VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP992/16

CATCHWORDS

New home domestic building contract. Owners taking possession prior to completion of the works constitutes repudiation of contract. Repudiation accepted by builder and contract brought to an end. Builder entitled to damages for breach of contract or quantum meruit, but not both. Breach of contract damages assessed after making allowance for plus and minus variations, liquidated damages for delay and cost to rectify defective works.

FIRST APPLICANT	Mr Bishoy Nashed
SECOND APPLICANT	Ms Mariam Rezkallah
RESPONDENT	AMT Design and Construction Pty Ltd (ACN 167 990 034)
WHERE HELD	Melbourne
BEFORE	Senior Member M Farrelly
HEARING TYPE	Hearing
DATE OF HEARING	6, 7, 8 and 18 September 2017
DATE OF ORDER	11 October 2017
CITATION	Nashed v AMT Design and Construction Pty Ltd (Building and Property) [2017] VCAT 1641

ORDERS

1. The applicants, Mr B Nashed and Ms M Rezkallah, must pay the respondent, AMT Design and Construction, $6,202.80.
2. Costs reserved with liberty to apply until 30 November 2017. If no application for costs has been filed at the Tribunal by 30 November 2017, there shall be no order as to costs. I direct the Principal Registrar to refer any application for costs to Senior Member Farrelly who will make orders in chambers as to the conduct of such application.

SENIOR MEMBER M FARRELLY

APPEARANCES:

For Applicants:	Mr Bishoy Nashed and Ms Mariam Rezkallah, in person
For Respondent:	Ms A Weisz, solicitor

REASONS

1 In April 2015 the applicants, Mr Nashed and his wife Ms Rezkallah ("**the owners**"), purchased a block of land in Wollert Victoria. In May 2015, they met with Mr Simon Henry, director of the respondent, to discuss the construction of a new home on the property. The owners had obtained concept drawings for the proposed home.

2 On about 25 May 2015, the respondent ("**the builder**") provided to the owners a quotation for construction of the proposed home at an estimate of $270,000 including GST.

3 By contract between the builder and the owners dated 14 July 2015 ("**the contract**"), the owners engaged the builder to construct a new home on the property at a contract price of $270,000. The contract provided for a construction period of 244 days.

4 The building works commenced in August 2015. The owners, in particular Mr Nashed, were closely involved with the construction works throughout their progress. Pursuant to various discussions between Mr Nashed and Mr Henry, the builder carried out some extra works, that is works not within the scope of the contract works at the time the contract was entered, while some of the contract works were taken over by the owners, that is they were removed from the contract scope of works. These various changes to the scope of works under the contract were not clearly documented.

5 An Occupancy Permit in respect of the building works was issued by Mr Vranjes, the relevant building surveyor, on 13 April 2017.

6 The owners and the builder fell into dispute as to whether or not works had been satisfactorily carried out and completed and whether the builder was entitled to the final payment as claimed. As part of the parties' attempt to resolve the dispute, the builder carried out further works, including rendering of the home, which were not included in the contract scope of works. However, the parties remained in dispute and on 22 July 2016, at which time the final payment claim had not been paid by the owners, the owners took possession of the home and changed the locks. By letter from the builder's lawyers to the owners dated 29 July 2016, the builder asserted, amongst other things, that the owners had, by taking possession of the home, repudiated the contract. In the letter, the builder also made it clear that it "accepted" such repudiation.

7 Also on 29 July 2016, Mr Nashed commenced this proceeding by filing an application at the Tribunal.

8 By order of the Tribunal made 7 February 2017, Mariam Rezkallah was included as an applicant in the proceeding.

9 The owners subsequently filed Points of Claim, drawn by lawyers, and the builder filed a Defence and Counterclaim, also drawn by its lawyers.

10 The pleadings filed by the parties, in particular the owners' Points of Claim, are a little unclear. At the hearing, I allowed each of the parties to articulate

and clarify their claims, with the result that the claims as articulated and pursued at the hearing are, in some respects, different to the claims as pleaded. In my view, there was no unfairness or prejudice to either party in proceeding on this basis, partly because the claims as articulated at the hearing did not alter the essential nature of the claims as pleaded, and also because each of the parties was given fair opportunity to respond to the articulated claims. I was also mindful of the fact that the owners were self-represented at the hearing and their "Points of Claim", drawn by lawyers, was confusing in a number of respects, particularly for non-lawyers.

11 The builder's claim is made up of the following:

a) The sum of the unpaid final payment claim, $14,780;

b) $1,800 for the installation of fly screens which the builder says were variation extra works, that is works in addition to the original scope of works under the contract;

c) $220 for the removal of the hot water service, after it was installed, at the request of the owners;

d) $1,500 being the sum of a payment made by the builder to a tiler in respect of tiling works which the builder says were arranged by the owners directly with the tiler. The builder says that the tiling works were outside the builder's scope of works under the contract, and the builder claims reimbursement of the sum paid;

e) $14,656.55 as the alleged reasonable allowance for 'extra' works which the builder says it carried out pursuant to an agreement with the owners that there would be no charge for such extra works on the condition that the owners would pay the builder's final payment claim. As the owners have not paid the final payment claim, the builder now claims an entitlement, on a quantum meruit basis, for the extra works as follows:

- $9,097.48 as the reasonable allowance for rendering the exterior of the home. The allowance is an estimate provided by the expert witness Mr Campbell;
- $4,138.75 for repainting the interior of the home. Again, the allowance is an estimate provided by Mr Campbell;
- $1,420.32 as the cost, estimated by the builder, to replace a cracked feature floor tile in the hallway of the home;

f) Interest and costs.

12 The owners claim:

a) $7,000 as liquidated damages for delay up to 22 July 2016, the date they took possession of the home. The sum is calculated at the contract specified rate of $500 per week for 14 weeks;

b) Approximately $17,000 as the reasonable cost, as estimated by their expert witness Mr Fitzmaurice, to complete the contract works and

rectify defects in the works, less any unpaid balance of the contract. The owners say that, after allowing for a range of items for which they are entitled to receive credit allowances, the unpaid contract balance is approximately $7000.

c) Interest and costs.

THE HEARING

13 The owners were self-represented. The builder was represented by Ms Weisz, solicitor.

14 Each of the owners gave evidence at the hearing, almost all of it being given by Mr Nashed. An interpreter was present throughout the hearing to assist the owners, however the interpreter's assistance was minimal as Mr Nashed demonstrated a good command of the English language.

15 Mr Mekhail, an acquaintance of the owners, was also called by the owners to give evidence.

16 For the builder, its director Mr Simon Henry gave evidence.

17 Concurrent expert evidence was given by building consultants Mr Brett Fitzmaurice, who was called by the owners, and Mr James Campbell who was called by the builder. Mr Fitzmaurice and Mr Campbell also produced written reports.

18 I conducted a view of the home on the second day of the hearing. Mr Henry, Ms Weisz and the owners were present at the view.

19 Other than the expert evidence, all of the evidence for the builder was given by Mr Henry, and almost all of the evidence for the applicants was given by Mr Nashed.

20 Much of Mr Nashed's evidence was confusing and reactive. He frequently fell into self-serving and unconvincing commentary.

21 I found Mr Henry to be a more helpful and convincing witness. Although there were some instances when I found Mr Henry's evidence to be confusing, generally I found his evidence to be honest and straightforward, and that he was prepared to make sensible concessions on some issues.

22 Where the evidence of Mr Nashed and Mr Henry conflicts, I generally prefer the evidence of Mr Henry.

WORKS COMMENCEMENT DATE AND DUE COMPLETION DATE.

23 The contract, a standard form 'Master Builders Association New Homes Contract', defines the "*commencement date*" for the building works to be the date as determined in accordance with clause 8.1 in the contract. Clause 8.1 provides that where no specific commencement date is prescribed in the appendix to the contract (as is the case here), the builder will do everything reasonably possible to commence construction of the works within 14 days following the builder's receipt of, amongst other things, all necessary building and planning permits.

24 The building permit was issued on 21 August 2015.

25 The owners say that the builder commenced site preparation works in early August 2015, and as such the commencement date is around early August.

26 Mr Henry says that the builder did not commence works until approximately 28 August 2015, that being one week after the building permit was issued.

27 Having regard to the contract provision as to the commencement date, the date of issue of the building permit, and generally preferring Mr Henry's evidence to the evidence of Mr Nashed, I find that the commencement date for the contract works was 28 August 2015. As the contract provides for a construction period of 244 days, I find that the due date for completion of the works was, subject to any valid extensions of time pursuant to the terms of the contract, 28 April 2016.

DEPOSIT PAYMENT

28 The contract stipulates stage payments for the works as follows:

- deposit, 5% of contract price, $13,500,
- base stage, 10% of contract price, $27,000,
- frame stage, 15% of contract price, $40,500,
- lock-up stage, 35% of contract price, $94,500,
- fixing stage, 25% of contract price, $67,500,
- final/completion, 10% of contract price, $27,000.

29 The above the stage payments are in accordance with the requirements of sections 11 and 40 of the Domestic Building Contracts Act 1995 ("**the DBC Act**").

30 On 15 July 2015, the day after the contract was signed, the builder issued an invoice for the deposit in the sum of $12,380.30. The invoice notes a "*credit*" in the sum of $1,018.18 (ex GST) as explanation as to why the payment claim is $12,380.30, rather than the $13,500 prescribed in the contract.

31 The builder says that, prior to the contract, the owners had paid the builder $2500 for the cost of a soil report, an energy report, construction plans and engineering drawings. The builder says that he agreed with the owners that, upon entering a building contract with the builder, the builder would credit the owners the cost of preparing the construction plans. The builder says that the credit referred to in the deposit invoice is the credit given for the cost of preparing the construction plans.

32 Mr Nashed's evidence on this issue is confusing and contradictory. He agrees that, prior to the contract, the owners paid the builder $2500 which he believes was for the cost of obtaining documents including the soil report, the energy report and construction drawings. On the 2nd day of the hearing, Mr Nashed said he had no knowledge of any agreement for the

provision of a credit in respect of the cost of construction plans. However, on the 3rd day of the hearing, Mr Nashed said that the credit sum should have been $1300 rather than the $1120 allowed by the builder. In support of this contention, Mr Nashed produced a telephone text message dated 16 October 2015 from himself to the builder which states "*also the $1300 it was left from the soil report receipt same way".* The phone message, on its own, is meaningless and Mr Nashed was unable to elaborate as to its meaning.

33 Having regard to the fact that the deposit invoice was paid by the owners promptly without question, and preferring the evidence of Mr Henry to the evidence of Mr Nashed, I am satisfied that the deposit payable under the contract was reduced to $12,380.30 pursuant to an agreement between the parties that, upon the owners entering a building contract with the builder, credit would be given by the builder in respect of the prior incurred cost of preparing the construction plans.

WORKS PROGRESS AND TERMINATION OF THE CONTRACT

34 By February 2016, the works were well progressed and the owners had made, in addition to the above-mentioned deposit payment, full payment of the base, frame, lock-up and fixing stage payments as prescribed in the contract, a total of $241,880.30. No further payments were made.

35 On 9 February 2016, Mr Nashed and Mr Henry met to discuss the various allowances to be made in respect of works added to or removed from the builder's scope of works under the contract, and in respect of various other miscellaneous issues. For example, the owners had decided to source the supply of the kitchen and to engage a contractor directly to install it, and they sought an appropriate credit allowance. As another example, after windows were delivered to site, the owners requested alternative windows and the builder sought recompense for the extra cost of those windows.

36 At the hearing before me, a one-page document full of handwritten notes and figures was produced. The owners and the builder agree that the document was created at the meeting on 9 February 2016, however they disagree as to what the document evidences. In particular, they disagree as to the nature of any agreement reached and noted in the document. The document, on its face, records no agreement reached. It is simply a page of handwritten figures and notes. Having regard to this, and the disagreement between the owners and the builder as to what agreements may have been recorded in the document, I find that the document is of no assistance in determining whether any agreement was reached on 9 February 2016 or at any other time.

37 What is agreed by the parties is that on or about the day of the meeting, 9 February 2016, the builder agreed to provide to the applicants, at Mr Nashed's request, a 'final claim' invoice for the building works. Mr Nashed says that his request was made in the context of his eagerness that the building works be completed as soon as possible. He says that the invoice

was to be used to expedite the advancement of funds from the owners' financing bank, so that the owners could make final payment to the builder and move into the completed home with minimal delay.

38 Mr Henry says that he complied with the request to provide the final payment invoice in the knowledge that, until the contract works were completed and a certificate of occupancy was issued by the relevant building surveyor, the builder was not entitled to the final payment under the contract.

39 The builder issued the "final payment" invoice dated 9 February 2016 which identified the final payment sum as specified in the contract, $27,000, less a "credit" of $12,220, leaving a balance payable of $14,780. The invoice does not provide any explanation as to how the credit of $12,220 has been calculated. Mr Henry says the sum of the credit was resolved in the discussions he had with Mr Nashed at their meeting on 9 February 2016. Mr Nashed disputes that any such agreement was reached. As noted above, the document produced at the meeting on 9 February 2016 is of no assistance as it does not confirm any agreement reached. Certainly there is nothing in the document to suggest that a credit of $12,220, or any amount, would be included in the builder's final payment claim.

40 Towards the end of March 2016, at which time the building works were nearing completion, the owners notified the builder of their intention to engage a building consultant to inspect the home ahead of "handover". Works still to be done by the builder included the installation of fly screens, completion of painting and the installation of appliances. An Occupancy Permit was also yet to be issued by the relevant surveyor. Some works were also to be completed by the owners, including the installation of bamboo flooring.

41 Mr Fitzmaurice, the building consultant engaged by the owners, inspected the home on 7 April 2016 and produced a written report on about 13 April 2016. At the beginning of his report, Mr Fitzmaurice states:

> At the request of Mr Bishoy Nashed I inspected the property, [property address]
>
> I inspected the property on the complaint that works to the construction of a class 1a domestic home and class 10a garage had defective items…

42 In the report Mr Fitzmaurice identified works which he considered required further attention:

- a number of windows/ had 80 to 100 mm voids that required infilling;
- a number of areas of the brickwork was unsatisfactory. The unsatisfactory works included chipped bricks, missing mortar and misaligned and unacceptable variance in perpends;
- the bottom course of brick bed located at the rear under the alfresco was being supported by a piece of timber. Mr Fitzmaurice was concerned that the piece of timber was not termite treated;

- Mr Fitzmaurice considered that the level of the tiled floors in the lounge area did not meet the standard prescribed in the 2015 '*Guide to Standards and Tolerances'* published by the Victorian Building Authority ("**the ST guide**");
- a mark on the bath tub;
- a missing seal to the underside of tiles in the feature wall in the lounge room;
- feature tile in the hallway appeared 'drummy';
- a chipped tile in the ensuite opposite the toilet;
- chipped tiles under the ensuite cabinet and sink;
- a 15 m hole in one eve lining;
- a skirting board in the front bedroom was out of level;
- a downpipe located on the garage side of the home was not fixed to the brickwork.

The report included photos of most of the above items, in particular the brickwork.

43 The Occupancy Permit was issued on 13 April 2016.

44 Mr Henry and Mr Nashed met on site on 16 April 2016. Mr Nashed says that his family friend, Mr Reda Mikhail, was also at this meeting. Mr Henry cannot recall if Mr Mikhail was at the meeting. Mr Mikhail, who gave evidence, thinks that he may have been at the meeting, however he is unsure.

45 Mr Nashed says that, at this meeting, Mr Henry agreed that the builder would rectify all of the items identified in Mr Fitzmaurice's report.

46 The owners were due to travel overseas on 19 April 2016, returning around 7 June 2016. Mr Nashed says that he told Mr Henry that, in his absence, the builder should communicate with Mr Mikhail as to the progress of the works, including the agreed rectification works.

47 Mr Nashed says that when he returned from overseas, many of the rectification works had not been carried out.

48 Mr Henry says that agreement was not reached at the meeting on 16 April 2016 as suggested by Mr Nashed. Mr Henry says that he was prepared to do some rectification works, and that he notified the owners of his intentions in this regard in an email to Mr Nashed dated 20 April 2016. That email confirms the builder's proposal to rectify items listed in Mr Fitzmaurice's report, with the following exceptions or qualifications:

- Mr Nashed was to confirm whether he wished the window voids to be filled using aluminium infill, cement sheet or polystyrene;
- Mr Henry suggested rendering the facade and the west side of the home as a means of dealing with the brickwork appearance issues;

- Mr Henry denied that the floor tiles were unacceptably out of level;
- Mr Henry considered the timber support to the brickwork in the alfresco area was not a problem because the brickwork was structurally sound and the home was not located in a designated termite zone.

49 Mr Henry produced a response email from Mr Nasser dated 21 April 2016 wherein, amongst other things, Mr Nashed:

- asserts that the builder would, under the contract, bear the cost of further wasted time;
- demands that, in respect of the window voids, the builder either replace the windows or the brickwork so that there were no voids;
- confirms that rendering the brickwork would be acceptable, subject to the whole house being rendered;
- requests documentary evidence that the location of the home was, as suggested by the builder, a termite free zone;
- asserts that the floor level was a defective item and the builder should either rectify the defect or provide some form of financial compensation;

50 Mr Henry sent a response email to Mr Nashed on 22 April 2017. The response email did little more than reiterate the builder's position as set out in Mr Henry's prior email of 20 April 2016.

51 In any event, not much was done during the period the owners were overseas. Following their return, Mr Nashed met Mr Henry for a further on-site meeting on the 14 June 2016. Mr Henry says that agreement was reached at this meeting, and that he confirmed the agreement in an email to Mr Nashed the following day, 15 June 2016. That email states, amongst other things:

> … As discussed, the following will be done
>
> - Fix the painting issues, this will be done next week.
> - You can arrange the bamboo flooring installation by the end of next week
> - If you want to change the yellow colour [paint] for the whole house to light cream, there will be $1000 charge
> - The filling above the pantry window and the 2 doors will be filled by foam
> - The whole house will be rendered with no extra cost, except the 3 piers, garage boundary wall and the wall which will have tiles.
> - The garage door from the laundry will be replaced.
> - The wall behind the laundry cabinet will be patched.

- The feature tile will be installed, and as discussed, it will have the same issues as it is curved from the middle.

You are welcome to move to the house once the painting is done, and once the following invoices are paid:

- The final payment
- The plumber invoice I sent you for the hot water system, I paid him, so please transfer the money to my account.
- As mentioned before, if you want to keep your promise to pay the fly screens, it will be appreciated, if not, that is fine.

Please let me know if I missed any item we discussed….

52 Mr Nashed responded to the above email on 15 June 2016 as follows :

> I am happy with this very much, I just wanted to mention couple of points we discussed today. 1 - Calling the Windows company to fix spring of the bottom bar of the Alfresco door and just doing the touch-ups for all scratched Windows. 2 - the fridge water connection and the hot water system.
>
> Please Simon we need to get all of this done ASAP so we can finalise the whole process and to the settlement stage. Also in regards to paperwork which should given [sic] to me at this stage please let me know how they go and when people starting work. Thank you

53 Mr Henry responded to Mr Nashed with a further email dated 16 June 2016 where he states:

> Sorry for forgetting the 2 points you mentioned, will get someone from the Windows company to fix the windows very soon.
>
> Regarding the hot water system, it will be installed with the appliances on the same day you move to the house.
>
> Can you please advise what paperwork you mean? You only need the occupancy certificate in this stage, which I have emailed you, please let me know if you need another document?
>
> Also, what do you want to do with the painting in regards to changing the whole house painting colour? And do you want to move in before the render or after?

54 Following the above emails, the builder attended to works including filling the window/door voids, rendering the brickwork and some further interior painting.

55 The builder submits that the above email exchange confirms agreement reached with the owners as to the scope of rectification works to be carried out to meet all the concerns raised by the owners and in Mr Fitzmaurice's report. The builder submits further that the email exchange also confirms agreement with the owners that the 'extra' works the builder agreed to carry out, that is works outside the scope of works under the contract such as further interior painting and exterior rendering, would be done at no extra charge *on the condition* that the owners would pay the final claim invoice.

56 I do not accept the builder's submissions.

57 Although the emails evidence agreement as to certain works to be carried out, they do not, in my view, confirm any agreement that the builder's responsibility for rectification works would be limited to the items of work identified in the emails.

58 And the emails certainly do not suggest any agreement that the so-called 'extra' works, such as the rendering works, were to be carried out at no extra charge to the owners on the condition that the applicants pay the final claim invoice.

59 In my view, the emails simply confirm a range of works the builder agreed to carry out to address a number of the issues raised in Mr Fitzmaurice's report and raised by the owners.

60 Mr Mikhail's evidence is of no assistance. I found that Mr Mikhail answered questions honestly and to the best of his recollection, however his recollection is not good. He knows he attended at least one meeting at the property with Mr Nashed and Mr Henry, but he is unsure whether this was the meeting on 16 April 2016 or the meeting on 14 June 2016, or possibly some other meeting. He recalls issues raised, such as the brickwork, the windows and the floor level, but he is unable to say whether Mr Nashed and Mr Henry reached any agreement/s as to rectification works to be done by the builder.

61 Having viewed the email correspondence between Mr Henry and Mr Nashed in the period April to June 2016, and having heard evidence from them both, I accept that they had discussions and communications in relation to certain rectification works and some variation works, however the rights and obligations of the applicants and the builder under the contract remained unchanged. That is, I find that no agreement was reached that altered the rights and obligations of the parties under the contract.

62 On 19 July 2016, the owners sent an email to the builder wherein they state, amongst other things:

> We are writing this official email to make sure you are aware of few facts in our signed building contract:
>
> 1 - We are entitled to get $500 per week as a liquidated damage for not moving into our house before the cut-off date of the contract (16th of April 2016) because of the work delay and not fixing the defects (into inspector report) by the contract cut-off date.
>
> Since 16th of April 2016 up until today's date 19th of July 2016 we have been 14 weeks out of our house, which means we are entitled to get $7000 worth of liquidated damage (According to clause 17 page 40). Therefore we are going to deduct this amount of the final payment.
>
> …
>
> …we need the house key is to be handed over to us within two days by the 22 of July 2016. In addition to that we need to get our hot water

> system and our kitchen appliances installed (as part of the contract) right after we get into our house to avoid them getting stolen.
>
> If we did not receive the house keys by the 22 of July 2016, the contract will be terminated from our end based on your breaches however we are not in the contract time fram. [sic]

63 On 22 July 2016, the owners took possession of the home and changed the locks. Mr Nashed sent an email to Mr Henry at 10:53 AM on 22 July 2016 in which Mr Nashed states, amongst other things:

> Subject: Locks change and moving into my property
>
> Dear Simon
>
> Since today is Friday 22/07/2016 (the time frame I gave you to hand the house over to me) and based on your email which states that you are refusing to give me my house keys as well as the outstanding building materials as the hot water system, garage remote, alarm system remote, paint payments and you didn't send trades to install kitchen appliances into my new house, I officially terminated the contract and I had to bring lock smith people to unlock the doors for me and rekey all the doors, attached to this email is a photo of the original lock smith receipt which should be payable to me from you.
>
> I let you know that I moved my family into my new house… Now you have no control or power as a builder upon my house since contract has been terminated.
>
> Coming to my house or trying to cause any trouble for me or my family will exposure to a legal action and police should be involved…

64 On the same day, 22 July 2016, Mr Nashed prepared and signed the VCAT application to commence this proceeding. The application was received by the tribunal on 29 July 2016.

65 The builder's lawyers sent a letter to Mr Nashed dated 29 July 2016, wherein, amongst other things, they state:

> We are further instructed that you have taken possession of the property, which is a fundamental breach of the terms of the Contract. As such, we understand that in doing so, you have repudiated the Contract. Your repudiation has been accepted.

The letter then sets out the builder's demand for payment of:

- $14,780, as the unpaid balance of the contract; and
- $1,500 as reimbursement of money paid by the builder to a tiler on behalf of the applicants; and
- $220 as reimbursement of money paid by the builder to a plumber; and
- $681.64 as accrued interest on the sum outstanding, calculated at the rate prescribed in the contract ; and
- legal costs in the sum of $550.

66 Clause 20 in the contract sets out the owner's rights to terminate the contract. The clause specifies conduct or actions on the part of the builder which may entitle the owners to terminate the contract. The conduct or actions prescribed include:

- failing to proceed with works with due diligence or in a competent manner;
- refusing or persistently neglecting to remove or remedy defective work;
- refusing or persistently neglecting to comply with the contract; and
- being in substantial breach of the contract.

67 Clause 20 provides that before terminating the contract, the owners must give written notice to the builder by registered post describing the alleged breaches of the contract on the part of the builder, and stating the owners' intention to terminate the contract unless the builder remedies the breaches within 14 days ("**default notice**"). If the builder fails to remedy the breaches within a 14 day period, the owners may then terminate the contract by written notice to be sent to the builder by registered post.

68 It is apparent that the owners have failed to comply with clause 20. The builder was not served with a default notice in accordance with clause 20. The owners' email to the builder of 19 July 2017 demanded, in effect, that the builder complete all outstanding works and hand over the keys within 3 days, failing which the owners intended to enter possession of the home and terminate the contract. The owners subsequently changed the locks, took possession of the home and purported to terminate the contract on the 22 July 2016.

69 It is a general principle of contract law that when a party to a contract has, by its conduct, 'repudiated' the contract, the other party is entitled to 'accept' the repudiation and bring the contract to an end. Conduct that amounts to 'repudiation' is often described as conduct that clearly evinces the intention of a party to no longer be bound by the terms of the contract.

70 In my view, it was not open to the owners to terminate the contract under this general principle. That the builder was late in completing the works does not amount to a repudiation of the contract. The contract provides for compensation – liquidated damages – in the event the builder is late in completing the works. And while the owners and the builder were in dispute as to the builder's responsibility in respect of several alleged items of defective work, the builder did not, in my view, evince an intention to be no longer bound by the terms of the contract. On the contrary, the builder proceeded with works and, save for disputed items, attended to rectification of various items of defective work. The builder did not repudiate the contract. As discussed later in these reasons, I find that the builder was justified in rejecting responsibility in respect of some items of work alleged by the owners to be defective.

71 In my view the owners, by their email of 19 June 2016 and their subsequent conduct in taking possession of the home on 22 July 2016, evinced a clear intention to no longer be bound by the terms of the contract. In my view the owners repudiated the contract, and the builder was entitled to accept the repudiation, as it did, and bring the contract to an end.

72 Upon acceptance of the owners' repudiation, the builder is entitled to sue for damages for breach of contract. The general rule with respect to damages for breach of contract is that the innocent party is, in so far as money can do it, to be placed in the situation it would have been had the contract been fully performed.[1]

73 Alternatively, instead of suing for damages for breach of contract, a builder who has accepted an owner's repudiation may sue for damages on a 'quantum meruit' basis.[2] That is, the builder may claim compensation for the reasonable value of the building works carried out, free of any constraint imposed by the contract.

74 But a builder cannot recover damages/compensation under *both* bases. It is one or the other.

75 In my view, the builder has in this case elected to pursue damages for breach of contract. In the letter of 29 July 2016, wherein the builder confirmed its acceptance of the owner's repudiation, the builder demanded payment of monies alleged to be outstanding under the contract.

76 In its counterclaim filed in this proceeding, the builder again claims contractual damages. Somewhat peculiarly, however, the builder also claims an *additional* entitlement (not an *alternative* entitlement) to damages on a quantum meruit basis. It is clear from the counterclaim document, and from the builders submissions at the hearing, that the quantum meruit claim relates only to the so-called 'extra' works, that is the rendering works, the extra painting and replacement of a feature floor tile, that the builder says were agreed to be carried out at no charge conditional upon the owners making the final payment claim under the contract. The builder says that because the owners did not meet the condition of making the final payment, they must now reimburse the builder for the cost of these 'extra' works.

77 I reject the builder's submission. As discussed above in these reasons, I do not accept that any agreement in respect of the 'extra' works, as alleged by the builder, was reached. In any event, in circumstances where the builder claims damages for breach of contract, it is not open to the builder to also claim damages on a quantum meruit basis.

78 Accordingly, I will assess the builder's damages on the basis that the builder be placed in the position it would have been had the contract been fully performed. In so doing, I will make allowance for:

- plus and minus variations to the contract works, to reach an adjusted contract price;

[1] Robinson v Harman (1848) ALL E.R. 383 at 385
[2] Sopov v Kane Constructions Pty Ltd (No.2) [2009] VSCA 141

- the reasonable cost the builder would have incurred in completing the contract works and rectifying defective works; and
- liquidated damages for delay.

WORKS VARIATIONS ALLOWANCES

79 Provisions as to variations to the contract works are set out in clauses 12 and 13 in the contract.

80 In essence, the contract provides that written notice of requested variations to the works is to be provided by the party seeking the variation, and the builder is entitled to be paid for the extra cost of variation works or, in the event the variation reduces the cost of works, there should be an appropriate reduction in the contract price.

81 Where the variation works are likely to add more than 2% to the original contract price, or where the variation works are requested by the builder, the builder must provide written notice to the owners of, amongst other things, the cost of the works. The builder must not proceed with the variation works unless the owners have provided written consent or unless the works have become necessary by reason of a matter beyond the reasonable control of the builder, such as a works direction from the relevant building surveyor.

82 Under sections 37 and 38 of the DBC Act, where a builder fails to meet contractual requirements as to written notice and written consent for variation works , the builder is not entitled to recover any money in respect of the variation works unless:

a) the Tribunal is satisfied that there are exceptional circumstances or that the builder would suffer a significant or exceptional hardship, and that it would not be unfair to the owners for the builder to recover the money; or

b) in respect only of variation works carried out at the initiative of the builder, the builder can establish that the variation works were made necessary by circumstances not reasonably foreseeable by the builder at the time the contract was entered into.

83 The builder and the owners agreed to a number of variations to the works, some of which added to, and some of which reduced, the cost of works carried out by the builder. The variations were almost entirely verbal. No written notifications of the variations, as contemplated by the provisions in the contract, were provided.

84 In many cases, the builder and the applicants disagree on the sum of the variation that should be allowed. There are also a number of works in respect of which the parties are in dispute as to whether the works constitute variation works, that is, whether the works were included in the original scope of works in the contract.

85 I turn now to consider the various claims of the parties as to works variations and the effect, if any, on the contract price.

Deposit adjustment

86 As discussed earlier in these reasons, the first adjustment to the contract price is a credit of $1120 pursuant to an agreement between the builder and the owners in respect of the cost of construction plans. I allow a credit of **$1,120.**

Cornice upgrade

87 The owners say they paid $600 cash for a cornice upgrade. They accept that the builder is entitled to the extra payment for the works. The builder says the payment was made direct to the plasterer, and therefore there is no effect on the contract price. This is not a controversial item. I accept the builder's evidence and find that the payment was made direct to the plasterer. As such there is no variation to the contract price.

Additional bulkhead

88 The owners say they paid $500 cash for an additional bulkhead. Again, this is not a controversial item, because the owners accept that the builder is entitled to the extra payment. As with the cornice upgrade, the builder says the payment was made by the owners direct to the carpenter. I accept the builder's evidence and, as such, find that there is no variation to the contract price.

Painting

89 The owners say they paid $250 for some repainting works after they changed their mind on the colour of the paint. Again, they concede the builder is entitled to the extra payment. I accept the builder's evidence that, if the owners made such payment, it was made direct to the painter. As such, there is no variation to the contract price.

90 The owners also claim $301 as the cost of paint purchased by them, as evidenced by a Bunnings invoice. The builder says the owner should bear the cost because it is simply the cost of the extra paint required when the owners changed their mind on the colour of some painting works already carried out. The builder's explanation is plausible and there is no other evidence as to the cost of paint borne by the owners in respect of their decision to change the paint colour. As such, I accept the builder's evidence and find that the owners are not entitled to a credit for the cost of the paint.

Windows change

91 When the works were at frame stage, windows were delivered to site. Mr Nashed inspected the windows and was not satisfied with them. He wanted windows with wider frames. He also wanted some of the windows changed from awning windows to casement windows.

92 Mr Henry says he informed Mr Nashed that the windows could be changed, but that the owners would bear the extra cost of the changed windows. Mr Henry says that Mr Nashed agreed to bear the extra cost, and that he subsequently re-ordered new windows. Mr Henry concedes that at the time of the agreement, he did not advise Mr Nashed of the actual likely extra cost of the windows. The extra cost was calculated after the new windows were ordered and delivered. The builder claimed variation extra charges the extra cost in subsequent invoices to the owners:

- invoice dated 31 August 2015 which includes a charge of $900 (inclusive of GST) for the upgrade to wider windows; and
- invoice dated 13 November 2015 in the sum of $1439 (inclusive of GST) is a variation cost for the change from awning to casement windows.

93 Mr Nashed agrees that he requested wider windows, but he disputes that he was told that the owners would be required to bear any extra cost. In respect of the change to casement windows, Mr Nashed says that he was placed under pressure by Mr Henry to accept that the change would constitute variation extra works under the contract. Mr Nashed maintains that the owners were entitled to casement windows under the contract, and it was wrong of the builder to refuse to provide casement windows unless the owners agreed to pay the extra cost. Finally he says that the actual extra likely cost was not discussed, and he first became aware of the extra cost when he received the above-mentioned invoice.

94 I am satisfied that the changes to the windows, both the change in width and the change of some windows from awning to casement, constitute owner requested variations to works under the contract in respect of which the builder is entitled to be compensated for the reasonable extra cost.

95 As to the width of the windows, the contract documentation is silent. However there is no evidence that the windows initially delivered to site were inadequate or unsuitable. It was simply the choice of the owners that they wished to have wider windows.

96 As noted earlier, where the evidence of Mr Henry and Mr Nashed conflicts, I generally prefer the evidence of Mr Henry. Such is the case here. I am satisfied, on Mr Henry's evidence, that Mr Nashed agreed to pay the extra cost of the change to wider windows. I am satisfied, on Mr Henry's evidence, that the wider windows were more expensive, and I am also satisfied that the $900 variation extra charge claimed by the builder is reasonable.

97 In respect of the casement windows, I do not accept the owner's submission that they are entitled to casement windows under the contract. Mr Henry took me to the construction plans which clearly indicate windows opening in the fashion of awning windows. On this evidence, I am satisfied that the change to casement windows, where the plans indicate awning windows, constitutes a variation to works at the request of the owners. Again, I accept

the evidence of Mr Henry that Mr Nashed agreed to pay the extra cost of the casement windows. Again, I am satisfied on Mr Henry's evidence that the casement windows were more expensive and that the variation extra charge claimed by the builder, $1439, is reasonable.

98 In respect of both variation changes to the windows, I am satisfied that the builder would suffer hardship if not fairly compensated, and that it is not unfair to the owners that the builder recover the extra cost in circumstances where the owners enjoy the benefit of the changed windows as requested by them.

99 For the above reasons, I find the builder is entitled to a variation extra charge in respect of the windows in a total sum of $2339.

Utility connection charge

100 The builder paid the Yarra Valley Water $101 charge for connection of water and sewerage. The builder says it is entitled to claim this as an extra cost not included in the contract price. The owners dispute that the builder is entitled to claim the cost as an extra charge over and above the contract price.

101 The works specifications in the contract identify certain items which have not been allowed for, including *"Any authority fees (only the building permit fee is included in our price)".* In my view it is clear from this notation in the contract that the contract price, at the time the contract was entered, did not include the connection fee paid to Yarra Valley Water. As such, I am satisfied that the builder is entitled to be reimbursed for the payment. I allow $101 as a variation extra charge.

Blinding concrete

102 A further item identified in the contract works specifications as having not been allowed for is "*Any blinding concrete, if required*".

103 The builder says that blinding concrete was required for the foundations. By invoice to the owners dated 15 September 2015, the builder claimed $6340.95 as a variation extra for the blinding concrete. The invoice references 18 cubic metres of concrete, a pump and an excavator.

104 The owners do not dispute that blinding concrete was installed, however they say that they were simply not informed, and had no knowledge of it, until after the works were done and they received the invoice dated 15 September 2015. Mr Nashed also questions whether the blinding concrete works are variation extra works.

105 I accept the evidence of Mr Henry that the blinding concrete was approved as necessary by the relevant consulting engineer.

106 The builder concedes that it did not provide to the owners written notice of the need for the blinding concrete works or the likely extra cost.

107 Having regard to the above-mentioned notation in the specifications in the contract which, in my view, clearly provides that the contract price does not

include the cost of any blinding concrete that may be required, I am satisfied that the supply and installation of the blinding concrete constitutes variation extra works.

108 The builder produced an invoice addressed to it from "Alcon Concreting" dated 10 September 2015 which details, amongst other things, the following charges:

- 9 trucks of soil at a cost of $2700 plus GST
- 18 m³ of blinding concrete at a cost of $2880 plus GST
- concrete pump (blinding) at a cost of $710.60 plus GST
- one day excavator machine hire at a cost of $900 plus GST

109 The above charges, not including the soil, total $4939.66 (inclusive of GST). Accepting also that the builder provided extra time and labour in respect of the blinding concrete, I am satisfied that the builders charge for the variation extra works, $6340.95, is reasonable.

110 The issue remains as to whether the builder is entitled to charge for these variation extra works in circumstances where no written notice of the variation works was provided to the owners.

111 In my view, it might fairly be said that the requirement for blinding concrete was not reasonably foreseeable by the builder at the time the contract was entered into.

112 In any event, I am satisfied that the builder would suffer significant hardship if not compensated for these extra works, and that it is not unfair to the owners that they pay for these extra works.

113 Accordingly, I find that the builder is entitled to $6340.95 as a variation extra charge in respect of the blinding concrete works.

Sarking

114 The builder claims $495 as a variation extra charge for the installation of sarking.

115 There is no mention of sarking in the contract specifications.

116 Mr Henry says that, while on-site one day early in the construction period, Mr Nashed requested that sarking be included. Mr Nashed confirms a discussion as to the inclusion of sarking, but says that he was not requesting the installation of sarking as variation extra works, but rather as works falling within the scope of works under the contract. He says the sarking was required to meet the applicable 'bushfire attack level' requirements ("**BAL requirements**"), and that this is something the builder ought to have been aware of at the time the contract was entered.

117 The builder agrees that sarking was required to meet the BAL requirements, however the builder says that this only became known after the building permit was issued. The building permit was issued on 21 August 2015, one week after the date the contract was signed.

118 Further, the builder says that it had good reason to believe, prior to the issue of the building permit, that the building works did not attract any BAL requirements.

119 The builder produced a letter from the city of Whittlesea addressed to the builder dated 17 July 2015. The letter sets out relevant information as to applicable regulations in respect of the owners' property. Part of the information provided is confirmation that no BAL has been specified in a Planning Scheme. The letter also states, amongst other things :

> The Minister for planning has declared portions of the State of Victoria as designated bush fire prone areas. This mapping is available via [website address provided]

120 The building permit, issued on 21 August 2015, includes a number of conditions including the following:

> The site is designated as being bushfire prone. Construction for bushfire attack level (BAL) must be in accordance with BAL – 12.5 of AES 3959 – 2009

121 Mr Henry says that when he received the building permit, he was surprised to see the inclusion of the above condition.

122 The builder submits that it could not have reasonably foreseen that the surveyor, in issuing the building permit, would have included the BAL requirement.

123 I do not accept the builder's submission.

124 In my view, had the builder made reasonable enquiry prior to entering the contract, it would have learned that the property was situated in a designated bush fire prone area. Reasonable enquiry could have included search of government website or direct enquiry to a building surveyor.

125 The works specifications in the contract are brief and many standard items of building work are not specifically mentioned. In my view, it is reasonable to consider sarking to be a standard inclusion if it is not specifically referred to in the contract works specifications. Having regard to this, and my finding that the builder, upon reasonable enquiry, could have learned that the property is located in a designated bush fire prone area and that, as such, the surveyor would likely prescribe BAL requirements when issuing the building permit, I find that the sarking falls within the scope of works under the building contract, and does not constitute variation works for which the builder is entitled to claim a variation extra charge.

Fly screens

126 There is no dispute that fly screens were not specified in the contract work specifications, and that they became necessary to meet the BAL requirements specified by the surveyor in the building permit.

127 In my view, however, fly screens, unlike sarking, do not fall within standard building works inclusions when they are not actually specified in

contract works specifications. In my view, fly screens are commonly accepted as optional works.

128 There appears to be no dispute that fly screens were not included in the scope of works under the contract. The owners acknowledgement of this is confirmed in an email from Mr Nashed to the builder dated 23 January 2016, wherein Mr Nashed states:

> I know the fly screen is not included in the contract, That is why Do not worry about it, I am gonna do it later on. It is too expensive for me and I ran out of money.

129 There is no dispute that the building surveyor required the installation of fly screens. Without them, an Occupancy Permit would not be issued.

130 In order to meet the surveyor's requirements, and to not hold up the issue of the Occupancy Permit, the builder installed fly screens and claims an entitlement to a variation extra charge of $1800. Although the builder has not produced documentation to verify the supply cost of the fly screens, I am satisfied that $1800 is a reasonable charge.

131 The owners do not dispute the reasonableness of the charge, but assert that the builder should bear the cost because the builder ought to have known that fly screens would be required to meet the BAL requirements.

132 The owners were aware that the fly screens were not included in the contract works, and they have received the benefit of installed fly screens, a significant benefit when one considers that an Occupancy Permit would not have been issued without the installation of the fly screens. In my view, the installation of fly screens constitutes variation works outside the original scope of works under the contract. To the extent the builder may have failed to give requisite written notice of the likely cost of fly screens as a variation extra charge, I am satisfied that the builder would suffer significant hardship if not fairly compensated for the cost of installing the fly screens, and that it is not unfair to the owners that the builder recover such cost.

133 Accordingly, I allow $1800 as a variation extra charge for the supply and installation of fly screens.

Landscape works

134 The contract provides a provisional sum of $10,000 for landscaping works. The work specifications found in the appendix to the contract identify the landscaping works as:

- exposed concrete driveway (based on 15 m^2), and
- Timber fence

135 There is no dispute that the fencing was removed from the builder's scope of works. The builder has allowed $3400 as the cost of the driveway works carried out, and in support of this the builder produced a concrete supply invoice showing the cost of concrete as $4950 for both the driveway and the alfresco area. The builder considered an allowance of $3400 to be fair, thus

resulting in a credit allowance of $6600 for the fencing works not carried out.

136 Mr Nashed says that the builder's allowance for the driveway is too high because the driveway is not 15 m². Mr Nashed is unable to say what the actual size of the driveway is. Having viewed the driveway, I accept the builder's evidence that the driveway in fact ended up being around 30 m² in size.

137 On the evidence before me, I am satisfied that the builder's allowance for the driveway works is fair and reasonable, and as such, a credit of $6600 for the removed fencing works is reasonable. I allow a credit of $6600.

Bamboo flooring installation

138 There is no dispute between the parties that the owners took over the task of installing bamboo flooring, and that a $2000 credit for the removal of such works from the builder's scope of works under the contract is reasonable. I allow a credit of $2000.

Plumbing/sanitary fittings

139 There is no dispute that the owners, upon viewing the standard range of plumbing/sanitary fittings to be supplied by the builder, chose to purchase superior quality items themselves. As the builder did not supply the fittings, there is no dispute that a credit - contract price reduction - should be allowed. The builder allows $2900. The owners say the allowance is insufficient.

140 The specifications in the contract provide for:

> Supply & install plumbing hardware as per plans from the standard builder range from Bourne Bathrooms and Kitchens.

141 The builder produced the current price list of *Bourne Bathrooms and Kitchens* to demonstrate the cost of items. In calculating its credit allowance, the builder has allowed the cost of items excluding GST. In my view, GST should be included when calculating the credit allowance because the contract price to be paid by the owners includes GST.

142 Having viewed the *Bourne Bathrooms and Kitchens* pricelist, inclusive of GST, I find the following as reasonable credit allowances:

a) 4 basins at $88 each, $352;

b) 2 shower mixers at $55 each, $110;

c) 4 basin mixers at $72.60 each, $290.40;

d) 1 bath tub mixer, $55;

e) bath tub spout, $39.60;

f) kitchen sink, $361.90;

g) kitchen mixer, $89.10;

h) laundry sink, $108.90;

i) Laundry mixer, $38.50;

j) 2 shower rails at $88 each, $176; and

k) 3 toilet suites at $251.90 each, $755.70

Sub-total $2377.10

143 The owners say that further allowance should be made for a towel rail in each of the 2 bathrooms and a toilet roll holder in each of the 3 toilets. The builder says that these items do not fall within its standard supply allowances and, accordingly, there should be no credit. The contract does not mention towel rails and toilet roll holders, but neither does it specifically mention other sanitary/plumbing items for which allowance has been made as set out above.

144 In my view, towel rails and toilet roll holders are items that one would ordinarily expect to be included within a standard range of bathroom/sanitary fittings. As such, I find that a credit should be allowed for these items. Based on the cost of such items as set out in the *Bourne Bathrooms and Kitchens* pricelist, I allow:

a) 2 towel rails at $30.80 each, $61.60; and

b) 3 toilet roll holders at $18.70 each, $56.10.

145 There is no dispute that the owners sourced and purchased two shower screens, and that a credit allowance should be made. The builder says $997 is a fair allowance. The owners say the allowance should be around $2000 as that is the approximate cost they incurred on the shower screens and related fittings.

146 The contract specifies *"framed shower screens with clear safety glass"*. The builder says that the owners purchased more expensive frameless shower screens.

147 The appropriate credit allowance is the reasonable supply cost of shower screens to be supplied pursuant to the contract. I accept that the contract provided for framed shower screens. Having viewed material provided by the builder, including examples of the cost of framed shower screens, I am satisfied that the builder's allowance of $997 is reasonable.

148 In summary, I allow $3491.80 as the total credit allowance for the sanitary/plumbing fittings.

Joinery

149 The contract identifies a provisional sum for "joinery works" in the sum of $20,000. There is no dispute that, by agreement with the builder, the owners sourced the supply of a kitchen and directly engaged that supplier to install the kitchen. Although the owners sourced the supply of the kitchen, it is not in dispute that the builder paid the supplier $10,011 for the cost of the kitchen, and that the builder also incurred cost of around $500 for other benches. In other words, there is no dispute that the builder incurred cost of around $10,500 as the supply cost of joinery.

150 Because the builder did not install the kitchen, the builder considers it fair to simply deduct the cost it incurred for the supply of the kitchen and benches, $10,500, from the provisional allowance for joinery works in the contract. On this basis, the builder allows a credit of $9,500.

151 The owners consider the credit allowance to be inadequate. Mr Nashed says that, despite what is written in the contract, the *real* provisional allowance for joinery works, allegedly agreed with the builder, was $33,200.

152 Having regard to the clear provisional allowance stipulated in the contract for joinery works, I reject the owners' submission.

153 Having regard to the undisputed supply cost for joinery incurred by the builder, and the clear provisional allowance in the contract for joinery works, I consider the builder's credit allowance of $9500 to be more than reasonable. I allow a credit of $9500.

Hot water system

154 The owners claim a credit in the sum of $767.80 for the cost they incurred in purchasing the hot water system. The builder concedes this item and, accordingly, I allow a credit of $767.80.

Hot water service installation

155 The builder intended to install the hot water service at the time the completed home was handed over to the owners. The reason for this was to avoid the possibility of the hot water service being stolen before the owners took possession of the home. As I understand it, the owners agreed to this proposal. The proposal is confirmed in the builder's email to the owners dated 16 June 2016, referred to earlier in these reasons.

156 As noted earlier, the owners arranged for Mr Fitzmaurice to inspect the building works on 7 April 2016. Prior to his inspection, Mr Fitzmaurice had suggested to the owners that the hot water service be installed in order that it could be included as part of his inspection. For this reason, the owners requested that the builder install the hot water service prior to Mr Fitzmaurice's inspection, which the builder did.

157 The builder says that, following Mr Fitzmaurice's inspection, the owners requested that the hot water service be removed as a precaution against theft. Mr Henry says he agreed to the request and the hot water service was removed.

158 After the owners took possession of the home on 22 July 2016, the owners arranged for the installation of the hot water service at a cost to them of approximately $200. They claim a credit for this cost as installation of the hot water service fell within the builder's scope of works under the contract.

159 The builder, on the other hand, claims an entitlement to $220 as the extra cost it says it incurred in removing the hot water service, at the request of the owners, after it had been installed.

160 I find that the builder is entitled to the extra cost it claims. I accept the builder's evidence, not disputed by the owners, that the hot water service was first installed at the request of the owners in early April 2016, and then removed also at the request of the owners. The removal of the hot water service, after it has been installed, constitutes variation works carried out by the builder at the request of the owners. Although the variation works are not confirmed in a signed variation order, I am satisfied that the owners received the benefit of the works which they requested, and that it would be unfair for the builder not to be compensated for carrying out the works as requested. I am satisfied that the charge, $220, is reasonable having regard to the fact that a plumber had to be engaged to carry out the works.

161 Accordingly, I allow $220 for variation extra works in respect of this item.

Door stoppers

162 The owners claims $56.50 as the cost they paid for the purchase of door stoppers. The builder concedes that door stoppers are included in the contract works, but has no recollection or records as to who purchased the stoppers. Having regard to the PayPal record of purchase produced by the owners, I accept that they paid for the door stoppers. Accordingly I allow a credit of $56.50.

Tiles and tiling works

163 The owners bring a number of claims in respect of the cost of tiles purchased by them. The builder says that several of these claims relate to tiling works falling outside the standard scope of tiling works under the contract, and that the owners directly engaged the tiler to carry out these extra works.

164 The owners concede that they directly engaged the tiler to carry out extra works, but they say that those extra works are limited to the feature tile wall in the living room.

Laudry/pantry tiles

165 The owners claim $429 as the cost they paid for the purchase of wall tiles for the laundry/pantry area.

166 The builder says its responsibility for tiling in the laundry/pantry area was limited to providing a small splash back behind the washing machine. The Bunnings invoice produced by the owners confirms a quantity of tiles to cover approximately 5 m².The builder says the tiling of the walls was extra work arranged by the owners directly with the tiler.

167 The contract documents are silent as to whether wall tiles to the laundry/pantry area are included in the contract scope of works. I do not accept that that wall tiling to a laundry and pantry necessary falls within what might be termed "standard" works.

168 On the evidence before me, I am not satisfied that the contract scope of works included tiling to the walls in the laundry and the pantry, and as such, I find that no credit should be allowed for this item..

Bathroom tiles

169 The owners claim $350 as the purchase cost of bathroom tiles. The owners produced an invoice for the cost of the tiles.

170 The builder does not dispute that the owner purchased the tiles, but says that the tiles were for the walls in the powder room/toilet, extra work arranged by the owners directly with the tiler.

171 The contract is silent as to whether the powder room/toilet walls were to be tiled. As with the laundry and pantry, I do not accept that wall tiling to a powder room/toilet necessary falls within what might be termed "standard" works.

172 On the evidence before me, I am not satisfied that the contract scope of works included tiling to the walls in the powder room/toilet, and as such, I find that the owners have failed to substantiate their claim for a credit allowance.

Floor tiles

173 It is not disputed that the porcelain floor tiles were purchased from *"San Marco Ceramics"*, and that the owners contributed $1000 to the purchase price. Mr Henry says that the owners chose San Marco Ceramics in preference to the builder's normal supplier, "*National Tiles"*, and that because the tiles chosen by the owners from the San Marco range were more expensive, it was agreed that the owners would contribute $1000 to the supply cost of the tiles.

174 Mr Nashed says there was no such agreement.

175 I prefer the evidence of Mr Henry. As noted earlier in these reasons, I generally prefer Mr Henry's evidence when it is in conflict with the evidence of Mr Nashed. Further, no alternative credible explanation has been provided as to why the owners contributed $1000 towards the purchase cost of the tiles.

176 I make no credit allowance for this item.

Skirting tiles

177 The owners claim $40.25 as the cost they incurred in purchasing a small quantity of tiles for the skirting area around the washing machine. Having regard to an invoice produced by the owners, I am satisfied that they incurred the cost.

178 The builder does not dispute that these particular tiling works were within the builder's scope of works under the contract. The builder simply has no records or recollection as to who purchased the tiles.

179 I accept the owners' evidence in respect of this item and allow a credit of $40.25.

Builder payment to tiler on behalf of the owners

180 As noted above, the owners engaged a tiler directly to carry out works outside the scope of works under the contract.

181 The tiler was also engaged by the builder for other tiling works that fell within the builder's scope of works under the contract.

182 Mr Henry says that the tiler advised him that the owners had failed to pay the tiler $1500 in respect of extra works carried out pursuant to the arrangement between the owners and the tiler. Mr Henry says that the tiler demanded payment of the sum owing, failing which he would refuse to carry out further work. Mr Henry says that he confirmed with Mr Nashed that the builder would make the $1500 payment owed by the owners to the tiler, and that the owners would subsequently reimburse the builder. Mr Henry says that, pursuant to the agreement, he paid the tiler $1500. Mr Henry says the agreement with Mr Nashed is confirmed in email correspondence between himself and Mr Nashed dated 22 June 2016. That correspondence states:

> [Mr Henry to Mr Nashed]
>
> Hi Bishoy,
>
> As discussed, I will pay the $1500 for the tiler for the wall tiles, and you will pay that to me with the final payment. Please confirm ASAP so the tiler can do the feature tile.
>
> [Mr Nashed response email to Mr Henry]
>
> Please go ahead, thanks
>
> Bishoy

183 Mr Nashed submits that his response email was confirmation that the builder should proceed to pay the tiler, but not confirmation that he agreed to reimburse the builder.

184 I do not accept Mr Nashed's submission. In my view the email correspondence simply and clearly confirms the agreement as alleged by Mr Henry. And, as noted earlier, where the evidence of Mr Nashed and Mr Henry is conflicting, I generally prefer the evidence of Mr Henry.

185 I am satisfied on the evidence before me that the builder paid the tiler $1500 which was owed to the tiler by the owners, and that Mr Nashed agreed that the owners would reimburse the builder at the time of the final payment under the contract.

186 Accordingly, I allow $1500 as an extra charge to be added to the contract price.

Stolen tiles

187 During the course of construction works, Mr Nashed purchased a batch of tiles and delivered them to be stored on site. I am satisfied, having regard to an invoice in respect of the purchase of the tiles produced by the owners, that the tiles cost $735 and that Mr Nashed delivered them to site in around mid-January 2016.

188 There is no dispute that the tiles were stolen in around mid-February 2016. The owners say that, as the builder was in control of the site, the builder should reimburse the owners the cost of the stolen tiles.

189 Mr Henry says that, as he was not informed that the tiles were being stored on-site, the builder should not bear the cost of the stolen tiles.

190 Under clause 7 in the contract, the owners grant the builder licence to free and uninterrupted access to and occupation of the land.

191 Under clause 6.3 in the contract, the builder must take out insurance and indemnify the owner against liability for loss or damage to property. However, under clause 6.5, the builder is not liable for loss or damage to property resulting from any act or omission by the owners.

192 In my view, the theft of the tiles is not the result of an act or omission by the owners. The tiles were on-site for approximately 4 weeks before they were stolen. During this time the builder visited the site and the builder's contractors were working on site. As such, I consider the builder ought to have known the tiles were being stored on-site. Having regard to its obligation under clause 6.5 in the contract, I find that the builder should indemnify the owners for this loss of property. Accordingly, I allow a credit of $735.

Exterior lighting

193 The owners claim $136.59 for the cost of exterior lights purchased by them. The Bunnings invoice produced by the owners identifies 3 floodlights at $35.53 each and 2 lead capsule globes at $15 each.

194 The builder says it installed a standard exterior light fitting and globe, and has no knowledge in respect of the special light globes purchased by the owners.

195 On the evidence before me, I am not satisfied that the lights purchased by the owners fell within the builders contract scope of works, and as such, I find that the owners have failed to substantiate this claim.

Bedroom chandelier

196 There is no dispute that the owners chose to purchase a chandelier for their bedroom lighting in preference to a standard ceiling light fixture. The owners seek no credit for the cost of the chandelier, but say that they ought to be given a credit for the cost of a standard light fitting which the builder was not required to install. The owners do not know what an appropriate credit allowance would be.

197 The builder says that the cost of a standard light fitting is minimal, and in any event, the builder incurred extra cost in fitting the chandelier but made no charge to the owners for the extra cost.

198 The builder's evidence is uncontested and, accepting that the builder would have incurred extra cost in installing a chandelier, I find that the owners have no entitlement to the credit allowance claimed.

Door seal

199 The owners claim $49.50 as the cost of a door seal purchased by them. They say the door seal was for the front door of the home. They produced an invoice from Corinthian Industries (Australia) Pty Ltd, and a receipt, each dated 9 August 2016 as evidence of the purchase.

200 Mr Henry says that the builder installed the front door with a standard door seal.

201 The owners took possession of the home on 22 July 2016. No further works were carried out by the builder after that date. The invoice and receipt produced by the owners are dated 9 August 2016. As such, whatever door seal was purchased by the owners, it cannot be a door seal that was installed by the builder.

202 I accept Mr Henry's evidence that the builder installed the front door of the home complete with a seal. Whatever the purpose of the door seal purchased by the owners on 9 August 2017, I am not satisfied on the evidence that the seal they purchased was an item to be supplied and/or installed by the builder as part of the builder's scope of works under the contract. Accordingly the owners claim in respect of this item is rejected.

Trilock

203 The builder concedes the owners' entitlement to a credit allowance for a trilock they purchased at a cost of $199. Accordingly I allow a credit of $199.

Wardrobe doors

204 There is no dispute that the owners selected, and purchased, mirrored wardrobe doors in preference to the standard mirrorless wardrobe doors provided for under the contract. The owners say that the cost of the mirrored wardrobe doors was around $1,500.

205 The owners claim a credit for the cost of the standard mirrorless wardrobe doors which the builder no longer had to supply. The owners suggest a credit of a proximally $1,000.

206 The builder says he had in fact already purchased the standard wardrobe doors before the owners decided to upgrade to mirrored wardrobe doors. He says each of the 3 standard doors cost $28 each, and he retains them in store because he is unable to return them and receive a refund.

207 On the evidence before me, I am satisfied that the standard doors purchased by the builder still have some value to the builder, and it is fair that the owners receive a credit. I accept the builder's evidence that the cost of the 3 doors he has retained is $28 each, or $84 in total. I think it fair to allow a credit of $84.

Summary of variations allowances and adjusted contract price

208 In summary, the allowances I make for variations to the contract price are as follows:

Extra charges

- change to windows $2,339
- utility connection charge $101
- blinding concrete $6,340.95
- fly screens $1,800
- removal of hot water system after it had been installed $220
- payment to tiler on behalf of the owners $1,500

Total $12,300.95

Credit allowances

- deposit adjustment $1,120
- landscape works $6,600
- Bamboo floor installation $2,000
- plumbing fittings, including shower screens, $3,491.80
- joinery $9,500
- hot water system supply cost $767.80
- door stoppers $56.50
- skirting tiles $40.25
- stolen tiles $735
- trilock $199
- wardrobe doors $84

Total $24,594.35

209 The contract price, initially $270,000, is, after making the above allowances, adjusted to $257,706.60.

INCOMPLETE WORKS

210 At the time the owners took possession of the home, some contract works remained to be completed. In assessing the builder's claim for damages for breach of contract, allowance should be made for the reasonable further

cost the builder would have incurred had the builder completed the contract works.

Installation of appliances

211 At the time the contract was terminated, appliances were to be installed. The owners produced invoices as evidence of the total cost, $1092.90, incurred by them to have the range hood, cook top, oven and dishwasher installed. These appliances were installed after the owners took possession of the home on 22 July 2017.

212 I am satisfied that the cost incurred by the owners is reasonable. I am also satisfied that, had the builder installed the appliances, the builder would have incurred a similar cost. There is insufficient evidence for me to find that, had the builder incurred such cost, the cost or part of it might have been chargeable as a legitimate addition to the contract price either as a variation extra charge or as expenditure over and above a prime cost allowance. Accordingly, for the purpose of calculating the adjusted contract price, I will allow a credit of $1092.90 in respect of the installation of appliances.

Cleaning cost

213 Shortly after taking possession of the home, the owners engaged F&T Albert Cleaning Services Pty Ltd to clean the home. The cleaner's invoice dated 24 July 2016, in the sum of $1089, generally lists the works carried out. I am satisfied, having examined the invoice, that the cleaning works carried out were typical of the final clean-up works a builder would attend to prior to handing over a newly constructed home to owners. The owners claim a credit of $1089.

214 The builder says it had already incurred cleaning costs of $913 around the end of March 2016, and the builder produced an invoice dated 31 March 2016 to verify this.

215 Whatever cleaning works were carried out by the builder in March 2016, I am satisfied that, had the builder been given the opportunity to complete the contract works, the builder would have borne some further cleaning cost prior to handover of the home. I am satisfied that such cost would have been less than $1089, however, because rather than engaging a specialist cleaning service for all the cleaning works, the builder itself would have carried out many of the cleaning works, including items such as the following listed in the F&T Albert Cleaning Services Pty Ltd invoice:

- removal of building materials and rubbish from around the site;
- cleaning mud from alfresco door;
- removing excess grout and silicon from tiled/wet areas

216 It is difficult to estimate the actual cost the builder would have incurred in a final clean-up. Doing the best I can, I allow $500 as a reasonable allowance.

Summary incomplete works

217 For the above reasons, I allow $1592.90 as a reasonable allowance for incomplete works.

RECTIFICATION WORKS

218 In my view, it is appropriate to also make allowance for the reasonable cost the builder would have incurred in rectifying defective works for which it is responsible. By "defective works" I mean building works that do not meet the warranties that, by law, apply to the works carried out by the builder.

219 Clause 10 in the contract sets out the builder's warranties applicable to the contract works as mandated by section 8 of the DBC Act ("**the warranties**"). The warranties include the following:

> (a) the builder warrants that the work will be carried out in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract;
>
> (b) the builder warrants that all materials to be supplied by the builder for use in the work will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new;
>
> (c) the builder warrants that the work will be carried out in accordance with, and will comply with, all laws and legal requirements including, without limiting the generality of this warranty, the Building Act 1993 and the regulations made under that Act[4];
>
> (d) the builder warrants that the work will be carried out with reasonable care and skill and will be completed by the date or within the period specified by the contract.

220 The owners assert a number of defects in the works, and in this regard they rely on the evidence of Mr Fitzmaurice. In addition to his inspection of the works in progress on 7 April 2016, Mr Fitzmaurice carried out further inspections on 21 July 2016 and 10 March 2017. He produced a report dated 10 March 2017.

221 The builder disputes many of the assertions as to defective works, and in this regard the builder relies upon the evidence of Mr Campbell. Mr Campbell inspected the building works on 7 March 2017 and produced a report dated 7 April 2017.

222 The experts and the parties reference the ST guide when asserting or disputing whether certain works are 'defective', or in other words, whether certain works meet the warranties. It should be borne in mind that the ST guide is precisely what it purports to be, namely a "guide". Works that do not meet a quality or standard prescribed in the ST guide are not necessarily works that fail to meet the warranties. Likewise, works that meet a quality or standard prescribed in the ST guide are not necessarily works that meet the warranties. The ST guide is a useful document used widely in the building industry. It gives builders and owners alike an objective measure

that may be helpful in forming a view as to whether or not works meet the warranties. But it is no more than that.

Floor level

223 Mr Fitzmaurice says that the tiled floor in the lounge area of the home is unacceptably out of level. He says it does not meet the standard set out in the ST guide, namely that floor levels should not deviate by more than 10 mm in any room or area, or more than 4 mm in any 2 m length. I understand Mr Fitzmaurice used a spirit level when measuring the floor level.

224 Mr Campbell says he checked floor levels using a 'Nivcom' electronic levelling instrument and found that the floor levels were not outside the standard prescribed in the ST guide.

225 In my view Mr Campbell's method of measurement is preferable in terms of providing an accurate measurement.

226 In any event, I inspected the floor closely at the view and I was unable to discern that it was out of level. Whether or not the floor level meets the standard prescribed in the ST guide, I am satisfied that the floor is acceptably level and there has been no breach of the warranties in respect of this item.

Tiles

227 The owners say that the tiling works, both floor tiles and wall tiles, have numerous defects in that many of them are chipped and some have permanent marks.

228 At the view, I carefully inspected all of the tiling works, and the owners pointed out to me areas of particular concern to them. I consider the tiling works to be generally of good quality with very few blemishes. Some of the 'chips' and blemishes pointed out by the owners were not observable from an ordinary, standing, viewing position, and could only been seen upon very close inspection.

229 In my view, the quality of the tiling works is acceptable, that is it meets the warranties, save for the following:

a) Each of the showers in the master bedroom ensuite and the main bathroom contain a 'niche' shelf within one of the shower walls. The base of the niche, where a tile has been cut, is a little ragged. That is, the tile cut is quite noticeably ragged with small chipping. In my view the base tile in each of the niches should be replaced ensuring a fine, clean tile cut.

b) One of the floor tiles in the hall area has 4 observable marks which appear to be a defect in the tile itself. The marked areas have less sheen than the remainder of the tile. It is particularly noticeable when viewed looking back towards the front of the home with light shining in through the front door area. I allow for the replacement of the tile.

c) One floor tile in front of the kitchen island bench has a slight deformity in the form of a small 2 to 3 mm dent or hole in its surface. I allow for replacement of the tile.

d) There is a noticeable scratch in one of the floor tiles in the powder room/toilet. I am satisfied, on the evidence of Mr Nashed, that the owners discovered the scratch shortly after they moved into the home. As such, I am satisfied that the scratch was caused during the period the site was under the control of the builder, and as such, the builder bears responsibility. I allow for replacement of the tile.

230 There is no evidence before me that the tiles that require replacing are no longer in stock, and accordingly I assume that replacement tiles are readily available. Doing the best I can, allowing for the cost of tiles including a few extra tiles in case of damage during the course of rectification, and allowing a tiler around one day to carry out the rectification works, I allow $650 as the reasonable cost to the builder to attend to these rectification works.

231 There is no dispute that an area of the bottom row of tiles to the feature wall in the lounge room has not been sealed/grouted. There is also grout missing from a bottom course of tiles in the powder room/toilet. I make no extra allowance for these works because rectification is a simple, quick and inexpensive matter that can be carried out by a tiler engaged to rectify the tiling works as discussed above. That is, the cost of these rectification works is included within the $650 allowed as set out above.

Timber supporting brickwork

232 As noted earlier, Mr Fitzmaurice observed on his first inspection on 7 April 2016 a piece of timber supporting the bottom course of a brick bed in the alfresco area. Mr Fitzmaurice's concern is that the timber did not appear to have been termite treated. The alfresco area has since been concreted, and the piece of timber is no longer readily observable.

233 The builder produced a letter dated 17 July 2015 addressed to it from the city of Whittlesea. Amongst other things, the letter confirms that the property is not located in a designated termite prone area.

234 There being no structural concern as to the use of the timber support, and having regard to the fact that the home is not situated in a designated termite prone area, and noting also that the piece of timber in question has now been concreted over, I find that there is no need to carry out any rectification works.

Gas pipe

235 Mr Fitzmaurice and Mr Campbell agree that the tail of an exposed gas supply pipe is covered in yellow plastic, and that this does not meet the BAL requirement that the pipe be copper or fireproof.

236 I accept Mr Campbell's estimate that the cost to rectify the pipe by installing a fireproof cover would be around $100.

237 I allow $100 for this item.

Vent dampers and bathroom fan

238 Mr Fitzmaurice and Mr Campbell agree that mechanical vents require dampers to be installed as part of the energy efficiency requirements. Mr Fitzmaurice estimates the cost of such works at approximately $261, whereas Mr Campbell estimates the cost at approximately $161. The difference between their cost estimates is that Mr Fitzmaurice has allowed for an electrician to carry out the rectification works, whereas Mr Campbell does not believe that an electrician is required do the works.

239 In my view an electrician will not be required, and as such I prefer Mr Campbell's cost estimate and I allow $161 for this item.

Bathroom fan

240 There is no dispute that the exhaust fan in the main bathroom makes a loud bagging noise when in operation. It appears that the fan is hitting some building material and may need to be repositioned.

241 Mr Fitzmaurice estimates a cost of $75 to engage an electrician to rectify this minor item. Mr Campbell considers this to be a minor item that does not require an electrician.

242 Having viewed the fan, in my view it is more likely that an electrician will be required to rectify this item. Accordingly I prefer Mr Fitzmaurice's cost estimate and I allow $75 for this item.

Bath tub

243 The bath tub supplied and installed by the builder has a noticeable mark. Mr Campbell says that, on close inspection, the mark is a slight impression. He says that it is unlikely that the mark could be polished out, and as such, rectification will necessitate replacement of the bath.

244 I am satisfied, on the evidence of Mr Nashed, that the owners discovered the mark on the tub shortly after they moved into the home. As such, I am satisfied that the tub was either supplied with the mark or the mark was caused by damage incurred whilst the site was under the control of the builder.

245 Accordingly, I am satisfied that the builder is responsible for rectification, and on the evidence of Mr Campbell, I am satisfied that appropriate rectification is replacement of the bath. The cost estimates of Mr Campbell and Mr Fitzmaurice are very similar and, with no inclusion for builder's profit margin, I allow $600 as the reasonable cost to the builder to replace the bath.

Damaged Eves and short cladding

246 There is no dispute that one section of eve as a hole in it, and another section of eve has a crack in it. Both sections need to be replaced.

247 There is also no dispute that the cement sheet cladding running to a timber beam within the alfresco area is short. That is, there is a small gap between the cladding and the beam which needs filling.

248 Having heard evidence from Mr Fitzmaurice and Mr Campbell as to the cost of rectifying these works, I allow $350 as the reasonable cost to the builder to rectify the works.

Downpipe brackets

249 There is no dispute that some downpipe fixing brackets are loose and require re-fixing. The brackets were intentionally loosened when the builder rendered the exterior of the home.

250 After considering the cost estimates of Mr Campbell and Mr Fitzmaurice, I allow $130 as the reasonable cost to the builder to rectify the loose brackets.

Water hammer bath tap

251 At the view, Mr Nashed demonstrated that when the bath tap is flicked off quickly, the pipe makes a brief but very noticeable hammer noise.

252 Mr Henry demonstrated at the view that when the tap is turned off carefully and slowly, there is no hammer noise.

253 In my view, the warranties require that there should be no hammer noise whether the tap is turned off quickly or slowly, and as such I find that there should be a reasonable allowance of the cost to the builder to rectify the problem. Having heard evidence from Mr Fitzmaurice and Mr Campbell as to the likely cost, I allow sum of $150.

Sealing of sinks

254 It is not disputed that the kitchen and laundry wash sinks need final sealing. Having heard evidence from Mr Fitzmaurice and Mr Campbell as to the likely cost, I allow $120 as the reasonable cost to the builder to attend to these works.

Door seals

255 I accept the evidence of Mr Fitzmaurice that the external door leading into the garage requires an ember strip to be attached in order to meet bushfire requirements. I also accept the evidence of Mr Fitzmaurice that a bottom edge weather seal should be fitted to the internal garage door leading into the house.

256 Having heard evidence from Mr Fitzmaurice and Mr Campbell as to the cost of such works, I allow $80 as the reasonable cost to the builder to attend to these works.

General marks and blemishes

257 There are a number of areas around the home, particularly around the garage, where there are some minor overruns of paint and render. There is no dispute these minor defects fall within the builder's responsibility.

258 Having viewed the home, and having heard evidence from Mr Fitzmaurice and Mr Campbell, I allow $150 as reasonable cost to the builder to rectify these works.

259 The owners also pointed out to me at the view a number of areas of internal plasterwork which they considered to be of unsatisfactory quality. The alleged blemishes in the plasterwork were extremely minor and visible only upon very close inspection. In my view, the plasterwork meets the warranties and no rectification is required.

Blocked sewer

260 A month after the owners took possession of the home, there was a blockage in the sewer. The owners engaged a plumber, 'PlumbFirst Pty Ltd', to unblock the sewer. The owners produced an invoice from the plumber dated 27 August 2017 confirming the charge of $288.50.

261 Mr Nashed says he was advised by the plumber that the sewer shaft was blocked with building rubble. Mr Nashed says he viewed the building rubble removed by the plumber. I accept this uncontested evidence of Mr Nashed.

262 The builder says it would have attended to unblocking the sewer had it been allowed access to the home. Mr Nashed says that he notified the builder of the blockage and was prepared to allow the builder access to unblock the sewer.

263 In my view, it makes little difference whether or not the builder was denied access to unblock the sewer.

264 I am satisfied, on the evidence of Mr Nashed, that the sewer was blocked by building rubble. As such, I am satisfied that the builder bears responsibility. Had the builder attended to rectifying the problem, I am satisfied that the builder would have incurred a similar cost in engaging a plumber as the cost incurred by the owners. As such I allow $288.50 as the reasonable cost of rectification.

Summary of rectification allowance

265 In summary, I allow the following as the reasonable cost the builder would have incurred in attending to rectification works for which the builder is responsible:

- tiling $650
- gas pipe $100
- vent dampers $161
- bathroom fan $75

- bath tub $600
- eves/short cladding $350
- downpipe brackets $130
- water hammer bath tap $150
- sealing of sinks $120
- door seals $80
- general marks and blemishes $150
- blocked sewer $288.50

Total $2,854.50

LIQUIDATED DAMAGES

266 The contract provides that if the builder fails to bring the contract works to completion by the due completion date, the builder must pay or allow to the owner liquidated damages calculated at the rate of $500 per week (or pro rata for a part of a week).[3]

267 As discussed earlier in these reasons, I find that the due date for completion of the works under the contract was, subject to any valid extensions of time pursuant to the terms of the contract, 28 April 2016.

268 Clause 15 in the contract sets out the circumstances under which the builder may be entitled to claim an extension of time for the due completion of the works, and the process by which such extension of time may be claimed. In essence, the builder may have an entitlement to an extension of time where delays have been caused by the applicants, or where delay has been caused for a reason outside the reasonable control of the builder. To claim the extension of time, the builder must provide notification to the owner of the extension of time claimed and the reason for the claim.

269 The builder made no claims for extension of time in accordance with the terms of the contract. Although in its Points of Defence, filed in this proceeding, the builder denies the applicants' claimed entitlement to liquidated damages for delay, no particulars are provided to substantiate the denial.

270 In short, the builder has presented no compelling submission or evidence as to why the contract provision as to liquidated damages for delay should not be taken into account. In my view, allowance should be made as provided in the contract.

271 I assess the liquidated damages at the contract specified rate, $500 per week, for the period commencing 29 April 2016 (the day following the date for due completion of the works) to 22 July 2016 (the date the builder accepted the owner's repudiation and brought the contract to an end). That being a period of 12.14 weeks, I calculate liquidated damages as $6070.

[3] clause 18 in the contract, and item 17 in the appendix to the contract

DAMAGES ASSESSMENT

272 I assess the builder's damages, the sum of compensation to place the builder in the position it would have been in had the contract been fully performed, as $5,308.90, excluding interest, calculated as follows:

- adjusted contract price after allowing for works variations $257,706.60
- less allowances for incomplete works $1,592.90, rectification works $2,854.50 and liquidated damages $6,070 (total $10,517.40)

  balance: $247,189.20
- less total payments made by owners to the builder, $241,880.30
- balance payable to builder: **$5,308.90**

INTEREST

273 The builder claims interest on any sum assessed in its favour from the date the owners took possession of the property, 22 July 2016.

274 The builder claims interest at the rate of 14% per annum, that being the rate prescribed in the contract as applicable to late payments.

275 In my view, the builder's claim has merit. The sum of damages I have awarded the builder, $5308.90, is effectively the balance of money owed to the builder pursuant to the contract after making allowances for variations to the works, liquidated damages and the estimated cost to the builder of completing the works, including rectifying defects in the works. The builder has been deprived of the use of this money, and I consider it fair and reasonable that interest be awarded. I also think it fair that the interest be at the rate prescribed in the contract, 14%, for the period from 29 July 2017, that being the date the builder accepted the owner's repudiation of the contract and brought the contract to an end, to the date of these reasons, 11 August 2017, a total of 439 days.

276 I calculate such interest as $893.90.

CONCLUSION

277 For the reasons set out above, in finalisation of the claim brought by the owners in this proceeding, and the counterclaim brought by the builder, I will order that the owners pay the builder damages and interest in a total sum of $6,202.80.

278 I will reserve costs with liberty to apply, and in so doing I draw the parties' attention to Divisions 8 of the *Victorian Civil and Administrative Tribunal Act* 1998. If no application for costs is made to the Tribunal by 30 November 2017, there shall be no order as to costs.

SENIOR MEMBER M FARRELLY