VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO D6/2009

CATCHWORDS

Domestic Building, concreting trade contract, contracting with a partnership, whether a domestic building contract, novation, variation, provisional sums where only rates provided, defects, work not completed, mutual abandonment of the contract, delay costs, damages, interest.

APPLICANT	Pacrete Industries Pty Ltd (ACN 104 585 426)
FIRST AND SECOND RESPONDENTS	Karen Hendriks, Jack Hendriks
THIRD RESPONDENT	Maxine Amanda Kakouris
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Hearing
DATE OF HEARING	27 -29 January 2010
DATE OF ORDER	10 February 2010
CITATION	Pacrete Industries Pty Ltd v Hendriks (Domestic Building) [2010] VCAT 132

ORDERS

1 The First and Third Respondent must pay the Applicant $35,610.36 forthwith.

2 Costs are reserved and there is liberty to apply until 16 April 2010.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicant	Mr Carr of Counsel
For First and Second Respondents	Mr R. Fink of Counsel
For Third Respondent:	Mrs Kakouris in person

REASONS

1 A reasonably simple proceeding concerning concrete works has been complicated by a terrible family dispute among various owners of the site. The allegations family members make against each other include forgery by one and violence by another. They have not been taken into account, except to note the relationship between family members is bitter.

2 The Applicant concreter, Pacrete, claims that it has not been paid for all the work it did in Summerhill Road, Glen Iris in 2006. The owners of the site at the time when the work was done were the First Respondent, Mrs Hendriks, her adoptive father, Mr McNiece and another of Mr McNiece's daughters, Mrs Kakouris. The Second Respondent, Mr Hendriks, is married to Mrs Hendriks and although he was not an owner at the time when the work was done, he was involved in arranging the project and subsequently bought a share in the property and entered a deed with the three previous owners on 13 September 2007 ("the Deed").

3 On the first day of the hearing, 27 January 2010, Mrs Kakouris was joined as the Third Respondent. The application to join her was by Pacrete, she consented to it and Mr and Mrs Hendiks neither objected nor consented. The joinder application was made at the commencement of the hearing and I did not consider it until after the lunch break, to give Mrs Kakouris the opportunity to seek legal advice. After lunch she assured me that she had obtained legal advice and still consented to being joined. She said that she agreed to be joined as she is a small business person herself and people should be paid what they are entitled to. In answer to the question of Mr Fink of Counsel for Mr and Mrs Hendriks, Mrs Kakouris said that she did not intend to cross-examine witnesses.

4 No application was made to join Mr McNeice. The explanation was that he is elderly and has very limited assets. Surprisingly, as a witness statement for him had been filed by Mr and Mrs Hendriks dated 21 August 2009, Mr McNeice was not called to give evidence.

5 The allegations against Mrs Kakouris are in the Third Further Amended Points of Claim ("PoC") filed on 27 January 2010.

6 The work under the contract was to construct the concrete slabs, verandahs, porches, steps and piers for two units and also a concrete driveway and vehicle cross-over. The contract is evidenced in writing by a quotation to Mr McNeice dated 17 June 2006. The parties agree that Pacrete had done the work with the exception of the driveway and vehicle cross-over, which were to be constructed at the end of the building work, and that it had not poured the concrete for the second bedroom of unit 2.

7 Pacrete claims $41,268 as a debt plus damages of $1,882 for loss of profit; a total of $43,150 from the Respondents. The parties agree that Pacrete has been paid $39,600 for the project.

8 Mr Fink said during the hearing that Mrs Hendriks' counterclaim is contingent upon the finding that she contracted with Pacrete (which she denies) and is for rectification costs associated with allegedly missing rebates of $2,261, associated soil excavation of $559 and consultants' fees of $990. She also claims delay costs of $23,632.55. Mr Fink submitted on her behalf that these sums and the amount which had been paid should be deducted from the amount that had been invoiced at the time work stopped – a difference of $26,484.48. If I were to take the whole contract sum into account, she also claims in accordance with the evidence of her expert witness, Mr Buchanan, quantity surveyor, $20,020 for the driveway, $1,942 for the cross-over and an amount for bedroom two of unit two, about which more is said below.

9 On Mrs Hendriks' behalf, Mr Fink abandoned a claim of $95,885 for loss of profits during his final address.

CREDIBILITY OF THE WITNESSES

10 I have concerns about the memory of accuracy of a number of the witnesses in this proceeding. Mr Pacquola, director of Pacrete, seemed confused in some of his recollections and I am concerned that he thought it was acceptable to write the name of Mr Spooner, apparently the project manager, into the space for signature by or on behalf of the "owner" in a written variation.

11 Mrs Hendriks also had trouble recalling certain matters and seemed more intent on repeating what she thought she should say, rather than accurately stating the matters she could recall. For example, she repeatedly said "We had a builder" or "Wayne was the builder", referring to Mr Spooner, although she knew the builder under the original lump sum contract of 2004 was not Mr Spooner, but his company trading as WRS Homes. She also appears to have been caught in a careless untruth when, in answer to a question, she said she had drafted her own witness statement. She clearly had not, unless she had also drafted Mr Hendriks' and Mr McNeice's, which are identical in many respects. As there were aspects of her witness statement about which she was confused, it is unlikely that she was the author.

12 Mr Hendriks did not impress me as a witness upon whose evidence I can rely. For example, under cross-examination about a statutory declaration made by Mr McNeice which he witnessed on 27 June 2006, he said repeatedly that as a bank manager he witnesses statutory declarations that he does not read. The impression he gave was that he was unaware of the contents of the statutory declaration. He later admitted that he had written out the statutory declaration for Mr McNeice. He also first denied, then said that he did not recall sending the statutory declaration by facsimile to the relevant building surveyors, Group 4 Building Consultants. As it was sent from a facsimile number of his employer, and as he had sent at least one

other facsimile from the same number, it is very unlikely that it was sent by someone else.

13 Later, under cross-examination, he was referred to a letter to Mrs Kakouris' solicitors of 7 May 2007 where he had said, with respect to the Pacrete account "At the moment all parties should assume the total indebtedness." He said that this was not the position, only Mr McNeice was indebted to Pacrete, and that he said this in the knowledge that it was untrue but "as a negotiating point to make [Mrs Kakouris] think". The impression he gave was that he was willing to say something inaccurate for the purpose of negotiating and that he saw nothing wrong with doing so.

14 Mrs Kakouris was consistent in her evidence, however I have concerns that the degree of enmity between family members might have made her less than fair, even though there was no indication of inaccuracy. I cautiously accept her evidence and, in general, prefer it to that of Mr or Mrs Hendriks.

CONTRACT

15 The background to the contract to which Pacrete was a party is that Mr McNeice, Mrs Hendriks and Mrs Kakouris signed an undated contract with "Arcon Enterprises (Trading as WRS Homes)", probably in August 2004. The person who was the moving force behind WRS Homes was Mr Wayne Spooner. It is possible that a site scrape was undertaken by WRS Homes, but no other work was done by it. Arcon Enterprises Pty Ltd ("Arcon") notified ASIC of the appointment of an administrator on 20 June 2006.

16 The parties agree that Mr McNeice arranged for Mr Spooner, in his own capacity, to assist them to construct the units around 21 April 2006. I accept the evidence of Mrs Kakouris, given in answer to a question I asked her, that she believed WRS Homes could not complete the job at that stage for fear of trading while insolvent. Mr Hendriks also confirmed that he understood WRS Homes was in financial difficulties and had ceased trading in the first half of 2006. No explanation was given for its inaction after the building contract was signed in 2004.

17 Mr Spooner was not called to give evidence. Mr Hendriks said that he does not know Mr Spooner's whereabouts.

Domestic Building contract?

18 Mr and Mrs Hendriks plead that the contract is a domestic building contract. Two definitions in s3 of the *Domestic Building Contracts Act 1995* ("DBC Act") are:

> "domestic building contract" means a contract to carry out, or to arrange or manage the carrying out of, domestic building work <u>other than a contract between a builder and a sub-contractor</u>. [Emphasis added]
>
> "domestic building work" means any work referred to in section 5 that is not excluded from the operation of this Act by section 6.

19 Section 6 does not exclude concreting work, done alone, and section 5 applies the DBC Act to "the erection or construction of a home" which can include construction of one or more components of a home.

20 I have emphasised the words "other than a contract between a builder and a sub-contractor" because the DBC Act contemplates that in usual circumstances a firm in the position of Pacrete, dealing with a head contractor, is not a party to a domestic building contract and does not have to fulfil the requirements of the DBC Act. Where the protection of dealing with a head contractor is removed, such as where a trade contractor deals with an owner-builder, the sub-contractor becomes a trade contractor and can fall within the definition of "builder" for the purposes of the DBC Act.

21 I find the Pacrete contract was a domestic building contract and because it was for more than $5,000 it was a major domestic building contract. There are a number of provisions of the DBC Act that should have been complied with and have not. The warranties under s8 of the DBC Act regarding quality of the work and other matters applied to the contract, as did sections 37 and 38 regarding variations.

Parties to the contract

22 Pacrete pleads at paragraph 4 of the PoC that it:

> …provided a fixed price quotation to McNeice, acting for an on behalf of the Partnership [Emphasis added]

The partnership alleged is between Mr McNeice and the two of his daughters who are parties to this proceeding.

23 In answer, both Mr and Mrs Hendriks deny the allegation (although they admit the partnership) and plead at paragraph 5A:

> If Mr McNeice accepted the fixed price quotation as alleged by [Pacrete] (which is not admitted) he did not do so for and on behalf of the Partnership. Rather he did so on his own account.

24 The parties agree that Mr Pacquola, and hence Pacrete, was introduced to the project by Mrs Kakouris, who had previous dealings with him. Pacrete sent a quotation dated 17 June 2006 for $74,461.20, addressed to Mr McNeice alone. Pacrete also sent invoices dated 30 June 2006, 1 July 2006 and two dated 27 July 2006, all of which were addressed to Mr McNeice alone.

25 The question is whether Mr McNeice was contracting in his own right or on behalf of the partnership. Mr McNeice had not taken over as builder – as all parties agree, none of the partners were ever registered building practitioners and the building permit remained in the name of "WRS Constructions". WRS Constructions Pty Ltd also notified ASIC of the appointment of an administrator, on 21 June 2006, the day after Arcon.

26 Pacrete received a cheque drawn on Mr McNeice's Leongatha account of the NAB for $25,000, dated 29 August 2006. The cheque was signed by

Mrs Hendriks, who is a signatory to that account. Further, Mr Hendriks admitted under cross examination that there would be a reconciliation between Mr McNeice and his partners after the buildings were completed. The parties agree that the partners had borrowed money together to construct the units.

27 At paragraph 36 of her witness statement of 24 August 2009, Mrs Kakouris said:

> I introduced [Mr Pacquola] to [Mr McNeice] in April/May 2006. [Mr Pacquola] provided a quote for the Glen Iris and Boronia properties. [Mr McNeice] accepted the quote for Glen Iris.

28 Mr McNeice had provided a witness statement dated 21 August 2009 at the request of Mr and Mrs Hendriks, but did not attend the hearing. At paragraph 5 he says:

> [Mr Spooner] advised me that the construction could still proceed under his supervision on the basis that all suppliers, contractors and subcontractors would invoice me directly.

29 I accept that some of the partners acted without reference to the others. For example, Mr McNeice appears to have engaged Mr Spooner without conferring with Mrs Kakouris. At one point Mrs Kakouris renewed either a building or planning permit without the consent of the others. In each case, regardless of how unwise the actions might have been with the benefit of hindsight, I am satisfied that the actions were undertaken on behalf of the partnership and in the hope that the partnership would be benefitted.

30 Mr McNeice's witness statement did not say that he was to be ultimately responsible for the costs of construction and the failure of Mr and Mrs Hendriks to call him allows me to draw the inference, in accordance with the rule in *Jones v Dunkel*[1] that his evidence would not assist them. Mr Fink said on 28 January 2010 that Mr McNeice would not be called. Mr Carr said at the time that he would be asking me to draw inferences under *Jones v Dunkel* and invited Mr Hendriks to say why Mr McNeice might not be called. He answered that Mr McNeice has had a number of strokes and that his memory is not very good.

31 On 29 January 2010 I asked Mr Hendriks when Mr McNeice had his last stroke. He said that Mr McNeice's last stroke was between 18 months and two years ago, which is well before Mr McNeice provided the witness statement for Mr and Mrs Hendriks. No compelling evidence was given as to the reason for his absence.

32 I do not accept the evidence of Mr or Mrs Hendriks that Mr McNeice undertook to bear ultimate responsibility for the Pacrete account. Rather, I accept the evidence of Mrs Kakouris at paragraphs 69 and 70 of her witness statement:

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[1] (1959) 101 CLR 298

> I have also read paragraph 5A of [Mrs Hendriks'] Points of Defence in this proceeding …
>
> This is not the case. [Mr McNeice] acted for all of us in the partnership under the name Grahame McNeice & Associates as he had done with all previous developments. The agreements to partner in the developments were always casual with no formal agreement ever written. At all times we were aware that Grahame was the one who was doing the decision-making in regards to the development …

33 Mr Fink submitted that the purpose of the partnership between Mr McNeice and his daughters was to "develop" the site rather than to "build", meaning that Mrs Hendriks and Mrs Kakouris did not agree to accept any liability. There is no credible evidence to support this submission.

34 Mr Fink also submitted that it would be illegal for the partnership to build, as distinct from develop the site, as none of them is a registered building practitioner. This may well be so, but it would be just as illegal for Mr McNeice alone to take on the role of builder and supply building services to the partnership. This submission does not advance Mrs Hendriks' case.

35 The parties each produced letters subsequent to the engagement of Pacrete to support their contentions regarding the parties to the contract. Mrs Kakouris was cross-examined by Mr Fink on a letter from her solicitors of 4 May 2007 on the paragraph:

> [Mrs Kakouris's] view is that the rates and other outstanding debts <u>of the venture</u> should have been paid by [Mr McNeice] when they fell due and had the Property been sold a year ago as requested by our client, they would not have been incurred. [Emphasis added]

I find this paragraph means that Mr McNeice should have paid the debts as the person managing the dealings of the partnership, not that he should have been ultimately responsible for them.

36 On 7 May 2007 Mr Hendriks replied to Mrs Kakouris's solicitors[2], stating that there were defects in Pacrete's work that:

> … cannot be resolved until we [Mr and Mrs Hendriks and Mr McNeice] are comfortable that we have control of the development and then will engage a building report. At the moment <u>all parties should assume the total indebtedness.</u> [Emphasis added]

The letters are of little probative value, but tend to support the view that the partnership was responsible for Pacrete's debt, rather than Mr McNeice alone.

37 I am satisfied that there was a partnership between Mr McNeice, Mrs Hendriks and Mrs Kakouris for the purpose of making a profit by arranging for homes to be constructed on the site and selling them. I am satisfied that

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[2] The letter was marked "without prejudice" and the issue of whether I should consider it was debated in circumstances where there was no other member available to deal with this discrete issue. It was resolved by me considering only two marked passages, which had no relevance to any offer that might have been contained in the letter.

he entered the agreement with Pacrete on behalf of the partnership and that, absent any novation, Mrs Hendriks and Mrs Kakouris remain liable to Pacrete.

38 I say nothing of any potential liability of Mr McNeice, who is not a party to the proceeding. Mr and Mrs Hendriks had pleaded at paragraph 3A of each of their points of defence that the application should be dismissed because Mr McNeice and (at the time of the points of defence) Mrs Kakouris were not parties to the proceeding. This pleading was withdrawn by Mr Fink in his closing address.

Alleged novation

39 In the opening by Mr Carr of counsel, Pacrete alleged for the first time that any obligations of Mrs Kakouris had been novated to Mr Hendriks by implication. It alleged that this occurred by virtue of the Deed, when she ceased to be a partner in the development project (the partnership between herself, Mrs Hendriks and Mr McNeice was dissolved) and sold her one third interest in the land to Mr Hendriks.

40 The relevant clauses in the Deed are 3, 4 and 5:

> 3. [Mr McNeice] and [Mrs Hendriks] together with [Mr Hendriks] shall pay and discharge all debts of the partnership … and shall be at liberty to settle all accounts of the partnership and to compound for or release any debts or claims referrable to the Development provided that at all times [Mrs Kakouris] shall be indemnified against all costs and claims incurred in so doing.
>
> 4. [Mr McNeice, Mrs Hendriks] and [Mr Hendriks] jointly and severally indemnify [Mrs Kakouris] and shall keep [her] indemnified from and against all debts and liabilities of the partnership and all actions, claims, losses, costs, damages, charges and expenses of whatsoever kind arising from or referable to the operation of the former partnership, the Development, the Land and the Mortgage with effect from the Dissolution Date.
>
> 5. [Mr McNeice, Mrs Hendriks] and [Mr Hendriks] jointly and severally release [Mrs Kakouris] from and against all debts and liabilities of the partnership …

41 Mr Carr referred me to an extract from Greig and Davis[3] where the learned authors say:

> Novation may be express, or may be implied from conduct of the parties, as where C, having purchased B's business, wrote to A, a creditor of B, asking for a statement of the amount of the indebtedness, and indicating that he would pay.

42 Mr Carr also referred me to *Chatworth Investements Ltd v Cussins (Contractors) Ltd*[4] an English Court of Appeal case where Cussins

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3 The Law of Contract, Law Book Company, 1987 edition page 1023

undertook work for the plaintiff then later sold all its assets to another company which undertook to discharge its liabilities. To add confusion, the purchasing company, the defendant in the proceeding, took the name of the Cussins then later objected when sued by Chatworth Investments, that they had the wrong company. The plaintiff wished to add a pleading against the Defendant in novation. The report is not of the final determination of the case between the parties, but a pleading summons to determine whether the novation argument was tenable. Both Lord Denning and Lord Sachs agreed that it was, but as Lord Sachs said:

> As to whether the novation as pleaded was so tenuously supported as to justify the order for which counsel for the defendants pressed, I agree with what has fallen from Lord Denning MR; and naturally say nothing as to the chances of success of that plea at trial.

43 Mr Fink referred me to *Toikan International v Plasteel Windows*[5] where Samuels JA said:

> A novation is a transaction by which, with the consent of all the parties concerned, a new contract is substituted for the one that has already been made.

44 I am not satisfied that all five parties to the potential novation agreed to it. Had the new partnership of Mr McNeice and Mr and Mrs Hendriks communicated to Pacrete that they would be dealing with the debt, it is possible that I would have found a novation. There is no evidence before me that they did.

45 Further, the Deed has clearly been prepared by lawyers but says nothing about novation. It does not expressly require the new partners to deal directly with any third parties to whom the original partnership was or might have been indebted. Pacrete alleged that it accepted an implied novation when it commenced the proceeding in 2009, but as mentioned above, there is no evidence that it was ever offered novation.

46 I make no comment about any obligation of one or more of Mr McNeice, Mr Hendriks or Mrs Hendriks to indemnify Mrs Kakouris under the Deed because this issue was not before me.

The contract sum

47 The quotation by Pacrete to Mr McNeice of 17 June 2006 was for $74,461.20 inclusive of GST. Pacrete claims the contract sum, as adjusted, was $96,326 being the quotation, a variation of or about 28 June 2006 for $16,280 inclusive of GST, extra concrete of $1,200 and blinding concrete of $4,384.80.

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4 [1969] All ER 143

5 (1989) 15 NSWLR 641 at 645

48 I accept Mr Pacquola's evidence that the quotation was accepted by Mr McNeice. Mr and Mrs Hendriks do not challenge the quoted sum, although they do challenge who is responsible to pay it. The quotation stated in part:

> We have pleasure in submitting our quotation for concrete works to the above project in accordance with drawing numbers (4834) (500-303) Rev.0 and (C01, C02 Rev.0.
>
> Items as follows:
>
> - Mass concrete bulk piers - 18 units (380 W 1500 L x 2500 D)mm and 2 units of pad footings.
> - Dwelling (1), (2) R concrete raft slab-269.0m2
> - 100mm thick includes edge/internal thickening (allow one Hour)
> - Verandas and porches - 7 units- approx 23.2m2 includes edge thickenings.
> - Mass concrete steps - 7 units.
> - 100mm thick R concrete driveway - 1712.0m2 - F82 top on 80mm crushed rock. (No colour additives).
> - New Vehicle crossover - one unit to council requirements.
>
> Price $67,692.00
>
> GST $6769.20
>
> **Total $74,461.20**
>
> Note: Scope of works is attached
>
> …
>
> ***PROVISIONAL SUMS.***
>
> - Blinding concrete 15mpa will be carried out at $252.00 per cubic meter (Plus GST) which includes excavation.
> - …
> - If trenches or footings are over excavated due to striking of rock or collapsing ground conditions, bulk concrete shall apply. Bulk concrete rate $150 per cubic meter (Plus GST)

The quotation did not provide any other indications of the volume of concrete to be supplied, nor how the provisional sums would be applied.

Variation

49 The variation was to undertake a site cut, which Mr Pacquola says should have been done, but was not, before Pacrete commenced work. I accept his evidence that he arrived on site on 28 June 2006 to discover that it was still grassed and that he refused to commence work before the site was properly stripped and excavated. I also accept his evidence that he told Mr Spooner, Mr Hendriks and Mr McNeice that the cost to undertake the variation

would be between $14,000 and $16,000 and that Mr Hendriks and Mr McNeice told him to go ahead.

50 Mr and Mrs Hendriks and Mr McNeice all included identical paragraphs 8 in their witness statements of 27 July 2009:

> [Mr Pacquola] advised in [a meeting between him, Mr and Mrs Hendriks, Mr McNeice and Mrs Kakouris in July 2006] that the site was not adequately levelled in accordance with the plans and advised he was instructed by [Mr Spooner] to undertake the levelling. During that meeting we sought an estimate of this cost and [Mr Pacquola] advised that it would cost between $7,000.00 to $8,000.00. [Emphasis added]

51 I note that Mr and Mrs Hendriks concede in their witness statements that there was a variation for this work and find it surprising that they were saying what the work "would cost" after it had been undertaken.

52 As mentioned above, I am surprised that Mr Pacquola would write Mr Spooner's name in the variation and note that it was generated after the work was done. Two separate invoices were issued for the same work, one a detailed hand written invoice dated 30 June 2006 and the other, a simpler typed invoice for the same sum.

53 As I have found that the contract was a major domestic building contract to which the DBC Act applies, it follows that under s37, Pacrete should not have undertaken the variation without written agreement from or on behalf of the partnership, stating the value of the variation, among other things. The consequence of failing to obtain a variation in writing is that, under s37(3) of the DBC Act:

> A builder is not entitled to recover any money in respect of a variation unless-
>
> [the builder has complied with requirements for a variation in writing] or
>
> (b) the Tribunal is satisfied-
>
> (i) that there are exceptional circumstances or that the builder would suffer a significant or exceptional hardship by the operation of paragraph (a); and
>
> (ii) that it would not be unfair to the building owner for the builder to recover the money.

54 I find that there were exceptional circumstances in this case - Pacrete came to site on the first day and found work that should have been done by others had not been done. Mr Pacquola discussed the matter with Mr Spooner and reached a solution to avoid delaying the work.

55 I am not satisfied that Mr Pacquola told anyone that the cost of the variation would be $16,800 before the work was undertaken and obtained their consent to do the work for this sum. I allow the highest amount Mr

Hendriks and Mr McNeice authorised - $16,000.00, which I find is inclusive of GST.

Extra bulk concrete and blinding concrete

56 The PoC does not plead entitlement to these items, although they were included in the "Applicant's Particulars of Loss and Damage". This document was dated 29 September 2009 but, inexplicably, not filed or served until the commencement of the hearing on 27 January 2010.

57 Although the quotation describes these items as "provisional sums", they are not. Rates have been given for these items, but no lump sum or estimate of quantity has been provided. The way Pacrete has quoted, it would be entitled to demand an extra sum without the partnership having the right to determine whether the total it seeks, based on the volume, is fair and reasonable. Further, even if the partners were told how much concrete was used on the site in total, the contract does not provide a total originally contemplated by the contract to enable them to know if the amount used is more or less than that. Such a provision is not in accordance with s20 of the DBC Act, which contemplates that provisional sums will be an amount rather than a rate.

58 I find that these items were in the nature of variations, that Pacrete did not inform the partners or anyone on their behalf before the expenditures were made and that it has failed to establish a basis upon which it would be entitled to these sums. Further, Mr Pacquola could not tell me, except in vague terms, where the extra concrete was used, or why. These sums are not allowed.

The end of the contract

59 The parties agree that the contract is at an end, but it is not clear how it came to an end. At paragraphs 8 and 9 of the PoC, Pacrete pleaded that it was instructed to suspend work, which amounted to an unlawful termination for which it is entitled to damages.

60 That pleading was contradicted by Mr Pacquola who said under cross-examination that he was never told to suspend the work; instead:

> I said I wouldn't go near the job until I received some money.

61 I accept the evidence of Mr Hendriks that Pacrete could not pour the slab for bedroom 2 of unit 2 and its en-suite because of the possibility that the en-suite would intrude into a possible new easement for the sewer.

62 It is not clear whether there was any other work Pacrete could have done at the time. The site was not ready for the driveway and cross-over which would be built at the end of the project. There was no evidence to say whether the problems associated with the slab for bedroom 2 had been resolved and whether anyone on behalf of the partnership had asked Pacrete to complete the pour.

63 The sewer for the site and for the home to its west ran along the north of the property. I accept Mrs Kakouris' uncontradicted evidence, upon which she was not cross-examined, that the existing sewer was sufficient for two homes, but not for three and that the cost of rectifying the sewer problem would have been tens of thousands of dollars.

64 I also accept her evidence that a quote from another builder to complete the project was approximately $800,000, which would mean the project was not viable for the partnership. The builder was identified only as Mr Pacquola's uncle Loris.

65 The most likely explanation for the end of the contract was that there was mutual abandonment; by Pacrete because Mr Pacquola believed it had not been paid all it was entitled to, even though the contract as evidenced by the quotation made no mention of progress payments, and by the partnership because the two unit development was not viable.

66 Under s53(1) of the DBC Act the Tribunal may make any order it considers fair to resolve a domestic building dispute. I consider it fair that an allowance should be made to the partnership equivalent to the amount Pacrete would have charged them for the work not built. Pacrete is entitled to the contract sum as adjusted, less allowances for the work not undertaken. It is not entitled to loss of profits on those sums.

The value of work not undertaken

67 The parties agree that bedroom 2 of unit 2 was not poured and neither were the driveway or cross-over. Mr and Mrs Hendriks also alleged at paragraph 7 of each of their points of defence that "there were no verandahs, porches or concrete steps constructed" but failed to prove it, with the exception of Mr Pacquola's admission that not as many steps were constructed as originally contemplated because of the change in ground level. I note that Mr Buchanan did not cost these items and I make no allowance for them.

Bedroom 2

68 Mr Pacquola of Pacrete estimates it was about 3 meters by 3 meters with edge beams 400 by 400 mm by 9 meters long and a slab depth of 100 mm. Mr Pacquola said in answer to my questions that the cost of the uncompleted slab would be about $660. The elements of his estimate, made before me while being re-examined, were:

1.44m^3 of concrete for beams and 2.34 m^3	
for the slab@ $110	$257.40
F82 reinforcing for the slab	$50.00
2 lengths of trench mesh	$30.00
1 man day	$320.00
Approximately	$660.00

69 Mr Buchanan was also put in the unfortunate position of having to make a quick calculation during the hearing. He estimated the current value of the slab at \$150/ m^2 plus the beam at \$250 per lineal meter, a total of \$4,700, discounted by about \$750 to take into account the difference between costs now and in 2006.

70 I note that the rate for concrete allowed for the raft slab in the estimator's calculations was \$118/m^3 and that there are other elements in the calculation for the slab that have not been included. The rate given by the estimator for the raft slab was \$93.63/ m^3 (apparently including beams) which if multiplied by 9 m^2 equals \$842.67. When Pacrete's profit margin of 13.4% is added, the total is \$955.59.

71 It is possible that part of the difference between Mr Buchanan's rate and the estimator's rate is that Mr Buchanan would allow for items such as bringing a concrete pump to site. I do not make any allowance for this, as the concrete pump would have been on site if Pacrete had been able to pour the bedroom 2 slab with the remainder of the work. Pacrete must allow Mrs Hendriks and Mrs Kakouris \$955.59 for this item.

Driveway

72 In Mr Buchanan's report he estimated the price of the driveway at \$20,020. In evidence in chief he said he had done a "reverse quote" from the contract, to work out that in June 2006 the amount attributed to the driveway by Pacrete would be \$17,750 inclusive of GST.

73 Mr Pacquola's evidence was the cost Pacrete attributed to the driveway was \$9,313.75. It is supported by hand written sheets and the "at cost" price calculated by Pacrete's estimator. It does not include the profit margin of 13.4%, which I add, giving a total of \$10,561.79 which Pacrete must allow Mrs Hendriks and Mrs Kakouris.

Cross-over

74 Mr Pacquola agreed with Mr Buchanan's estimate of \$1,942 for the cross-over. His evidence was that he had allowed \$3,077.04 for the cross-over at cost, which equates to \$3,489.36 with the profit of 13.4% added. As I have accepted his evidence regarding the driveway, I also accept it with regard to the cross-over. Pacrete must allow Mrs Hendriks and Mrs Kakouris \$3,489.36 for this item.

Adjusted contract sum

75 The contract sum as adjusted is:

Original contract sum	\$74,461.20
Variation	\$16,000.00
	\$90,461.20
Less:	

Bedroom 2	$955.59	
Driveway	$10,561.79	
Cross-over	$3,489.36	
	$15,006.74	$15,006.74
		$75,454.46

ALLEGED DEFECTS

Edge rebates

76 Mr and Mrs Hendriks arranged for expert evidence of the cost of rectifying the allegedly missing edge rebates adjacent to the kitchen and laundry in unit 1, but no expert evidence of other alleged defects. The best evidence regarding the rebates the statement of Mr Hall from Group 4 building surveyors that the rebates were missing and photographs taken by Mr Kakouris on or about 13 September 2006. The photographs show rebates about a brick height below the floor slab on unit two, but not where they are alleged to be missing. Mr Pacquola gave evidence that the rebates might have been covered by dirt. His evidence is not convincing as the edge of the slab at that point is approximately 500mm above the excavated ground level, and a rebate of that depth would not be in accordance with the engineering design.

77 On balance I find that these edge rebates were missing. I accept Mr Buchanan's uncontradicted evidence that the cost to install the rebates using a concrete saw would be $2,261, plus excavation of $559 and engineering fees to sketch the rebate solution of $990 – a total of $3,810, which Pacrete must allow to Mrs Hendriks and Mrs Kakouris.

Warp

78 Mr and Mrs Hendriks also alleged that there was a "warp" in the dining room floor of unit one. Their evidence was not supported by any photographs or expert evidence. I am not convinced by Mr Hendriks' evidence that he saw the "warp" which he also described as a "hump" with a spirit level over it. He said the end of the spirit level was about one inch off the floor, but he was unable to tell me where the spirit level bubble was.

79 Relevantly to the alleged warp, I accept Mrs Kakouris's evidence at paragraphs 67 and 68 of her witness statement of 24 August 2009 where she said:

> At no point in 2006 was I told by [Mrs Hendriks, Mr Hendriks or Mr McNeice] that there were any problems with the work that [Pacrete] had done. In this regard I have read the witness statement of [Mrs Hendriks] dated 27 July 2009 where she says: "As a result of the defects, monies claimed by Pacrete and the lack of faith in [Mr McNeice's] capacity to manage the construction, [Mrs Kakouris]

> refused to authorise any further loan drawdowns. The project and construction were suspended."
>
> This statement is untrue. I was not aware of any defects in the slab, or of even any allegations of defects, by [Mrs Hendriks, Mr Hendriks or Mr McNeice]. I was aware that Pacrete was owed money, and that we did not have enough drawdown available from the bank loan to pay him.

80 Mr and Mrs Hendriks have failed to prove the alleged warp and I make no allowance for it.

OTHER CLAIMS BY MRS HENDRIKS

81 Mrs Hendriks claims delay costs of $23,632.55, further or alternatively reimbursement of the sum paid - $39,600- further or alternatively $10,000 to remove the slab.

82 As I have found that the partnership abandoned the contract with Pacrete, Mrs Hendriks is not entitled to delay costs. As to any delay caused by the absence of edge rebates, Mrs Hendriks has failed to prove that there was a term of the contract that required the work to be completed by a particular date, or that Pacrete behaved unreasonably in a manner that delayed the project and that any delay was caused by Pacrete. Given that the only order for rectification costs is $3,810 to install rebates, if the partners incurred the alleged delay losses they have failed to mitigate their loss.

83 Both Mr and Mrs Hendriks said at paragraph 14 and 10 respectively of their witness statements of 27 July 2009:

> Pacrete's refusal to correct the defect on acceptable terms to the owners or other subcontractors made it very difficult for the construction to continue.

Neither gave credible evidence to support this statement.

84 Mrs Hendriks would only be entitled to a refund of $39,600 and/or $10,000 to remove the slab if it was so defective that removal was justified. This was not proved and these amounts are not allowed.

85 I remark that Mr Hendriks' evidence was that the cost of removing the slab was "approximately $10,000". I asked him how much it was exactly, as the work had already been undertaken. He said that it was exactly $10,000 and that he had documentation to prove that. I asked him to produce the document on the next day of the hearing. He did not do so.

ENTITLEMENT

86 Without taking interest into account, Mrs Hendriks and Mrs Kakouris must pay Pacrete:

Contract sum as adjusted	$75,454.46
Less previously paid	$39,600.00

Less edge rebates	$3,810.00
	$32,044.46

INTEREST

87 Pacrete claims interest at the rates fixed under the *Penalty Interest Rates Act* 1983 ("PIR Act") from the date of Pacrete's demand for payment on 25 September 2006 to the date of these orders and reasons. There is no Hungerfords[6] claim, but Mr Carr submitted that Pacrete is entitled to interest for that period under s58 of the *Supreme Court Act* 1986 ("SC Act").

88 The Tribunal is a creature of statute, responding in a legislative sense only to the *Victorian Civil and Administrative Tribunal Act* 1998 ("VCAT Act") and its enabling enactments, which do not include the SC Act. Section 58 of the SC Act bears no resemblance to any of the provisions which govern the Tribunal.

89 Section 53(2) of the DBC Act provides in part:

> … the Tribunal may do one or more of the following-
>
> …
>
> (b) order the payment of a sum of money-
>
> (i) found to be owing by one party to another party;
>
> (ii) by way of damages (including exemplary damages and damages in the nature of interest) [emphasis added]

Section 53(3) provides that in awarding damages in the nature of interest, the Tribunal may base the rate on that fixed from time to time under the PIR Act, or any lesser rate.

90 Money now is worth more than the same amount at some date in the future. Interest compensates a party who has been kept out of their money. Pacrete is entitled to interest on its entitlement of $32,044.46 from the date of commencement of the proceeding on 7 January 2009, which I allow on $32,044.46 at the relevant rates under the PIR Act: a sum of $3,565.90.

91 Including interest, Mrs Hendriks and Mrs Kakouris must pay Pacrete $35,610.36.

COSTS

92 Costs are reserved and there is liberty to apply until 16 April 2010. The parties' attention is drawn to s109 of the VCAT Act.

SENIOR MEMBER M. LOTHIAN

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6 *Hungerfords v Walker* [1989] HCA 8