be found, Mr Mamone considered that the whole floor would have to be lifted up and replaced. He costed the removal process at $520, the retiling at $3,153.50 including materials, and re-caulking at $234.

150 Mr Lei at the hearing contested liability, saying that the tiles had been affected by soil movement caused by flooding of the site before the retaining wall had been constructed. This proposition was put to Mr Mamone during cross-examination. He answered that he disagreed with the theory, and said there was no evidence that the alfresco area had sunk. Also, he pointed out that there was no evidence that the house generally had been affected by soil movement, as might have been expected if subsidence had occurred.

151 I am not convinced by Mr Mamone's response to the suggestion that there was no evidence that the alfresco area had sunk. He does not seem to recognise that the fact that the alfresco area does not now drain may itself be evidence of settlement.

152 Furthermore, when he suggested that there was no evidence that the house had been affected by soil movement, he appears to overlooked the statement he makes at [8.2.1.1] of his report that cracking along the cornice line in the ceiling of the open kitchen, dining and family room was "deemed to be the direct result of building settlement exacerbated by uncontrolled ground movements".

153 Accordingly, on the basis of Mr Mamone's own evidence that there had been building settlement exacerbated by uncontrolled ground movements, I find that the owners have not discharged the burden of proving that the alfresco tiling had been placed with insufficient gradient.

154 The upshot is that I allow nothing to the owners of damages in respect of the alfresco tiling.

Damaged alfresco ceiling as a result of leaking in first floor balcony [3.2]

155 Mr Mamone suggested that the ceiling of the alfresco area had been damaged as a result of leaking from the first floor balcony. However, he did not appear to price the rectification of the ceiling as a separate item, presumably because it could be simply painted.

156 The suggested rectification includes repairing nail head holes in the ceiling (two hours work at $75 per hour plus materials of $12, a total of $162, and repainting - three hours at $75 per hour plus $360 for paint - or $585.

157 I defer making a finding regarding this issue until I have dealt with the question of liability for defects in the balcony. I now turn to this issue.

Defects in first floor balcony above the ground floor alfresco [3.2.2]

158 Mr Mamone said that the balcony floor tiles had to be removed because water was penetrating through to the ceiling of the alfresco area. Regarding the mechanism of failure, he noted the following, starting at [3.2.2.1]:

> Areas of the balcony floor noted to be relatively flat with a number of balcony floor tiles displaying up to approximately 3.5mm depression along tile joints between floor tiles in parts.
>
> 3.2.2.1.1 Visible staining & dirt marks scattered across the surface of the balcony floor indicating water retention across large areas of the balcony floor surface during & following rain periods.
>
> 3.2.2.2 Heavy build-up of efflorescence along parts of floor tiles grout indicating water/moisture penetration/absorption into the floor tile grout.
>
> 3.2.2.3 Cracked sealant along floor perimeter in parts.
>
> 3.2.2.4 Potentially compromised waterproof membrane under floor tiles resulting in the water leak through to the ground floor Alfresco Ceiling.

159 The rectification work described as necessary by Mr Mamone included removing the balcony floor tiles, taking out the existing cement screed and waterproof membrane, and cleaning the substrate. He suggested modifying the waste points at each end of the balcony to make them larger and cutting a 90mm drain across the width of the floor at each end, adjusting the floor frame, installing new strip drains, collecting them to drainage points, and blocking the existing middle waste. To conclude the work, there would be waterproofing, replacing screed, and then retiling the balcony with an appropriate gradient. Skirting tiles would have to be placed around the balcony and the balustrade walls. Mr Mamone costed all this work at nearly $11,000.

160 The builder's defence stated that the balcony tiling was subject to further investigation, but it would rectify the balcony if required. At the hearing, Mr Lei conceded the problems with the balcony, but raised the theory that the balcony may have been affected by foundation movement. This theory was put to Mr Mamone for comment, and he rejected it on the basis that there was no evidence of general subsidence of the building.

161 For the reasons put forward with respect to the alfresco tiling, I think that the evidence given by Mr Mamone regarding settlement of the house is inconsistent with his own observations recorded at [8.2.1.1] where he said

there had been building settlement exacerbated by uncontrolled ground movements.

162 The balcony is directly above the alfresco area. The damage to the balcony recorded by Mr Mamone, set out above, is consistent with minor settlement of the structure.

163 It is to be noted that although Mr Mamone opined at [3.2.2.4] that the waterproof membrane had potentially been compromised, he had not carried out destructive testing to see this was the case, or to determine the actual cause.

164 For all these reasons, I find that the owners have not discharged the onus of establishing that the failure of the balcony waterproofing arose from workmanship issues as distinct from ground settlement. I accordingly find against the owners in respect of this issue.

Finding as to builder's liability for damage to the alfresco ceiling

165 As the owners have failed to establish that the builder is liable for the failure of the membrane in the balcony, I find against the owners in respect of their claim for damage to the alfresco ceiling as well.

A large number of bricks on the ground floor display mortar smears [3.3]

166 The builder conceded this defect existed. Mr Mamone's costing of the rectification at $570 was also conceded by the builder in its defence. Accordingly, **$570** is allowed to the owners in respect of this item.

Windows within rear wall have been installed without adequate provision for sill gaps along the underside of the window frame [3.4]

167 Mr Mamone observes that four windows within the rear wall have been installed without adequate provision for sill gaps along the underside of the frames. The recommended rectification work includes demolition of the sills, the cutting of new sill bricks to allow for the required sill gap, the installation of the new sill bricks, and cleaning. The work is costed at $1,256.

168 The builder in its defence concedes both the defect and the rectification cost. **$1,256** is accordingly allowed.

The top of the glass privacy screen installed at each end of the alfresco is 1.5m not 1.7m [3.5]

169 The builder, in its defence, says that glass at this height was approved at the final inspection, but also raises the contradictory possibility that the glass has been altered later by the owners. At the site inspection, it was manifest that the privacy screens were only 1.5m in height. There was no sign that shorter screens had been re-fitted by the owners, or that higher screens had been cut down to 1.5m. I have no hesitation in finding for the owners in respect of this defect.

170 As the defence centred on the existence of the defect, but did not question rectification of **$1,766.80**, I allow the owners damages in that sum.

There is no provision for subfloor ventilation across the length of ground floor walls [3.6]

171 This defect has been dealt with above.[9]

Defects on the west side of the house [4.1 - 4.3]

172 The defects noted by Mr Mamone at [4.1 - 4.3] are considered below as they relate to works forming part of the Driveway Contract.

Two downpipes on the side of the house have been left covered with protective plastic [4.4]

173 The existence of the defect was accepted by the builder in its defence. Mr Mamone's costing involves 4 hours work at $65 an hour. I will allow $50 an hour, as the work will be performed by a labourer. The total recovery is to be **$200**, not the claimed $260.

The bottom wall bracket of the LHS downpipe has pulled off the wall [4.5]

174 The builder conceded the defect in its defence. Mr Lei at the hearing confirmed that the downpipe has to be repaired.

175 Mr Mamone costs the repair at $75, on the basis it will involve one hour's work by a general tradesperson. I allow one hour, at $50 per hour, as a labourer's skill set would be sufficient. I accordingly award **$50.**

Sub floor vents [4.6]

176 Mr Mamone referred to the installation of five terracotta sub floor vents and recommended that they be replaced by five new sub floor vents.

177 The builder, in its defence, asserted that these vents had been approved by the owners. Mr Lei in relation to the vents on the eastern side had given evidence that the terra cotta vents had been discussed and approved before installation.

178 I accept Mr Lei's evidence, and find against the owners. Nothing is awarded for this item.

Exceptionally poor blending of render colour and finish [4.7]

179 Mr Mamone referred to exceptionally poor blending of the render across the (exterior) dining room wall and the first floor bedroom wall above the dining room. The builder in its defence said that the defect was subject to further investigation, but would be rectified if required. At the hearing, Mr Lei highlighted that the builder's contract was concerned with the extension, not with the existing house. He said it is not responsible for the colour of the render on the existing house.

9 See paragraphs 76-86 inclusive.

180 At the inspection, I was informed that after the builder had rendered and painted the extension, the owners had repainted the existing house. The owners said they chose a colour which exactly matched the pre-existing colour, in order to observe the heritage requirement of the planning permit.

181 The difference in colour between the render on the extension and the repainted front house was, in my view, marginal. I consider that the owners could have repainted the original house in paint that exactly matched the extension in colour without offending the planning permit. Accordingly, I consider that they are responsible for the mismatch in colour between the old and the new render. I find against the owners on this issue.

The owners had to replace the flashing along the length of the first floor junction with the ground floor roof [4.8]

182 Mr Mamone in his report reflects instructions from the owners that they had to replace the flashing because of leaks that had damaged the ceiling and wall plaster within the dining room below.

183 As the defect has been rectified, it is dealt with below as one of the owners "other claims".

Roof [5.1]

184 Mr Mamone notes that the ridge flex on the new roof is not matched to the pre-existing ridge flex colour. He recommends that the correct colour ridge flex should be applied over the top of the incorrectly coloured flex. He puts the cost of this at $1,200, but adds that this work would require the erection of a scaffold at a cost of $1,600.

185 At the inspection, a different colour in the roof flex was perceptible, but it was barely noticeable in my opinion. The owners gave evidence that they were concerned that they were not complying with the heritage aspect of their town planning permit, but there was no evidence from them that the council was concerned. In the circumstances, I consider that if a defect exists, it is as of such a technical nature that is rectification is unnecessary and unreasonable. I find that to allow substantial damages to the owners, such as the total of $2,800 claimed, would be allowing the owners to use, in the words of Oliver J in *Radford v De Froberville* "a technical breach to secure an uncovenanted profit".[10] The defect falls within the narrow exception to the rule regarding the recovery of damages for breach of contract recognised by the High Court in *Bellgrove v Eldridge* as qualified in *Tabcorp v Bowen*, discussed above.[11] I accordingly allow nothing for it.

[10] [1977] 1 WLR 1262
[11] See paragraph 63 above.

Internal defects

Dining room ceiling [7.1]

186 Mr Mamone observed that there had been extensive water damage to the plaster cornice and the plaster ceiling in the dining room. The builder, in its defence, said that this damage was caused prior to any work being carried out under the builder's contract. At the hearing, Mr Lei explained that the dining room of the existing house was approximately eighty years old when the builder began work.

187 The owners met this evidence head-on, arguing that prior to the builder beginning work under the house contract, the dining room had already been renovated by them. The damage which they complained about was specifically caused by leaks in the flashing above the dining room, which in turn, they said, was the responsibility of the builder under its contract.

188 Mr Lei responded that the flashing concern was not part of his contract. On behalf of the owners, Mr Jiang agreed with this, but said that the builder had opened up the roof flashing in order to cover the new wall of the extension. He said making good the flashing was a responsibility of the builder.

189 At this point, Mr Lei changed his argument, and contended that the water damage had not been caused by the flashing.

190 This prompted the owners to refer to a photo taken on 18 September 2015 that showed the builder's worker, David, extending an arm out of the roof. The roof concerned was above the dining room. Mr Jiang deposed that David put his finger through the flashing, demonstrating that it was ineffective. Despite this, he complained, the builder had failed to fix the flashing.

191 I accept Mr Jiang's evidence about this, and find for the owners in respect of the issue of liability for the damage to the dining room roof.

192 Turning to quantum, I note that Mr Mamone's costing begins with an allowance of one hour at $65 an hour for removal of furniture, and another hour at $65 an hour for protecting the floor with plywood and plastic sheeting. I will allow one hour at $50 for both these tasks.

193 Mr Mamone then allows for 3 hours work each by 2 labourers at $65 an hour to demolish the ceiling and cornice. In the absence of any criticism of the allowance for time by the builder, I accept 6 hours work is required, but I reduce the hourly rate to $50, as the work will be carried out by a labourer. The total allowance for 6 hours labourer's time accordingly is $300.

194 Mr Mamone then allows for the replacement of 20.16 m² ceiling and cornices at a rate of $60 m², or $1,209.60. I accept this figure as reasonable.

195 Replacement of 27.6m of cornice, at $12 per lineal metre is also claimed, a total of $331.20. I accept this figure as being reasonable.

196 Mr Mamone then allows for three hours work by a painter at $75 per hour to paint the ceiling and the cornices, together with $120 for materials, a total of $345. Four hours for re-painting the walls, together with materials of $120 is also claimed, or a further $420. I will allow all these figures.

197 The total amount allowed in respect of repair of the dining room ceiling and cornices and the consequential repainting is accordingly ($50+300+$1,209.60+$331.20+$345+$420=) **$2,655.80**.

Cracking along top window on west wall of room [7.2]

198 Mr Mamone recommended rectification of this cracking, but noted that the costing had already been included in the allowance for painting in respect of the dining room. No further allowance is warranted.

Open kitchen, dining and family room

199 The damage to the floor boards in these areas has been discussed above.[12]

Ceiling - cracking and patching [8.2]

Cornice cracking [8.2.1.1]

200 Mr Mamone deemed that the cracking along parts of the cornice line was the direct result of building settlement exacerbated by uncontrolled ground movement.

201 The owners did not explain why the builder should be held responsible for damage caused by uncontrolled ground movements. The onus of establishing liability lies with the owners, and they have not discharged it. I make no award to the owners in respect of this particular complaint.

Paint and plaster patches [8.2.2.1]

202 The other defects noted were plaster and paint patches which Mr Mamone said were a direct result of the relocation of down lights performed by the builder. At the inspection I noted four such patches.

203 Mr Mamone suggests that the whole ceiling area plus cornices must be repainted. I agree. The four patches had already been touched up, unsuccessfully. Mr Mamone says that the ceiling, including the cornice lines, could be repainted by 2 men over 8 hours. At $75 an hour, plus materials of $120, he costed the work at $720. I regard this assessment as reasonable.

204 In addition, Mr Mamone allowed two hours at $75 an hour for protection works. As the works described involve placing protective covers over the kitchen, the stair and the family room, I think two hours is overgenerous and will allow one hour at the painter's rate of $75 an hour.

205 In total, I allow **$795** to the owners in respect of this item.

[12] See paragraphs 64-74 above.

Range hood shroud not installed over flue [8.3]

206 Mr Mamone noted that the range hood shroud had not been installed over the flue. The builder accepted this complaint in its defence, and Mr Lei confirmed this concession at the hearing. Mr Mamone calculated that it would take a tradesperson two hours at $75 an hour to install the range hood properly, together with $60 in materials. I find the total of **$210** to be reasonable, and award that sum to the owners.

Electrical meter box surround has not yet been painted [8.4]

207 Mr Lei conceded the existence of the defect. Mr Mamone suggested it would take a painter half an hour to paint the meter box, and at his rate for a painter of $75 an hour, assessed the work at **$37.50**. I accept this figure, and award it to the owners.

Kitchen & Island stone bench tops [8.5]

208 Mr Mamone suggested there are issues with the kitchen and island stone bench tops, but did not elaborate. He also indicated that the rectification was unnecessary because the benchtops would have to be replaced when the kitchen was dismantled in order to repair the floor. Nothing is allowed for this item.

Eight timber framed windows south wall of room bind during operation [8.6]

209 Mr Mamone stated that eight timber framed windows on the south wall of the house were defective. At the hearing it became clear that the issue was that each of the windows was bound, and would not open. At inspection I was satisfied the windows were binding.

210 In its defence, the builder said that the issue was subject to further investigation, but would rectify the windows if required. At the hearing Mr Lei suggested that the windows might be stuck because of movement in the house.

211 This was put to Mr Mamone at the hearing. As on the other occasions when it had been suggested that the house moved, he responded by saying that if there had been movement of the house, cracking would be evident, and he had found no such damage.

212 In connection with the alfresco tiling, I identified that the evidence given by Mr Mamone regarding settlement of the house is inconsistent with his observations at [8.2.1.1] that there had been building settlement exacerbated by uncontrolled ground movements.

213 The owners did not dispute the windows had been working at handover. The fact that they are now binding is consistent with settlement of the extension. In these circumstances, I find that the owners have not discharged the onus on them to establish that the windows are now defective because of the builder's workmanship. I accordingly allow nothing for this item.

Winder handles [8.6.5.2]

214 There was a separate issue with the windows in so far as three of the window winder handles had to be replaced. This was evident at the inspection. The cost of replacement for the **$36**, which appeared to be reasonable for three handles. I allow this figure.

Glazing bead [8.6.5.3]

215 Mr Mamone said that some old timber glazing bead needed to be replaced. This defect was evident at the inspection. Mr Mamone costed rectification at $87, on the basis that it would take a general tradesperson (at $75 per hour) half an hour to remove the old glazing bead, half an hour to install new glazing bead, and $12 for materials.

216 Mr Mamone gave no explanation as to why the glazing bead had become damaged. He, accordingly, did not demonstrate that the damage was due to any act or omission of the builder. The damage may have occurred because the windows had become distorted as a result of settling of the wall. I find that the owners have not discharged the burden of proof with respect to liability. I award nothing for this item.

French doors leading to alfresco have defects [8.7]

217 Mr Mamone indicated that these doors were defective because the door lock set was loose, and it was also incorrect. It was agreed that the lockset was not the Lockwood Tri Lock which had been specified. The reason for this was examined late in the hearing, and it became clear that the doors had been fitted with a lock by the window manufacturer.

218 It was not suggested that the existing lock was of lesser quality. Accordingly, in my view, to award damages to the owners in a sum sufficient to enable them to change the lock would seem to me to be unnecessary and unreasonable, and would allow the owners to exploit a technical breach of the contract to gain a windfall. The defect accordingly falls within the exception to the general rule regarding the recovery of damages established by *Bellgrove v Eldridge*, discussed above.[13]

219 Although I am not prepared to award damages on the basis that the lock is to be replaced, the evidence is that it had become loose. The question arises as to whether the owners are entitled to damages in relation to the cost of rectifying this. There is no evidence that the lock was defective. The issue may well be a maintenance item. I allow nothing for it.

Other internal defects

220 Mr Mamone listed a number of defects inside the house at [9-23] of his report. Mr Lei elected not to cross-examine Mr Mamone about these defects, on the basis that at handover "it all looked good". This statement was made at the end of the first day of the hearing, in circumstances when it

13 See paragraph 63 above.

had been agreed that an inspection would take place the following morning. In these circumstances, it is reasonable to infer that Mr Lei thought the condition of the house would speak for itself.

Stair & stair well [9.1-9.3]

221 Mr Mamone pointed out that there were paint smears on the timber handrails, on the newel posts and on the baluster posts. He opined that the smears were the direct result of painters not protecting this part of the building when painting. He suggested that the stair balustrade had to be sanded back to bare timber and re-stained. The costing for stripping back the timber including the handrail, the newel posts and the baluster posts was put at $324, and the cost of re-staining was put $820.

222 At the inspection, I noted the marks complained of on the balustrade. I consider that their existence means that the staining of the balustrade and the posts falls short of an acceptable, reasonable standard. Mr Lei did not argue that the posts could be touched up, or otherwise attack Mr Mamone's costing. I allow the **$1,144** assessed by Mr Mamone.

Master bedroom [10]

Door issues [10.1]

223 The first defect noted by Mr Mamone was that the mushroom mould was damaged at the striker. I was not satisfied as to the existence of this defect, and I allow nothing for it.

224 The second defect alleged was that the privacy door locks did not work. This was confirmed at the inspection. However, Mr Lei said that it had been working at handover. The owners did not explain what the actual problem with the lock was. Bearing in mind that the lock was installed, apparently satisfactorily, four years ago, the issue may be one of maintenance. I allow nothing for this issue.

225 Mr Mamone identified a further problem with the bedroom doors, which was the bottom edges were not exactly at the same height above the carpet. Mr Mamone recommended that the doors be removed, the mushroom mould taken off, a new mushroom mould be installed, the underside of the doors be shaved or planed to ensure the doors are at the same height, and that the doors be repainted, and then rehung.

226 Viewing the doors doing the inspection, I was not satisfied that this complaint was justified, even though I note Mr Mamone thought "[T]he crooked underside of the door is highly noticeable". I accordingly do not think the doors need to be taken off, rectified and rehung. I allow nothing for this item.

Window issues [10.2]

227 Mr Mamone identified the three windows on the south wall of the master bedroom as requiring adjustment. This defect was confirmed at the inspection, and I find for the owners on liability.

228 Mr Mamone said the defect would require removal of the window sashes from their frames, shaving the sides and top and bottom of the sashes, and then reinstallation of the sashes followed by repainting. He said each of these operations would cost $112.50, i.e. a total of $337.50. After this the windows would have to be repainted. Three hours at $75 an hour was claimed for this, a total of $225. I accept these figures, and award the owners **$562.50** in aspect of this item.

Patch on the east wall [10.3]

229 Mr Mamone also identified a patch on the east wall which had been repaired by the builder. The need for the patch arose because the door handle had hit the wall before a door stop had been fixed to the floor. He said that the entire wall should be repainted to the nearest break lines, at a cost of $305.

230 The existence of this patch was confirmed at the inspection. However, I think the patch itself can carefully be touched up, and re-painting the entire wall is not necessary. I allow $37.50 for labour and $10 for materials, a total of **$47.50**.

Ceiling patch [10.4]

231 Mr Mamone also said the ceiling required patching. He recommended repainting the entire ceiling including the cornice line. This in turn would require a protective cover to be installed over the bedroom floor.

232 At the inspection I identified three patches. As it would appear that the builder has attempted to patch the ceiling, and as the patching is plainly visible, I accept the need to repaint the entire ceiling.

233 The cost assessed by Mr Mamone is $305, based on three hours labour at $75 an hour plus $80 for materials. I think this total is reasonable. I agree a protective cover will have to be installed. I allow $32.50 for the cost of installing the protective cover, as assessed by Mr Mamone. The total allowed accordingly is **$337.50**.

Wrinkled carpet [10.5] and noisy floor [10.6]

234 The next defect identified in the master bedroom was that the carpet was wrinkled [10.5]. Mr Mamone recommended that it be re-stretched. This would require all the furniture to be removed from the bedroom, and then replaced once the carpet had been attended to.

235 Mr Mamone also identified that at the north end of the room the floor was noisy. He said this could be rectified by the insertion of screws to better affix the particle board flooring sheets to the floor frame. This could be

done prior to the carpet being re-stretched. Mr Lei offered no comments in relation to Mr Mamone's costings, and I accept his assessment of the cost for removing furniture, lifting part of the carpet, fixing the floor noise issue, replacing the carpet, stretching the carpet, and replacing furniture, at **$563**. I award this figure to the owners.

Master ensuite [11]

Window [11.1]

236 The first defect noted was that the top sash of the window was binding during operation. Mr Mamone confirmed that the owners had instructed him that this occurred during the first three months of the maintenance period. The existence of the defect was confirmed at the inspection. I accept that the builder is liable for the defect.

237 Mr Mamone said that the window sash should be removed from its frame, then shaved at the sides and on the top and the bottom, then reinstalled and painted. He estimated the cost of performing this work at **$207.50**. I accept this costing is reasonable, and award the owners this sum.

Silicon [11.2]

238 The next alleged defect was that the silicon installed between the top of the vanity basin and the underside of the bench had discoloured and was mouldy. On the basis of instructions from the owner that the mould had developed within the first three months of the maintenance period, it was suggested by Mr Mamone that the silicon used may not be sanitised silicon appropriate for wet areas.

239 It is clear that Mr Mamone is merely speculating that the silicon is not an appropriate type. There is another plausible explanation, which is the silicon has not been regularly cleaned. I find that the owners have not discharged the burden of proof in relation to this defect, and find against them in respect of it.

Wall & floor tiles [11.3]

240 The third defect in this ensuite identified by Mr Mamone was a chipped wall tile [11.3.1]. The existence of the defect was confirmed at the inspection, but it was noted that the chip was small, and in my view could be appropriately patched. This would avoid the necessity of completely re-tiling the bathroom, as recommended by Mr Mamone.

Deviation of tiles from vertical [11.3.2]

241 However, the chipped tile was not the only defect noted. It was asserted by Mr Mamone that the east wall of the ensuite was displaying an approximate 20 mm deviation from the vertical. This was technically a defect under Section 9.02 of the VBA Guide to Standards and Tolerances 2015, as it exceeded the allowable deviation of 5 mm over a 1.8m straight edge.

242 As the deviation was not particularly noticeable, I would not have been prepared to award damages to the owners for the cost of re-tiling the whole bathroom on account of it alone, on the basis that this would not be reasonable and necessary. To make a substantial award in this respect would be to allow the owners to recover a windfall for merely a technical breach of the contract.

243 However, there was a third, significant defect in this bathroom, as a large floor tile within the shower base was loose. The defect was apparent at the inspection. Mr Lei said it arose because the floor tiles had been affixed to a plastic shower base, which had been installed underneath to ensure that the shower was waterproof. It appeared that the plastic base had some flexibility, which resulted in movement in one of the tiles affixed above.

244 I consider the loose floor tile to be a clear defect, which will necessitate the removal of all tiles from the shower, replacing or adjusting the plastic shower base underneath so that it becomes inflexible, and then reinstating the shower.

245 Mr Mamone contends that it will not be possible to match the shower tiles to the existing bathroom.

246 Mr Lei did not dispute this critical point, and I find that it will be necessary to redo tiling throughout the bathroom.

Rectification of the bathroom

247 As indicated by Mr Mamone, replacing the tiling will involve effectively the deconstruction of the bathroom. The mirror will have to be removed. As it will break in this process, it will have to be replaced. The shower waste, the shower screen, the shower taps, the bath taps and the towel rail will all have to be removed. The bath tub will have to be lifted. The vanity will have to be removed. There will be ancillary plumbing work. When the tiles had been removed, the water proofing membrane will have to be removed. The wall of the bathroom can be realigned to ensure that the vertical alignment complies with Section 9.02 of the VBA guide Guide to Standards and Tolerances 2015, and after this the waterproof membrane can be reapplied. Then the bathroom can be retiled. Following this, the vanity, the shower waste, the shower screen, the shower taps, the bath taps, the mirror and the towel rails can be replaced. After all this, the bathroom is to be recaulked. Mr Mamone's total costing for this work is **$8,254.25**. I accept this estimate, and award this sum to the owners.

Bedroom No 2 [12]

Door [12.1]

248 The first defect noted was that the door lock tongue does not engage with the striker plate. Mr Mamone recorded his instructions from the owners that this has occurred within the first three months maintenance period. Mr Lei

was not in a position to contest this, and I accept that the defect occurred within the maintenance period.

249 The time for rectification was assessed by Mr Mamone at one hour. This seems excessive, as it merely involves removal and resetting of the door. A costing was not stated. I allow half an hour work by a carpenter, costed at **$37.50.**

Manhole [12.2]

250 There were a number of defects identified by Mr Mamone in connection with the manhole frame and cover. Paint patches were visible on the ceiling, the frame was loose and did not sit flush upon the ceiling, and the manhole cover itself had not been painted. I confirmed the existence of all these defects at the inspection. The cost of rectification is assessed by Mr Mamone at **$251** which includes caulking and repainting of the manhole frame. I award this sum to the owners.

Ceiling [12.2.5.5]

251 Mr Mamone also recommended repainting of the ceiling throughout the room. I disagree that this is necessary, and allow nothing for it.

Roof space light [12.3]

252 The absence of a light within the roof space above the manhole was noted by Mr Mamone as a defect. This complaint was sustained at the inspection. Mr Mamone has costed the installation of a light fitting and light switch within the roof at **$120**. I accept this assessment is reasonable, and award this sum to the owners.

Damaged cornice [12.4]

253 The last complaint about this room was that a large blog of cornice cement had fallen on the top of the balcony door frame during construction. This was confirmed at the inspection. The necessary removal of the cement, and cleaning of the doorframe and its subsequent repainting was costed by Mr Mamone at $186 on the basis it would take two hours labour at $75 an hour, plus **$36** for materials. I accept this costing, and award this sum to the owners.

Ensuite to Bedroom No 2 [13]

Loose floor tile in shower [13.1]

254 The first defect noted by Mr Mamone was that a floor tile within the shower was loose. This was confirmed at the inspection, and I accept there is a defect for which the builder is responsible.

255 The explanation given by Mr Lei for the loose tile on the floor of the shower was identical to that offered in relation to the master bedroom ensuite shower, namely the placement of the shower floor tiles on an

underlying waterproof plastic base. Rectification will require removal of the tile at the base of the shower, which will necessitate in turn the removal and replacement of the tiling in the shower itself. As there is no step into the shower, this will mean all the bathroom floor tiles have to be replaced.

256 Mr Mamone opined that in order to maintain a leak proof shower, all of the membrane, including the membrane on the walls, will have to be replaced. This in turn will necessitate the removal of all the wall tiles. The process will be identical to that involved in the rectification of the Master Bedroom ensuite, namely removal of the tiles, demounting the bathroom furniture and plumbed items, fixing the base of the shower, reinstating the waterproofing, and then reinstating the tiling. After this, the bathroom furniture can be re-installed, as well as the plumbed items, the shower screen and the towel rails. A new mirror will be required because the existing mirror will be destroyed on removal. After the reinstatement of the bathroom, caulking will be required. The total cost assessed by Mr Mamone is $4,435.25.

257 The costing was not attacked by Mr Lei, and I accepted it as reasonable, and accordingly award the owners **$4,435.25.**

Vanity did not sit flush on the floor [13.1.2]

258 A second defect identified by Mr Mamone was that the vanity did not sit flush on the floor, and that the gap along the underside of the vanity was both excessive and inconsistent. As I have accepted the necessity of retiling the whole bathroom, which will entail the removal and then the reinstallation of the vanity, this defect can be fixed during the course of the other works, and a separate allowance will not be made in respect of it.

Chipped grout [13.2]

259 A relatively minor defect identified by Mr Mamone is that the grout along the top of the window, as well as along the top of the wall tiles on the underside of the cornice line, has been chipped. Mr Mamone noted that this can be rectified when the room is re-caulked, and no separate allowance will be made for it.

First floor rumpus room, stairwell and first floor corridor [14]

Ceiling patches [14.1.1]

260 The first item noted by Mr Mamone was that plaster and paint patches were said to be visibly scattered across the surface of the ceiling in the rumpus room. At inspection, I could identify only one of these patches.

261 Mr Mamone says that the whole ceiling including the cornice line will have to be repainted. I disagree. The single patch identify can be touched up. I allow half an hour's work at $75 per hour plus $10 for materials, a total of **$47.50**.

Cornice line crack [14.1.1.3.3]

262 Another issue is that a crack has developed along the top of the cornice line on the south wall in the stairwell. Mr Mamone suggested that this should be repaired prior to repainting of the ceiling. There was no discussion as to liability at the hearing. The crack in the cornice line may be due to settlement of the extension. Certainly Mr Mamone suggested that cracking in the cornice in the ceiling of the family room below was due to "building settlement exacerbated by uncontrolled ground movements". The owners have not discharged the burden on them of establishing that the cracking in the cornice was due to any act or omission of the builder. I allow nothing for this item.

Stickers on window [14.2]

263 A further minor issue identified by Mr Mamone, is that stickers stuck on the outside face of the window to the rumpus room have not been removed. The existence of this defect was confirmed at the inspection. The stickers ought to be removed. This will now have to be done using a long ladder. Mr Mamone assessed the cost at $130, on the basis that it will involve two hours work at $65 an hour. I regard this allowance as excessive. Firstly, I noticed only about 3 stickers requiring removal, and the work could be done in an hour, even if they have to be scraped off. Secondly, the work will be performed by a labourer, and I will allow $50 an hour only. I accordingly award **$50** to the owners in respect of this item.

Cornice glue stuck on window frame [14.3]

264 Another minor issue was that plaster or cornice glue was stuck on the window frame. This defect was evident at the inspection, and ought to be rectified. Mr Mamone said that after removal of the plaster or glue, the architrave, reveals and window sash would require repainting. He costed this work at $186, on the basis of 2 hours work by a painter at $75 an hour would be required, and $36 in materials would be used. I accept these figures, and award **$186** to the owners for this item.

Corridor level [14.4]

265 Mr Mamone identified an issue with the corridor, which had an approximate deviation in horizontal alignment of 34mm over a 2 metre length. However, Mr Mamone noted that re-levelling the floor would affect the doorways into two rooms at the end of the corridor, resulting in an approximate 100mm step at the door thresholds. This was not desirable, because it would reduce the doorway head height into these rooms, and also a 100mm step would not comply with the access requirements in the building regulations. Rectification would require major structural work, which Mr Mamone conceded was not appropriate. He accordingly recommended acceptance of the deviation in the floor level.

266 I regard Mr Mamone's concession as an appropriate one, and make no allowance in damages to the owners in respect of this particular defect.

Corridor noise [14.4.1.2]

267 Mr Mamone also noted that the floor was noisy, and said that this could be repaired by the removal of the carpet and the installation of additional screw fixings into the underlying particle board sheet flooring. The carpet have to be replaced afterwards. Mr Mamone costed this particular rectification at $336. I accept this as reasonable, save for the fact that he has allowed one hour's work at $75 an hour to remove the carpet and another hour to replace the carpet. I consider that half an hour to remove the carpet and half an hour to replace the carpet are more appropriate allowances. I accordingly reduce the award for this item by $75 from $336 to **$261**.

First floor bathroom [15]

268 At the inspection, I was informed that the shower in this bathroom was being used all the time because the showers in the two ensuites were unusable.

Deviation in wall [15.1]

269 Although the vanity installation within this room was deemed by Mr Mamone to be adequate, he observed that the west wall displayed a 15mm deviation from vertical alignment. He said this deviation was highly visible along the left-hand side of the mirror. I confirmed this observation at the inspection. Mr Mamone also said the deviation in vertical alignment was obvious when looking along the edge of the shower screen. I do not agree this deviation was obvious from this position.

270 The 15mm deviation in vertical alignment is a defect under the VBA Guide to Standards and Tolerances 2015, and ought to be rectified Mr Mamone's estimation.

271 I heard evidence that this bathroom had been created at the suggestion of Mr Lei when he realised sufficient room for its creation existed in the roof space of the existing dwelling he had opened up. He quoted $12,000 as the cost of making a bathroom in the space. Because this occurred during the running of the works, and the relevant trades were on site, Mr Lei gave the owners 24 hours to accept the proposal. In the event, the owners agreed.

272 The arrangement involves amendment of the contract plans and specifications, but it was not documented as it should have been under clause 12 of the contract, alternatively under s 38 of the *Domestic Building Contract Act 1995*, as a variation requested by the owners. However, the owners do not rely on this point. They have paid the $12,000 sought by the builder, and do not seek a refund.

273 The deviation from vertical alignment arose, I was told, from deviations in the underlying brick wall. At the hearing, Ms Li accepted this, and said that she was not pursuing the complaint about the wall being out of alignment. Accordingly, nothing will be allowed for this item.

Window sash binding [15.2.1]

274 Mr Mamone identified a separate problem with the window, namely the sash was binding. Furthermore the outside face of the window frame had not been properly painted, and the brick sill had not been cleared of mortar smears. Mr Mamone reported that he had been instructed by the owners that the window binding problem has occurred in the first three months of the maintenance period, and as this was not contradicted by Mr Lei, I accept that it is a defect which the builder is responsible.

275 The window will have to be rectified by the removal of the sash from the frame. The sash will have to be shaved along the sides and at the top and bottom, and it will then have to be reinstalled and repainted. The cost of this work was assessed by Mr Mamone at **$223.50**. I regard this figure as reasonable, and award damages in this sum to the owners.

Outside face of window frame not properly painted [15.2.2]

276 Mr Mamone indicated that the outside of the frame could be repainted when the sash was painted. There will be no separate allowance for this item.

Mortar smears on brick sill [15.2.3]

277 The cost of removing mortar smears from the brickwork was assessed at $130, based on 2 hours attendance by a labourer at $65 an hour. I think this allowance is overgenerous. This work could be done in an hour, and I will allow only $50 an hour for a labourer. **$50** is awarded to the owners for this issue.

Grout [15.3]

278 Mr Mamone noted as a separate problem the grout along the top of the window and along the top of the wall tiles on the underside of the cornice line. He did not cost this item as his expectation was that it could be fixed when the room was re-caulked following retiling. I consider it would be unfair to the owners not to make any allowance for this item, given that the bathroom will not be retiled. I allow half an hour's labour at $75 per hour, and materials and $10. The total allowance to be awarded to the owners is accordingly **$47.50.**

Bedroom No. 4 ensuite [16]

Chipped wall tiles [16.1.1]

279 The first issue was that there were two chipped wall tiles located behind the towel rail. Mr Mamone conceded that the relevant tiles will have to be replaced. As it would not be possible in his view to match those wall tiles he suggested that all wall tiles will have to be removed, including within the shower.

280 At the inspection I could identify the two chipped tiles, but the chips were not large and were behind the towel rail. In my view, to re-tile the entire

bathroom rather than patch the chip marks would be unreasonable and unnecessary, and would result in a windfall for the owners as a result of a technical breach. I allow **$47.50** for rectification work and materials for this item.

Gap below vanity [16.1.2]

281 Mr Mamone noted that the underside of the vanity had an inconsistent and excessive gap. This was visible at the inspection, but I formed the view that this issue could be rectified by the application of silicone.

282 Mr Mamone no doubt expected that the gap beneath the vanity could be rectified following the recreation of the bathroom. As damages will not be awarded for this, it is appropriate that an award of damages for the work of applying the silicon beneath the vanity be assessed. In the absence of evidence from either party about this, I allow **$47.50** for labour and materials.

Wall tile deviation [16.1.3]

283 Mr Mamone said that the north wall of this bathroom was displaying an approximate 8mm deviation from vertical alignment. He said it was a defect under the VBA Guide to Standards and Tolerances 2015.

284 At the inspection, I found this deviation hard to identify. I consider to make an award of damages based on the cost of rectification, which would involve the demolition and reconstruction of the bathroom at a cost of thousands of dollars would enable the owners to take advantage of a technical breach of contract in order to gain a windfall. I refer to the discussion regarding the exception to the rule in *Bellgrove v Eldridge* referred to above.[14]

Shower screen [16.1.3.1]

285 The shower screen had been installed in such a manner that the leading edge displayed an approximate 8mm deviation in vertical alignment. I accept that this is a defect under section 9.02 of the Guide to Standards and Tolerances 2015. The misalignment was obvious, and in my opinion, so unsightly that it was unacceptable. The shower screen ought to be removed and replaced.

286 In his costings regarding the deconstruction and reconstruction of the bathroom, Mr Mamone had suggested it would take a general tradesperson two hours at $75 an hour to remove the shower screen, and a similar time at a similar rate to reinstall the shower screen. I regard the time allowances as being generous, but will accept them for the reason that the removal and replacement of the style shower screen will have to be done with extreme care so as not to damage the tiling in the bathroom. I accordingly will allow **$300** for this item.

[14] See paragraph 63 above.

Bedroom No. 3 [17]

Wardrobe doors [17.1.1 - 17.1.5]

287 The first defect identified was that the wardrobe doors scraped on the carpet when operated. This defect was not apparent to me at the inspection. If this had been the only problem I would have made no allowance in respect of it.

288 The second defect was that the doors were out of alignment. I noted at the inspection that this was technically correct, but the misalignment amounted to 1mm at the top.

289 The third allegation was that the doors were chipped. The fourth was that the underside of the doors would had been damaged because the builder had shaved or planed the underside of the doors in order to prevent them scraping on the carpet. The result is that the doors have been left slightly damaged, and they are not painted on the bottom.

290 Looking at all the defects together, I find that it is appropriate, as recommended by Mr Mamone, that the doors be removed from the hinges, shaved further at the bottom to ensure that they do not scrape on the carpet when they are aligned at the top, and then reinstalled. In order to ensure consistency of paint finish, it is reasonable for the doors to be repainted.

291 Mr Mamone estimates the cost of the removal of the doors, the shaving, the repairing and the re-hanging to be $150. I find that figure to be reasonable.

292 Mr Mamone also says it will take two hours to repaint the doors. I find this is unrealistically generous. I will allow for an hour's work for a painter at $75, plus materials of $20, a total of $95. The total amount allowed for rectification of the wardrobe doors accordingly is **$245**.

Ceiling [17.2.1]

293 Mr Mamone observed that plaster and paint patches were visible across the surface of the ceiling. He suggested that they were the result of works performed by the builder to repair blemishes, or repairs following relocation of down lights. He suggested that the ceiling, including the cornice line, had to be repainted. This would involve placing a protective cover over the bedroom floor. He estimated the total costs of the work at $322.50 inclusive of $60 for materials.

294 I agree that the ceiling ought to be repainted as suggested by Mr Mamone, because the patches are the unsuccessful result of the builder's attempt to cover over earlier blemishes or repairs. I note the repainting has been costed at $75 an hour, which is acceptable for a painter, and that the allowance of $60 for paint is reasonable. I award the owners **$322.50** for this item.

Bedroom No. 4 [18]

295 The defects in this room were plaster and paint patches visible across the surface of the ceiling. Mr Mamone suggested that these were the result of works performed by the builder to repair blemishes, and as a result of

repairs carried out following relocation of down lights. He recommended that the ceiling be repainted, including the cornice line. Allowing for the protective cover, he estimated the repainting at $322.50 inclusive of $60 for materials.

296 I accept that the ceiling needs to be repainted because the builder's previous attempts to repair blemishes have been unsuccessful. I consider the fee claimed as reasonable, an award **$322.50** it to the owners.

Alarm [19]

297 Mr Mamone pointed out at that an alarm had not been installed, even though it was required by the specification. Reference to the contract indicates that an alarm to "Bosch standard" was included as item 1 of the so-called "additional" items in the specification. The owners are accordingly entitled to damages for this incomplete work.

298 Mr Mamone estimated a cost of $3,200 to install an alarm to the entire house in accordance with the specification. He did not provide a breakdown of the figure, or attach any quotation from an alarm installer relating to the cost of installing a Bosch or equivalent system. However, Mr Lei did not contest the figure. In my experience, $3,000 is not an unreasonable figure for the installation of online system to a house. I accept Mr Mamone's assessment, and award **$3,000** to the owners in respect of the builder's failure to install an alarm system.

Intercom system [20]

299 Mr Mamone noted that although an intercom system had been included in the specification, it had not been installed by the builder. Reference to the specification indicates that item 2 of the "additional" items calls for an intercom with video "7" monitor x 2 macket brand"(sic). I suspect there is a spelling mistake in the specification, and that what was intended was an intercom system with two 7 inch monitors of a standard market brand.

300 Mr Mamone suggested that $700 be allowed for the intercom system. I agree, and I award **$700** to the owners in respect of this item.

Doors [21]

301 Mr Mamone observed that the top and bottom of all doors required to be painted. He said that this would require removal of the doors, and the placing of protective sheets on the floor would be necessary to allow the doors to be stood up against the wall.

302 He listed all the doors which he said required attention. There were forty of them.

303 At the inspection, my attention was drawn to a small number of doors, and I satisfied myself that in each case the top and bottom of the door had not been painted. I am, in effect, being asked to infer that each of the doors in

the house has not been painted at the top and the bottom. In the absence of any objection from Mr Lei, I am prepared to draw this inference.

304 The cost of attending to each of the 40 doors, including placing protective materials before the work is carried out, and cleaning up afterwards, is assessed by Mr Mamone at $3,462, inclusive of $120 for materials. This figure is based on the assumption that the work will be carried out by a carpenter or a painter at $75 per hour. I consider this is a reasonable assumption to make. The figure also assumes that it will take the tradesperson involved an hour to remove the door, paint the top and the bottom of the door, and rehang the door. I suspect this is a generous allowance, but Mr Lei did not attack it. I am accordingly prepared to accept Mr Mamone's assessment of **$3,762.**

General clean [22]

305 Mr Mamone indicated that an allowance for a "builder's clean" should be made. He suggested that allowance of 16 hours at $75 dollars an hour should be made.

306 I agree that allowance should be made for a thorough cleaning of the house as some of the replicated work, in particular the lifting of the kitchen/living room for the rectification of two bathrooms generate significant dust. However, a rate of $75 per hour is not acceptable. I will allow 16 hours at $30 per hour, a total of $480, together with $60 of materials. The total allowance is accordingly **$540**.

Relocation of furniture during the course of rectification works [23.2]

307 Mr Mamone suggested that during the course of rectification works all furniture would have to be removed and stored off site. No evidence was given about the need for this. In my view this procedure will not be necessary. Loose furniture from the open kitchen/family room can be stored elsewhere in the house while the floors are redone. The other major work is in renovating two bathrooms upstairs. The floors do not have to be done concurrently with the bathrooms. Where painting is to be carried out, an allowance for protective coverings to be laid has been made. I allow nothing for this item.

Alternative accommodation [23.3]

308 Mr Mamone also says that an allowance for alternative accommodation should be made at the rate of $700 a week. No evidence is given about the need for this item either. However, as significant dust will be generated when the new kitchen/living room floor is sanded back, and fumes will be generated when the floorboards are treated before polishing, I consider a week's alternative accommodation is reasonable. I also consider a rate of $700 a week is reasonable. I allow **$700** in respect of alternative accommodation.

Summary of damages awarded in respect of house contract defects

309 I have awarded damages in respect of house defects as summarised in Schedule 1. The total is **$97,800,** inclusive of margin and GST.

LIQUIDATED DAMAGES CLAIMED UNDER THE HOUSE CONTRACT

The claim

310 In their points of claim, the owners assert that under clause 18.1 of the contract, read in conjunction with item 17 of the appendix, they are entitled to liquidated damages of $5,400. This figure was the product of applying a rate of $300 a week to an alleged period of 18 weeks between the Completion Date and the Date of Possession.

311 This claim was not ventilated by the owners at the hearing, but this does not mean that it need not be addressed by the Tribunal. The owners were not legally represented, and it may be that they overlooked the claim in making their submissions. Alternatively, they may have considered that their argument was self-evident, having regard to the terms of the contract, the manner in which the appendix had been completed, the date of issue of the building permit, and the date of the certificate of final inspection.

312 I am obliged under s 98 of the *Victorian Civil and Administrative Tribunal Act 1998* to act fairly in accordance to the substantial merits of the case. In my view, as the owners articulated a claim for liquidated damages of $5,400 and appropriately referred to the contractual basis for the claim and the manner of its calculation, it is fair that it should be dealt with on the basis of the evidence presented.

Relevant contractual provisions

313 Reference to the general conditions of the contract confirms that if the builder fails to bring the works to completion by the Completion Date, the builder must pay or allow to the owner pre-estimated and liquidated damages, a sum calculated at the rate stated in item 17 of the appendix for the period from the completion date until the works reach completion, or until the owner takes possession. Item 17 of the appendix stipulates the rate for liquidated damages to be $300 per week.

314 The following matters are self-evident from the contract:

(a) "Completion Date" is defined to mean "the date on which the Works are to reach Completion under the Contract being the date determined in accordance with clause 8.4 of the Contract";

(b) clause 8.4 indicates that the Completion Date is calculated with reference to the actual commencement date and to the Construction Period;

(c) the Construction Period is defined in item 9.2K of the appendix as 360 days;

(d) the Commencement Date is defined as "the date by which the Builder will commence to carry out the Works on the Land as determined in accordance with clause 8.1 of the Contract";

(e) clause 8.1 provides that the builder will commence construction of the Works on the date (if any) specified in item 9.1 of the appendix, or (if no date is specified) the builder will do everything reasonably possible to ensure construction of the Work will start within 14 days of receipt of key documents such as the permit;

(f) item 9.1 of the appendix indicates that the anticipated Commencement Date is "ASAP permit issued".

315 Evidence relevant to making out the claim was that:

(a) the date of issue of the building permit was 30 April 2013; and

(b) the certificate of final inspection was not issued until 26 August 2014.

316 The builder did not address the claim for liquidated damages in its points of defence. However, as the builder was not legally represented, and it was apparent from the form of the defence that it had not been drawn by a lawyer, I think it would not be fair to the builder to infer that the claim was conceded. It may well be that the issue of liquidated damages was merely overlooked because the builder's representative, Mr Lei, was concerned with the many defects asserted.

Finding as to Commencement Date

317 Because the issue of liquidated damages was not discussed in any detail at the hearing, the builder was not given the opportunity to raise any of the defences which might have been available under the contract. One of these relates to the Commencement Date. The building permit was issued on 30 April 2013. The builder would not be expected to start on that day. Clause 8.1(ii) indicates that the builder has 14 days following receipt of key documents such as the building permit in order to start work. Accordingly, I find a reasonable calculation of the Commencement Date to be **14 May 2013**.

318 Clause 8.4 states that the obligation of the builder to reach Completion by the Completion Date is subject to extensions to the Completion Date to which the builder is, or may become, entitled under the contract.

319 Without any extension of time, the builder might have been expected to complete the works within 360 days of 14 May 2013, namely 9 May 2014. If the period of delay is calculated from 8 May 2014 to the date of the final inspection, 26 August 2014, it is 15 weeks and five days.

Clause 15.1

320 The builder's entitlement to extensions of time is dealt with in clause 15.1. Reference to this clause indicates that the builder is entitled to claim an extension of time in relation to a number of events, including variations,

industrial action, unavailability of materials, inclement weather, an act, default or omission on the part of the owner, any delay or refusal of an authority to grant a necessary permit, or any other cause beyond the reasonable control of the builder.

321 Under clause 15.1, the builder within a reasonable time of the occurrence of a cause of delay must advise the owner of the cause and the reasonable estimated length of the delay. If the builder does this, the builder will be entitled to a fair and reasonable extension of time for completion of the works. The builder can also notify the owner in writing within 14 days of becoming aware that completion of the works will be delayed.

The bathroom variation

322 There was evidence that there was at least one major variation, namely the construction of a bathroom on the first floor which had not been included in the plans. This variation was valued at $12,000, and accordingly must have involved significant work. It is quite possible that it did delay the builder in achieving completion, but this is not necessarily the case. When the evidence came out about the variation at the hearing, the owners indicated that they had been pressed by Mr Lei to make up their mind as to whether they were going to go ahead with the creation of the new bathroom in 24 hours as the relevant trades were on-site. Accordingly, it is possible that Mr Lei managed to squeeze the new bathroom into the program without negatively affecting the network of critical activities which had to be undertaken to achieve completion.

No written claims for delay made

323 The fact that the builder did not discover any written claim for an extension of time made during the course of the project, coupled with the fact that Mr Lei did not give evidence about delays at the hearing, suggests that, as a matter of fact, the claim for an extension of time could not be justified.

324 On this basis, it would not be appropriate to retrospectively grant any extension of time to the builder for the bathroom variation.

Relevance of s 38 of the *Domestic Building Contracts Act 1995*

325 Furthermore, there may be may be a good legal reason why such an extension of time should not now be granted. As noted previously, the bathroom variation was not documented. If it had been documented in the manner required by s 38 of the *Domestic Building Contracts Act 1995*, the builder would have had to state if the variation would result in any, and if so what, delay to the project. Because the variation was not properly documented, there was no contemporaneous indication from the builder as to what delay, if any, arose from the variation.

326 One of the purposes of s 38 of the *Domestic Building Contracts Act 1995*, expressed in section 4(b), is:

> …to enable disputes involving domestic building work to be resolved as quickly, as efficiently and as cheaply as is possible having regard to the needs of fairness.

327 In my view, it would not be consistent with this object to allow a builder to retrospectively claim an extension of time for a variation that has not been documented in the manner required by s 38, as one of the purposes of that provision clearly is to avoid ambiguity and uncertainty about variations by requiring them to be documented.

328 I note the Tribunal has only a limited discretion to allow a builder to recover the cost of performing an undocumented variation. The discretion arises where the Tribunal is satisfied that either there are exceptional circumstances, or the builder would suffer a significant or exceptional hardship if it were to be denied recovery because it has not complied with the mandated procedure set out in s 38 and it would not be unfair to the owner for the builder to recover.

329 In the present case, we are not concerned with recovery of the builder of money for the performance of a variation, but with relief from liquidated damages by reason of the extra time taken to perform the variation. No discretion is given by s 38 for the Tribunal to grant time retrospectively in circumstances where the procedure laid down in the section has not been observed.

Conclusion

330 For all these reasons I am not prepared to grant an extension of time to the builder to the bathroom variation, or in relation to any other undocumented variation such as the addition of two extra outlets to the cooling system.

331 As the builder made no written claim for an extension of time as required by clause 15.1 in respect of any cause of delay at all, there is no basis to consider whether a cause of delay other than a variation affected the completion.

332 As the terms of the contract regarding Commencement Date, Completion Date and the owners' entitlement to liquidated damages speak for themselves, and as the owners put into evidence two documents critical to the assessment of their claim, namely the building permit, and the certificate of final inspection, their claim for liquidated damages is substantially made out.

333 I say the claim is substantially made out, because I have found, above, that a reasonable calculation of the Commencement Date to be 14 May 2013. As the builder is not entitled to any extension of time, the builder was obligated to complete the works within 360 days of 14 May 2013, namely 9 May 2014. I find that the builder is liable to Ms Li for damages for the period 9 May-26 August 2014 inclusive, or 15 weeks and 4/7ths of a week. At $300 (stipulated in item 17 of the appendix) per week of delay, the builder's liability is ($4,500+$171.43) = $4,671.43, which I round down to $4,671.

OTHER CLAIMS MADE BY OWNERS

Costs associated with the removal of a rag from the storm water drain

334 Two invoices are involved. The first was an invoice from Les Taylor, a plumber, in the sum of $771.66. The second was that of the concreting contractor, Urban Aspects Landscaping, which attended to cut a hole in the concrete to enable access by the plumber, and later returned to repair the concrete. This invoice was for $330. The total cost of these invoices is $1,101.66.

335 Mr Lei says that he is not liable, because as the builder he was entitled to be told about the issue and to be given an opportunity to fix it. He said that he did not attend to remove the rag because he had been banned from access to the site from December 2015.

336 The owners dispute this. They say that Mr Lei was put on notice about the existence of the rag in the pipe when he was sent a report from Independent Plumbing. That report contains a photo dated 17 March 2016 which clearly shows a rag blocking a pipe.

337 The evidence of the owners was that they invited the builder back to the site to undertake defect rectification following the conciliation process the parties had taken part in, but the builder had refused to attend at the site. They tendered an email sent to Mr Lei on 13 May 2016 which supported this statement.

338 I am satisfied from this email that the builder was invited back to the site in May 2016. Accordingly I do not accept Mr Lei's explanation that he could not attend because he was banned from the site.

339 At the hearing, Mr Lei also disputed whether the pipe had actually been blocked by a rag. Mr Jiang, on behalf the owners, said that he was present when Mr Lei attended the site and saw the rag. He also pointed out the rag was evident in the photo in the Independent Plumbing report which had been put into evidence.

340 I find on the basis of owners evidence, which is supported by the photographic evidence, that the pipe was blocked by a rag. I accept the owners' evidence, also, that they had no choice but to engage independent contractors to remove the rag, because Mr Lei would not attend to the task. I find for the owners in respect of this issue, and award them $1,101.66, which I round up to $1,102.

Cost of repair of soaker flashing

341 The owners' evidence is that they engaged Camberwell Pottery Roofing to rectify the problem because they were experiencing leaking through the roof above the dining room. Their explanation for engaging a separate contractor is that they had challenged the builder about the leak in the roof when he was on site, but he refused to rectify the problem.

342 The existence of this defect is referred to by Mr Mamone in his report at [4.8], where it is noted that the flashing has been repaired.

343 The builder, in its defence, said that all flashing required by the house contract had been provided. The builder suggested that the leaking problem arose when the owner had the existing roof tiles replaced, and the flashing between the new and existing roof should have been addressed by the owners' roofing contractor.

344 The owners contested this argument. As previously noted, they gave evidence at the hearing that the builder had arranged for his labourer David to get up into the roof, and tendered a photograph demonstrating that this occurred in September 2015.[15]

345 Mr Jiang's evidence was that David was able to push a finger through the loose flashing from inside the roof space. Despite a clear problem with the flashing being demonstrated in this way, the builder refused to undertake repairs at the time.

346 I have already indicated, in connection with the damage to the dining room ceiling and cornices, that I am satisfied that it was the builder's responsibility to ensure the integrity of the flashing above the dining room.[16] I find for the owners in respect of the issue of liability for the cost of repairing the flashing which was necessary to prevent water entry into the dining room.

347 I accept the owners' evidence that the builder did not take up the opportunity in September 2015 to repair the flashing, or to return in May 2016 to attend to defects. I am accordingly satisfied that the owners were justified in getting an independent contractor in to repair the flashing. I allow recovery of **$660** in respect of Campbell Pottery Roofing's invoice.

David Meyer's invoice for inspection of timber floor on 19 November 2015

348 The invoice was for $350. The invoice was incurred when the owners invited Mr David Meyer to attend to inspect the floor. The owners seek to recover this cost as damages, not as part of their costs of the proceeding. They did not call Mr Meyer as a witness.

349 Mr Lei disputed liability for the invoice. His first line of defence was that he was the builder, and the owners should have addressed the floor issue through him. The owners contested this response, saying that the reason they had called Mr Meyer to the site directly was that Mr Lei had refused to rectify the floor. When they had notified Mr Lei of the issue, he had consulted Mr Wilson from Melbourne Timber Flooring, the firm that had installed the flooring. Mr Wilson inspected the floor, and told the owners that the problems had arisen because of the moisture in the sub floor. Ms Li

[15] See paragraph 190 above.
[16] See paragraph 191 above.

said that when she went back to Mr Lei, he told her to forget what Mr Wilson had said.

350 Mr Lei conceded that he had spoken to Mr Wilson, and that Mr Wilson had agreed that the problem arose from the subfloor. However, Mr Lei also said that Mr Wilson had confirmed that the expansion joints were 10 to 15mm, and that they should have been adequate to deal with any expansion problems.

351 Mr Lei also raised again his defence that the owners had not installed the retaining wall and agricultural drains in a timely manner.

352 I have already dealt with this argument, and found that the owners' failure to put in a retaining wall and the agricultural drains immediately upon completion of the house, was not relevant to the damage to the floor boards, as the damage had manifested itself so quickly after handover under the house contract.

353 In the light of the evidence that Mr Lei refused to attend to the rectification of the floorboards, I consider that the owners were entitled to seek independent advice in order to understand why their floor was cupping. I find in their favour in respect of Mr Meyer's invoice. I award **$350** in damages to the owners in respect of it.

Half of City of Boorondara's invoice for $520 for amendment of planning permit

354 The City of Boorondara charged the owners $520 on 28 November 2013 in respect of an amendment to the planning permit. The issue arose when the builder had altered the construction of the balcony facade from balustrades to a continuous structure made of blue board. The owners paid the fee, and then, on the basis that the builder had caused them to incur it, back charged the builder half the fee ($260) at the time the final invoice was being negotiated.

355 Mr Lei's position was that he had discussed this change to the balcony facade with the owners, and recommended the blue board finish in order to create privacy. The owners had agreed to his proposal.

356 Although this change of the plan was for the benefit of the owners, it was not documented as required by both clause 12 of the contract, and s 38 of the *Domestic Building Contracts Act 1995*. However, I am satisfied that the change was carried out by the builder with the owners' approval, and that the owners benefitted from it. Far from it being appropriate that the builder be required to reimburse a further $260 to the owners, as they now seek, I might have been prepared to allow the builder to recover the $260 already deducted from the builder's final invoice, had the builder seen fit to make such a claim as this in a timely manner. However, the builder did not raise the issue in his counterclaim, and the issue does not arise.

357 In the circumstances, I find against the owners in respect of their claim for reimbursement of the balance of the fee they paid to the City of Boorondara for an amendment to their planning permit.

Half the sum of $450 which they had to paid their draughtsman to amend the plans

358 The owners also had to pay The Extension Company Pty Ltd to have their plans amended to reflect the as-built condition of the balustrade. For the reasons I found against the owners in respect of their claim for reimbursement of the balance of the fee they paid to the local council in respect of the amendment, I find against the owners in respect of this claim also.

Damage to the crossover

359 The City of Boorondara had required the owners to put up a bond of $1,000 in respect of the protection of the Council's assets adjoining the property. During the course of the works, the crossover was damaged. The Council charged the owners $710 for the replacement of two concrete panels on the footpath. The loss was established by a quotation attached to a letter from the Council dated 14 July 2016.

360 Mr Lei conceded at the hearing that if the builder's trades or suppliers damaged the footpath, then the builder would be liable. However, he said there was no evidence that the builder was responsible. Instead, he suggested the damage could have been caused by a truck carrying roof tiles for the company that carried out the re-roofing of the front part of the house for the owners, after the builder had left the site.

361 I was shown by Ms Li, on her computer, a photograph showing damage to the crossover in November 2015. This satisfied me that the damage occurred while the builder was still on the site. I accordingly find for the owners on this issue, and award damages of **$710** in respect of damage to the crossover.

Summary of amounts awarded to the owners in respect of their miscellaneous claims

362 I have awarded the owners in respect of the following claims, the following sums:

(a)	Removal of a rag from the storm water drain:	$1,102.00
(b)	Cost of repair of soaker flashing:	$660.00
(c)	David Meyer's invoice:	$350.00
(d)	Half of City of Boorondara's invoice for $520:	$0.00
(e)	Half of The Extension Company's fee:	$0.00
(e)	Damage to the crossover:	$710.00
Total:		**$2,822.00**

DRIVEWAY CONTRACT DEFECTS

363 The owners assert that some works performed on the driveway contract are defective.

364 It has been established that the driveway contract is subject to the guarantee created under s 60 of the ACL that the builder's services will be rendered with due care and skill.[17]

The owners' claim for defects in the concrete path on the east side of the house

365 Mr Mamone at [2] was of the view that the concrete pathway constructed on the east side of the house has a number of defects, including no provision for drainage, no provision for expansion between the base of the walls of the building on the edge of the concrete path, and no provision for expansion around building elements such as down pipes and drains. Furthermore sections of PVC storm or drain pipe were exposed at the surface of the concrete path.

366 At the hearing, Mr Lei accepted these criticisms of the pathway and indicated that he was prepared to remove it. However, he was not prepared to pay for the installation of the new concrete path.

367 I consider that Mr Lei's position does not reflect the legal position. Mr Lei has conceded there are defects in the concrete path. They are of such a nature that I find that there has been a breach of the guarantee created by s 60. Mr Lei has refused to replace the pathway. The owners said they do not want him to do the work anyway. It follows that the owners are entitled to damages in respect of the cost of removing the path and rebuilding it properly.

368 Mr Mamone costed the demolition of the path, the removal of rubble to the tip, ancillary work such as supporting the ducted heating unit and adjusting the PVC storm water drains and connecting them to the stormwater system, and then remaking the path, would cost a total of $12,845 exclusive of contingency, margin and GST. This is a large figure, but I consider it is reasonable because it includes plant hire of $1,640, a tipping fee of $980, creation of the drain priced at $1,280, and relaying of the concrete path at a cost of $8,400. I find that the owners are entitled to an award of $12,845 exclusive of contingency, margin and GST.

369 As previously indicated, I am not disposed to allow contingency, but will allow margin of 25%. The addition of margin of $3,211 increases the award to the owners in respect of the pathway to $16,056 exclusive of GST. With GST, the total amount to be awarded is **$17,662**.

[17] See paragraph 59 above.

Agricultural drains

370 Mr Mamone at [4.1] noted that the retaining wall was displaying an approximate 25mm lean. He said it was defective, and ought to be demolished and rebuilt. At the hearing, the owners indicated that they were not claiming for the rebuilding of the retaining wall, but wanted assurance that the agricultural drains have been installed.

371 Mr Lei confirmed that the agricultural drains had been installed by his labourer Mark.

372 As Mr Mamone did not undertake any testing about the matter, he was not in a position to venture a view as to whether the agricultural drains were in place. I note from Mr Mamone's report that he appears to have assumed that the agricultural drains had been installed, but that they had failed because of the condition of the retaining wall.

373 I have no reason to doubt Mr Lei's evidence that the agricultural drains had been installed. There was no direct evidence that they had failed. I make no award regarding the retaining wall and the agricultural drains.

The owners claim for defects in the driveway paving

374 Mr Mamone at [4.2] identified a number of defects in the concrete paving in the driveway. For instance he said the centre section of the paving retains water, the paving has been built hard up to the retaining wall with no provision for expansion, there is no provision for expansion between the paving and the walls of the house, and there is no provision for expansion around the down pipes and drains. Furthermore, horizontal sections of the PVC storm water drain pipes are exposed at the surface of the concrete. He suggested that the paving needed to be demolished and replaced.

375 Mr Lei agreed that the paving ought to be demolished, and said he was prepared to do this, but not to reinstate the paving. This mirrored the position he had adopted in relation to the concrete path on the east side of the house.

376 Just as I considered Mr Lei's position in relation to the concrete path on the east side of the house did not reflect the legal position, so I think his attitude in connection with the driveway paving is legally unrealistic.

377 Mr Mamone assessed the cost of demolition and reconstruction of the path driveway at $13,700 exclusive of margin and GST, inclusive of plant hire ($1,640), tipping fee ($1,250), and creation of a new concrete driveway ($10,800). I find that these figures are reasonable. With the addition of a margin of 25% ($3,425) the figure becomes $17,125. With the addition of GST, the total amount I award to the owners in respect of the driveway is **$18,837**.

Two PVC pipes exposed

378 The final defects identified by Mr Mamone at [4.3] in respect of the driveway contract was that two PVC stormwater drain pipes protruded through the surface of the concrete at their base. He assessed the cost of rectification at $290, involving three hours work by a plumber at $85 per hour plus materials.

379 I accept this costing is reasonable, and award the owners $255 exclusive of margin and GST in respect of these defects. When margin of $63.75 is added the total becomes $318.75. When GST is added to this figure, the amount awarded to the owners, rounded up to the nearest dollar, is **$351**.

Summary of amounts awarded to owners in respect of defects under the driveway contract

380 In respect of the concrete path, I have awarded $17,662.[18] I have awarded $18,837 in respect of the driveway.[19] Taking into account the amount awarded in respect of the exposed PVC drain pipes of $351, the total amount to be awarded in respect of driveway defects, inclusive of margin and GST, is **$36,850.**

THE BUILDER'S CLAIMS UNDER THE GARAGE CONTRACT

381 As noted, the agreed price was a lump sum of $39,000. At the request of the builder, the owners had paid the builder at the outset a deposit of $20,000. On 18 December 2015, after the builder had been barred from the site, the builder rendered a further account of $5,350 in respect of the supply of materials and labour, bring the amount invoiced up to $25,350.

382 Both sides proceeded on the basis that the garage contract was enforceable. I proceed to assess the builder's claims on the basis that the contract was enforceable at common law, and not rendered ineffective by reason of the operation of s 31(2) of the *Domestic Building Contracts Act 1995.*

The owners two lines of defence

383 The owners not only disputed liability for the further invoice of $5,350, but sought to recover a substantial portion of the deposit paid of $20,000. They did not press any argument about repudiation of the contract by the builder, but said (apparently on the basis of advice from Consumer Affairs Victoria) that it is illegal for a builder to charge more than 5% of the contract price as a deposit. Their second argument was that as the builder had referred in his December account to the payment being in respect of the deposit, base foundation, frame and lock-up, the payment was not due as the garage had clearly not reached the lock-up stage. Specifically, the garage doors had not been fixed, a soffit under the eaves was not in place, and a row of tiles that had been removed by the builder had not been replaced.

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[18] See paragraph 369 above.
[19] See paragraph 377 above.

Ruling on the deposit argument

384 I find against the owners in respect of their argument that the payment of $20,000 was illegal because it exceeded 5% of the contract price. If the contract had been a major domestic building contract, then the deposit payment may have been limited to 5% of the contract sum. However, the contract is not a major domestic building contract, and accordingly is not subject to the *Domestic Building Contracts Act 1995*. The contract is subject to the ACL, but there was nothing in the ACL to prevent the builder from demanding or retaining a deposit in excess of 5% of the contract sum in general, or $20,000 in particular. It follows that the builder is not obliged to refund any part of that deposit by reason of any statutory provision. A second point is that I accept Ms Lei's evidence that the $20,000 was not just a deposit, but also constituted payment for demolition, and the construction of some foundations. I reject the owners' first argument.

Ruling on the argument the works had not reached lock-up

385 I now turn to the second argument, which is that the invoice of $25,350 would have been payable only if lock-up had been achieved. Again, if the contract have been governed by the *Domestic Building Contracts Act 1995*, the effect of section 40 would have been that the stage payment relating to lock-up would only have become payable once lock-up had been achieved. However, I consider that where that Act does not apply, the builder is entitled to be paid for the work he has performed irrespective of the finalisation of any particular stage.

Assessment on the basis that the garage contract is enforceable

386 I am satisfied that it would have been a simple matter for the garage doors to have been secured, for the soffit to have been replaced, and for the roof tiles to have been put back. The value of this work, in my assessment, would not have been more than $1,000. Accordingly, I assess the value of the builder's work as at the date the builder was barred from the site to be the amount invoiced by the builder less $1,000, namely, $24,350.

Credit due for bricks?

387 A further matter was raised by the owners, which was that the builder had required Mr Jiang to pay for two pallets of bricks for the garage even though they ought to have been paid for by the builder as part of the lump sum price. The parties agree that the cost of the bricks was $1,350. I find for the owners in respect of this issue.

Conclusion

388 At the hearing, Mr Lei agreed that if I was to find that the builder was entitled to recover something in respect of the extra $5,350 he had invoiced the owners, it would be appropriate to deduct from the amount assessed, a credit of $1,350 in respect of the bricks.

389 In circumstances where I have found that, subject to the credit due to the owners of $1,350 in respect of bricks, the builders is entitled to a payment of $24,350, I now find that the builder is entitled to a net payment of $23,000 in respect of the garage. As the builder has been paid $20,000 already, the award in respect of the garage contract is limited to **$3,000.**

Alternative assessment if the garage contract is not enforceable

390 If the garage contract is of no effect because it is a major domestic building contract, but has not been signed by the parties, the builder's entitlement under the garage contract must be assessed on a *quantum meruit* basis, taking into account defects. The assessment carried out above has taken into account the need for the garage doors to be secured, for the soffit to be replaced, and for the roof tiles to be put back, and also the builder's failure to provide the required bricks. Accordingly, I do not think an assessment on a *quantum meruit* basis would be materially different to the first assessment of $3,000 already made.

THE BUILDER'S CLAIMS UNDER THE DRIVEWAY CONTRACT

391 Two invoices were rendered by the builder in respect of work of the driveway contract on 18 December 2015, immediately after the builder had been barred from the site by the owners.

The retaining wall invoice

392 One of these, No. 179, related specifically to the retaining wall. It was for $8,007.64 and included a management fee of $2,001.81. These figures were exclusive of GST. With GST, the invoice came to $11,010.40.

393 The first defence raised by the owners was that the invoice did not represent what was agreed to be paid. The agreed price was for the cost of materials and labour. Mr Lei did not dispute this, and in particular, agreed that the management fee was not part of the original arrangement. And accordingly it is clear that the full amount of $11,010.40 is not recoverable.

394 The owners then pointed out that the builder initially charged them $7,576.84 on 29 October 2015. Ms Li testified that she had gone through the details on this invoice, and on 5 December 2015, challenged the account and proposed a payment of $5,840.23. After some discussion at the hearing, Mr Lei said he agreed with the Ms Li's recalculation of the invoice.

395 The owners also raised in their points of defence the proposition that the retaining wall was defective. As Ms Li at the hearing indicated that damages in respect to this issue were no longer being pursued, this defence fell away.

396 Accordingly, I find the builder is entitled to be paid for the retaining wall. The amount to be recovered is limited to **$5,840.23.**

The driveway invoice

397 The builder on 18 December 2015 sent the owners a final invoice for the driveway in the sum of $7,595.50. Reference to the invoice indicates that the invoice was partly for 107.5 m² of concrete, at $65 per m² exclusive of GST. On my calculation, this portion of the invoice is understated.

398 The first defence raised by the owners was that they expected the work to be carried out by Mr Lei, but in the event it was carried out by his labourer Mark. In circumstances where they did not accept that Mark was a professional, and where they said the job is not up to standard, they had offered to pay to the builder $52 per m², which would have yielded a sum of $5,590.

399 Ms Li was asked whether she would still be prepared to pay $52 per m². She answered that she was not, as she was now planning a new driveway.

400 Ordinarily I would have denied the owners damages based on the cost of demolition and reconstruction of the driveway in circumstances where they previously would have been prepared to pay a reduced sum for it. However, on the basis that at the hearing Mr Lei agreed that the driveway ought to be demolished, I have already assessed damages on the basis that the driveway is to be remade.

401 In these circumstances, the builder is entitled to be paid the contracted price for the driveway.

402 Before I quantify the award to be made to the builder for the driveway, I must address an argument raised by the owners in respect of the second component of the invoice, which was a claim for $636.36 exclusive of GST, or $700 with GST, in respect of concrete steps. In their points of defence, the owners contend that this $700 was duplicated as it had already been charged in the retaining wall invoice. Reference to the retaining wall invoice rendered in December does not support this contention, as the account is not particularised save for the reference to a management fee.

403 I accordingly consider that the builder is entitled to be paid the whole of the December invoice for the concrete paving (including the concrete steps) in the sum of **$7,595.50**.

THE BUILDER'S CLAIMS UNDER THE FASCIA CONTRACT

404 The builder raised an invoice for work carried out under this contract only as on 18 October 2017. It is to be noted that this was well after the owners had instituted the proceeding. The owners understandably queried why a builder would be rendering them an invoice approximately two years after the work had been carried out.

405 The amount claimed by the builder for this invoice was $7,000 inclusive of GST. The work was described as "facial and gutter replacement for existing house as per required" (sic). It is to be noted that no details were given to enable the owners to understand what tradesperson did what work, or how

long each task took. Furthermore, no details of the materials supplied were given.

First defence

406 At the hearing both parties acknowledged that Ms Li had agreed to pay the builder the cost of labour and materials under the fascia contract, with no margin. Ms Li relied on this agreement as her first line of defence.

407 Mr Lei said that the figure he had invoiced was based on a plumber's invoice and the cost of materials, but then conceded it included a management fee of 25%. He said this was justified because the account was being paid late.

408 Ms Li accepted at the hearing that without the margin, the invoice sum would be reduced to $5,154.

409 If GST was added, the account would be increased to $5,669.40, which I suggested could be rounded up to $5,670.

410 Mr Lei agree that was a fair price for the cost of labour and materials under the contract.

411 Once the management fee was excluded, Ms Li did not suggest that the resulting figure, plus GST, was unreasonable. I accordingly find that $5,670 inclusive of GST is a reasonable price for the work performed and the materials supplied by the builder under the fascia contract, if in fact all the work was done.

Second defence

412 The owners raised a second defence, which was that the builder had not demolished and replaced the original fascia.

413 The builder faced a practical difficulty in resisting this assertion, in so far as Mr Lei had not produced any invoices in respect of labour and materials. However, I am satisfied that the builder's difficulties in this regard may stem from the fact that the owners last argument was only raised when they filed their points of defence to counterclaim on the second day of the hearing.

414 The owners have an explanation for this. They say that it was not until the opening of the hearing that the builder confirmed that he had paid the necessary filing fee, and would be pressing a counterclaim. I considered the owners' explanation to be reasonable, and this is why I allowed them to file their points of defence to counterclaim during the course of the hearing.

415 However, the fact remains that Mr Lei flagged his claim in connection with the fascia contract in October 2017 when he rendered the invoice. There was no evidence that the owners had expressed any concern with the invoice in so far as it related to work not performed at that point. If they had expressed any such concern: Mr Lei would have been on notice, and could have demonstrated either that the fascia had been removed by attending at

the site and taking photographs, or supplying relevant trade invoices or wages records.

Conclusion

416 In all the circumstances, I consider that to deny the builder payment of the full value of an invoice raised in October 2017, on the basis of a defence raised on the second day of the hearing that part of the work was not done, would be to deny the builder procedural fairness.

417 Accordingly, I allow recovery to the builder of the sum which I have found to be a reasonable price for the work performed and the materials supplied by the builder under the fascia contract, on the basis that all the work was done. I award **$5,670**.

THE BUILDER'S CLAIM FOR REMOVAL OF FLOORBOARDS

418 The owners complained to the builder after the floorboards in the kitchen/living area had cupped to such an extent that they became a health hazard. The builder, at the request of the owners, sent a worker named Andy to remove the two floorboards from the centre of the living room. The builder then charged the owners $318.18 for this work.

Defence

419 The owners dispute liability on the basis that the damage to the floorboards was the builder's responsibility under the contract.

420 I accept the owner's argument, and find against the builder in respect of this item.

Summary of amounts awarded to builder in respect of its counterclaim.

421 I have found that the builder is entitled in respect of the following claims, the following sums :

(a)	garage contract:	$3,000.00[20]
(b)	retaining wall:	$5,840.23[21]
(c)	driveway:	$7,595.50[22]
(d)	fascia contract:	$5,670.00[23]
(e)	floorboard removal:	$0.00[24]

The amount the total amount awarded to the builder in respect of his counterclaim accordingly is $22,105.73, which I round up to **$22,106.**

[20] See paragraph 389 and 390 above.
[21] See paragraph 396 above.
[22] See paragraph 403 above.
[23] See paragraph 417 above.
[24] See paragraph 420 above.

SUMMARY AND PROPOSED ORDERS

422 Ms Li is entitled to damages in respect of defects under the house contract, adjusted for margin and GST, of $97,800[25] and to liquidated damages under that contract of $4,671.[26] The total amount due to Ms Li under the house contract is accordingly $102,471.

423 In addition, Ms Li is entitled to damages in respect of costs associated with the removal of a rag from a storm water drain, the cost of repair of soaker flashing, David Meyer's invoice for inspection of the timber floor, and damage to the crossover totalling $2,822.[27]

424 Finally, in respect of the claims for defects under the driveway contract, Ms Li is entitled to damages in the sum of $36,850.[28]

425 The total amount due to Ms Li accordingly is **$142,143**. The amount found to be due to the builder is **$22,106**.[29] This sum is to be set off against the amount which is otherwise due from the builder to Ms Li. The net amount due to Ms Li from the builder is accordingly **$120,037**. These matters will be reflected in the orders that I make.

426 Ms Li has leave to seek an order for interest. Any such application may be made in writing, or at any cost hearing. Any application in writing must set out the basis upon which interest is claimed, and the applicable interest rates, and all relevant calculations. The builder will be given an opportunity to respond to any application.

427 It is appropriate that both sides be given liberty to make an application for costs. Any such application is to be made within 60 days. Any such application should refer to any offers made.

428 Ms Li and the builder are also to have leave to make an application for reimbursement of the filing fee and any hearing fees paid, under s 115B of the *Victorian Civil and Administrative Tribunal Act 1998.* The parties should note that the discretion of the Tribunal to order reimbursement of fees under s 115B is governed, in a proceeding under the *Domestic Building Contracts Act 1995*, by s 115C of the *Victorian Civil and Administrative Tribunal Act 1998.* Under s 115C, there is a presumption that a party who has substantially succeeded against another party is entitled to an order under s 115B that the other party reimburse the successful party the whole of the fees paid by the successful party in the proceeding.

MEMBER C EDQUIST

[25] See paragraph 309 above.
[26] See paragraph 333 above
[27] See paragraph 362 above.
[28] See paragraph 380 above.
[29] See paragraph 421 above.

SCHEDULE 1

(Note: numbers refer to the item numbers in Mr Mamone's report)

6 & 3.6 inadequate subfloor ventilation: $3,640

8 damage to kitchen/living/dining room area: $27,286

1. letterbox: $760
2.2 fascia: $170
2.3 hole in roof: $230
2.4 flashing: $85
2.5 east side render: $960
2.6 east side downpipes covered in plastic: $200
2.7 east side damaged downpipe: $200 confirmed
2.8 east side mortar smears: $360
2.9 east side vents: $205
2.10 pipe penetrations: $385
2.11 failure to install rain tank: $1,840
2.15 failure to install clothes line: $380
3.1 alfresco floor tiling: $nil
3.2 damage to alfresco area ceiling: $nil
3.2.2 first floor balcony: $nil
3.3 mortar smears on south side of house: $570
3.4 inadequate sill gaps: $1,256
3.5 glass privacy screen: $1,766.80
4.4 drainpipes on west side of house left covered in plastic: $200
4.5 drainpipe on west side of house has pulled of wall: $50
4.6 west side sub events: $nil
4.7 west side render: $nil
5.1 roof ridge: $ nil
7.1 dining room ceiling: $2,655.80
7.2 cracking on top of window on West wall: no separate allowance
8.2.1.1 cornice cracking $nil
8.2.2.1 plaster and paint patches: $795
8.3 range hood shroud: $210

8.4 electrical meter box not painted: $37.50

8.5 kitchen and island stone bench tops: $nil

8.6 timber framed windows binding: $nil

8.6.5.2 window handles $36

8.6.5.3 glazing beading: $nil

8.7 French doors leading to the Alfresco area: $nil

Stair and stairwell

9.1-9.3 stair and stairwell painting: $1,144

Master bedroom

10.1 doors: $nil

10.2 windows: $562.50

10.3 paint patches: $47.50

10.4 ceiling patches: $337.50

10.5 carpet & 10.6 floor noise: $563

Master ensuite

11.1 window binding: $207.50

11.2 vanity basin silicon: $nil

11.3 wall tiles and floor tiles: $8,254.25

Bedroom No.2

12.1 door lock: $37.50

12.2.5 manhole frame and cover: $251

12.2.5.5 repaint ceiling: $nil

12.3 roof space light missing: $120

12.4 damage to doorframe: $36

Ensuite to bedroom No.2 [13]

13.1 loose floor tile within shower, vanity and chipped grout: $4,435.25

13.1.2 vanity did not sit flush on the floor: no separate allowance

13.2 chipped grout: no separate allowance

Rumpus room, stairwell and first floor corridor [14]

14.1.1 ceiling patches: $47.50

14.1.1.3.3 cornice line cracking: $nil

14.2 stickers on windows: $50

14.3 plaster/glue on rumpus room window frame: $186

14.4 corridor not level: $nil

14.4.1.2 corridor noise: $261

First floor bathroom [15]

15.1 wall tiles: $nil

15.2.1 window sash is binding: $223.50

15.2.2 outside of window frame has not been properly painted: no separate allowance

15.2.3 mortar smears on brick sill: $50

15.3 chipped grout: $47.50

Bedroom No. 4 ensuite [16]

16.1.1 chipped tiles: $47.50

16.1.2 gap under vanity: $47.50

16.1.3 wall tile variation: nil

16.1.3.1 shower screen misalignment: $300

Bedroom No.3 [17]

17.1.1-17.1.5 wardrobe doors: $245

17.2 ceiling: $322.50

Bedroom No.4

18.1 ceiling: $322.50

Other defects/ incomplete work

19. alarm: $3,000

20. intercom system: $700

21. doors: $3,762

22. cleaning: $540

23.2 relocation and storage of furniture: $nil

23.3 alternative accommodation: $700

SUBTOTAL: ($71,126.60 rounded up)	$71,127.00
ADD MARGIN of 25%:	$17,782.00
NEW SUBTOTAL:	$88,909.00
ADD GST of 10%:	$8,891.00
TOTAL:	**$97,800.00**